

Serial 70
Legal Practitioners Amendment (Mortgage Practices) Bill 2002
Dr Toyne

**A BILL
for
AN ACT**

to amend the *Legal Practitioners Act*

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NORTHERN TERRITORY OF AUSTRALIA

LEGAL PRACTITIONERS AMENDMENT
(MORTGAGE PRACTICES) ACT 2002

No. of 2002

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NORTHERN TERRITORY OF AUSTRALIA

No. of 2002

AN ACT

to amend the *Legal Practitioners Act*

[Assented to 2002]
[Second reading 2002]

The Legislative Assembly of the Northern Territory enacts as follows:

1. Short title

This Act may be cited as the *Legal Practitioners Amendment (Mortgage Practices) Act 2002*.

2. Commencement

This Act comes into operation on the date fixed by the Administrator by notice in the *Gazette*.

3. Principal Act

The *Legal Practitioners Act* is in this Act referred to as the Principal Act.

4. Interpretation

Section 6 of the Principal Act is amended by inserting after the definition of "Admission Board" in subsection (1) the following:

"'approved policy of fidelity insurance' means a policy of fidelity insurance approved under section 84H;"

5. General grounds for refusal, cancellation or suspension of practising certificates

Section 27A of the Principal Act is amended –

- (a) by omitting "Where" and substituting "(1) Where"; and
- (b) by adding at the end the following:

"(2) Where section 84H(3) applies to a legal practitioner, the Law Society must not issue or renew the legal practitioner's practising certificate unless he or she produces evidence, to the satisfaction of the Law Society, that throughout the term for which the certificate is to be issued or renewed the legal practitioner will be insured under an approved policy of fidelity insurance."

6. New Part

The Principal Act is amended by inserting after Part VII the following:

"PART VIIA – MORTGAGE PRACTICES AND MANAGED INVESTMENT SCHEMES

"Division 1 – Preliminary

"84B. Interpretation

"(1) In this Part –

'ASIC exemption' means an exemption from the Corporations Act 2001 given by ASIC under that Act;

'borrower' means a person who borrows from a lender or contributor money that is secured by a mortgage;

'client', in relation to a legal practitioner, means a person who –

- (a) receives advice from the legal practitioner about investment in a regulated mortgage or managed investment scheme; or
- (b) gives the legal practitioner instructions to use money for a regulated mortgage or managed investment scheme;

'contributor' means a person who lends, or proposes to lend, money that is secured by a contributory mortgage arranged by a legal practitioner;

'contributory mortgage' means a mortgage to secure money lent by 2 or more contributors as tenants-in-common or joint tenants, whether or not the mortgagee is a person who holds the mortgage in trust for or on behalf of those contributors;

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'financial institution' means –

- (a) an authorised deposit-taking institution within the meaning of the *Banking Act 1959* of the Commonwealth;
- (b) a trustee company within the meaning of the *Companies (Trustees and Personal Representatives) Act*; or
- (c) a corporation or other body, or a corporation or body of a class, prescribed by the Regulations for the purposes of this definition;

'legal practitioner' includes an interstate legal practitioner;

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

'managed investment scheme' has the same meaning as in the *Corporations Act 2001*;

'mortgage' means an instrument under which an interest in real property is charged, encumbered or transferred as security for the payment or repayment of money, and includes –

- (a) a proposed mortgage; and
- (b) an instrument prescribed by the Regulations to be a mortgage;

'regulated mortgage' means a mortgage (including a contributory mortgage) other than the following:

- (a) a mortgage under which the lender is a financial institution;
- (b) a mortgage under which the lender or contributor nominates the borrower, but only if the borrower is not a person introduced to the lender or contributor by any of the following persons:
 - (i) the legal practitioner who acts for the lender or contributor;
 - (ii) an associate of the legal practitioner;
 - (iii) a person engaged by the legal practitioner for the purpose of introducing the borrower to the lender or contributor;
- (c) a mortgage of a kind prescribed by the Regulations;

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'responsible entity' has the same meaning as in the Corporations Act 2001;

'run-out mortgage' means a regulated mortgage created before the commencement of this Part that is not –

- (a) a Territory regulated mortgage; or
- (b) a mortgage that forms part of a managed investment scheme that is required to be operated by a responsible entity under the Corporations Act 2001 (as modified by any ASIC exemption or the regulations under that Act);

'Territory regulated mortgage' has the meaning in section 84C.

"(2) In this Part, a reference to an associate of a legal practitioner is a reference to any of the following:

- (a) a partner of the legal practitioner, whether or not the partner is a legal practitioner;
- (b) an employee or agent of the legal practitioner;
- (c) a co-trustee of the legal practitioner;
- (d) a person who bears a prescribed relationship to the legal practitioner or to a person referred to in paragraph (a) or (c);
- (e) a corporation, or a member of a corporation, partnership, syndicate or joint venture, in which the legal practitioner or a person referred to in paragraph (a), (b) or (d) has a beneficial interest;
- (f) if the legal practitioner or person referred to in paragraph (a) or (d) is a corporation – a subsidiary of that corporation within the meaning of the Corporations Act 2001;
- (g) a person prescribed by the Regulations to be an associate of the legal practitioner.

"(3) For the purposes of subsection (2)(d), a person bears a prescribed relationship to a legal practitioner, or to a partner or co-trustee of a legal practitioner, if the relationship is that of –

- (a) a spouse;
- (b) a defacto partner within the meaning of the *De Facto Relationships Act*;
- (c) a child, grandchild, sibling, parent or grandparent; or
- (d) a kind prescribed by the Regulations.

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"(4) In this Part, a reference to a legal practitioner acting for a lender or contributor is a reference to the legal practitioner acting in the capacity of that person's legal practitioner.

"84C. Territory regulated mortgage

"For the purposes of this Part, in relation to a legal practitioner, a regulated mortgage is a Territory regulated mortgage if –

- (a) a nomination of the legal practitioner's practice as a Territory regulated mortgage practice is in force under section 84F; and
- (b) the regulated mortgage –
 - (i) does not form part of a managed investment scheme; or
 - (ii) forms part of a managed investment scheme that is not required to be operated by a responsible entity under the Corporations Act 2001 (as modified by any ASIC exemption or the regulations under that Act).

"84D. Application of Part

"Subject to Division 5, this Part applies in relation to mortgages created before or after the commencement of this Part.

"Division 2 – Mortgage practices

"84E. Conduct of mortgage practice

"(1) A legal practitioner must not, in acting for a lender or contributor, negotiate the creation of or act in respect of a regulated mortgage unless that mortgage –

- (a) is a Territory regulated mortgage;
- (b) is a run-out mortgage; or
- (c) forms part of a managed investment scheme that is operated by a responsible entity.

"(2) A legal practitioner must not, in acting for a lender or contributor, negotiate the creation of or act in respect of a regulated mortgage except in accordance with –

- (a) the Corporations Act 2001 (as modified by any ASIC exemption or the regulations under that Act); and
- (b) this Act, the Regulations and the professional conduct rules.

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"(3) A legal practitioner must not, in acting for a lender or contributor, negotiate the creation of or act in respect of a regulated mortgage that forms part of a managed investment scheme unless the legal practitioner complies with the ASIC exemptions (if any) that apply to managed investment schemes –

- (a) that have more than 20 members; and
- (b) that are operated under the supervision of the Law Society in accordance with that exemption.

"(4) Subsection (3) applies even if the regulated mortgage forms part of a managed investment scheme that has no more than 20 members.

"(5) Subsection (3) does not apply if the managed investment scheme is operated by a responsible entity.

"(6) A legal practitioner who knows that a prescribed person has contravened a requirement of this section must notify the Law Society in writing of the contravention within 21 days after becoming aware of it.

"(7) In subsection (6) –

'prescribed person', in relation to a legal practitioner, means any of the following persons:

- (a) if the legal practitioner is a member of a firm of legal practitioners – a person who is a member of that firm;
- (b) an employee or agent of the legal practitioner.

"84F. Nomination of practice as Territory mortgage practice

"(1) A legal practitioner who, in acting for a lender or contributor, negotiates the creation of or acts in respect of a regulated mortgage or proposes to do so must by written notice lodged with the Law Society nominate his or her practice as a Territory regulated mortgage practice.

"(2) With the approval of the Law Society, a nomination may be made for a legal practitioner by another legal practitioner (for example by a legal practitioner on behalf of members of a firm of legal practitioners).

"(3) The nomination of a legal practitioner's practice as a Territory regulated mortgage practice comes into force on the date the notice is lodged under subsection (1).

"(4) The Law Society may, by written notice served on a legal practitioner, reject the nomination made in respect of his or her practice.

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"(5) The nomination of a legal practitioner's practice as a Territory regulated mortgage practice ceases to be in force if –

- (a) the Law Society rejects the nomination;
- (b) the legal practitioner revokes the nomination by written notice lodged with the Law Society; or
- (c) the legal practitioner ceases to hold a practising certificate or interstate practising certificate, as applicable.

"(6) A notice lodged under this section is to include the information (if any) prescribed by the Regulations.

"84G. Law Society to be notified of Territory regulated mortgage

"(1) A legal practitioner who, in acting for a lender or contributor, negotiates the creation of or acts in respect of a Territory regulated mortgage must, within 7 days, give the Law Society written notice of that fact.

Penalty: 20 penalty units.

"(2) The notice is to contain the information (if any) prescribed by the Regulations.

"(3) An offence against subsection (1) is a regulatory offence.

"84H. Approved policy of fidelity insurance

"(1) The Attorney-General may approve a policy of fidelity insurance for the purpose of compensating persons who suffer pecuniary loss because of a dishonest failure by a legal practitioner to pay money payable under a regulated mortgage.

"(2) The approval of a policy of fidelity insurance is to be in writing, approving the insurer and the terms of the policy, and may impose conditions to which the provision of fidelity insurance is to be subject.

"(3) A legal practitioner who, in acting for a lender or contributor, negotiates the creation of or acts in respect of a regulated mortgage must take out and maintain a policy of fidelity insurance as approved under this section.

Penalty: 200 penalty units.

"(4) This section does not apply in respect of a regulated mortgage that forms part of a managed investment scheme that is operated by a responsible entity.

"84I. Limited claim against Fidelity Fund in respect of regulated mortgage

"(1) A lender or contributor under a regulated mortgage to which section 84H applies is not entitled to apply for compensation from the Fidelity Fund for pecuniary loss he or she suffers because of a dishonest failure by the legal practitioner acting for the lender or contributor to pay money payable under that mortgage.

"(2) Subsection (1) does not apply if the legal practitioner acting for the lender or contributor fails to take out and maintain an approved policy of fidelity insurance in pursuance of section 84H(3).

"(3) A claim against the Fidelity Fund by virtue of subsection (2) –

- (a) is to be dealt with by the Fidelity Fund Committee as if the legal practitioner had taken out and maintained an approved policy of fidelity insurance; and
- (b) is subject to the same restrictions, including the amount of compensation payable, as would have applied under that approved policy of insurance.

"84J. Notification of insurance held in respect of regulated mortgage

"(1) If a client entrusts money to a legal practitioner and it is proposed to advance the money to a borrower for a regulated mortgage, the legal practitioner must, within 7 days after the receipt of the money, give the client written notice –

- (a) of the effect of section 84I; and
- (b) of the approved policy of fidelity insurance maintained by the legal practitioner.

"(2) The legal practitioner must not advance any money referred to in subsection (1) to a borrower for a regulated mortgage unless –

- (a) the legal practitioner has given the client notice under that subsection; and
- (b) the client has subsequently given the legal practitioner written authority to advance the money for that regulated mortgage.

"(3) A contravention of this section does not affect the operation of section 84I.

"(4) This section does not apply in respect of a regulated mortgage that forms part of a managed investment scheme that is operated by a responsible entity.

"Division 3 – Managed investment schemes

"84K. Notification of involvement in managed investment scheme

"(1) If –

- (a) a client entrusts, or proposes to entrust, money to a legal practitioner to be invested in a managed investment scheme that is operated by a responsible entity; and
- (b) the legal practitioner has a prescribed interest in the managed investment scheme,

the legal practitioner must give the client a written notice containing the following information:

- (c) that the legal practitioner has a prescribed interest in the managed investment scheme and particulars of that prescribed interest;
- (d) that the operation of the managed investment scheme does not form part of the legal practitioner's practice;
- (e) the effect of section 84L(1);
- (f) other information (if any) prescribed by the Regulations.

"(2) The legal practitioner must not advance any money entrusted to him or her to be invested in a managed investment scheme that is operated by a responsible entity –

- (a) to the responsible entity for the managed investment scheme; or
- (b) to any other person,

unless the legal practitioner has given the client the notice referred to in subsection (1).

"(3) A legal practitioner who knows that a prescribed person has contravened subsection (1) must notify the Law Society in writing of the contravention within 21 days after becoming aware of it.

"(4) For the purposes of this section, a legal practitioner has a prescribed interest in a managed investment scheme if any of the following circumstances apply:

- (a) the legal practitioner, or an associate of the legal practitioner, is a director of or is concerned in the management of the responsible entity for the managed investment scheme;

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- (b) the legal practitioner, or an associate of the legal practitioner, is a shareholder in the responsible entity for the managed investment scheme;
- (c) the legal practitioner, or an associate of the legal practitioner, is taken to be an agent of the responsible entity under Chapter 5C of the Corporations Act 2001;
- (d) the legal practitioner, or an associate of the legal practitioner, receives any pecuniary benefit from the managed investment scheme or the responsible entity for the managed investment scheme if a client of the legal practitioner invests in the managed investment scheme;
- (e) the legal practitioner, or an associate of the legal practitioner, has an interest in the managed investment scheme or the responsible entity for the managed investment scheme that is an interest of a kind prescribed by the Regulations.

"(5) In subsection (3) –

'prescribed person', in relation to a legal practitioner, means any of the following persons:

- (a) if the legal practitioner is a member of a firm of legal practitioners – a person who is a member of that firm;
- (b) an employee or agent of the legal practitioner.

"84L. Limited claims against Fidelity Fund relating to investments

"(1) A client referred to in section 84K who suffers pecuniary loss arising from an investment in a managed investment scheme referred to in that section is not entitled to apply for compensation from the Fidelity Fund in respect of that loss.

"(2) Subsection (1) does not apply if the legal practitioner who acted for the client failed to comply with section 84K(1) or (2).

"84M. Transfer of regulated mortgage to responsible entity

"(1) A legal practitioner who, in acting for a lender or contributor, is responsible for the administration of a regulated mortgage must not transfer that mortgage to a responsible entity for a managed investment scheme unless the lender or contributor has given the legal practitioner written authority to do so.

"(2) For the purposes of this section, a legal practitioner transfers a regulated mortgage to a responsible entity when the legal practitioner does anything that results in –

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- (a) a responsible entity for a managed investment scheme becoming the holder or custodian of the regulated mortgage; or
- (b) any advances of money made in respect of the mortgage, or the property that is charged or encumbered by the mortgage, becoming scheme property (within the meaning of the Corporation Act 2001) of a managed investment scheme.

"Division 4 – Miscellaneous

"84N. Law Society to disseminate information

"The Law Society has the function of disseminating information for the purpose of increasing public awareness about the obligations of legal practitioners under this Part.

"84O. Law Society may require information about mortgage practice

"(1) The Law Society may by written notice require a legal practitioner to provide information to the Law Society about any of the following:

- (a) whether the legal practitioner, or an associate of the legal practitioner, is negotiating the creation of or acting in respect of regulated mortgages or has done so in the past;
- (b) details of any regulated mortgages in force in respect of which the legal practitioner has acted;
- (c) whether the legal practitioner proposes –
 - (i) to nominate his or her practice as a Territory regulated mortgage practice in pursuance of section 84F;
 - (ii) to transfer responsibility for any regulated mortgage; or
 - (iii) to take no further action in respect of any regulated mortgage;
- (d) any other matters relating to regulated mortgages as prescribed by the Regulations.

"84P. Indemnity insurance

"This Part does not affect the terms of a policy of professional indemnity insurance to which Part IVA applies.

"84Q. Secrecy provisions

"This Act or any other law of the Territory does not prohibit the disclosure of information to ASIC or to a regulatory authority of a State or Territory of the

Commonwealth concerning the conduct of legal practitioners in respect of regulated mortgages.

"84R. Regulations relating to this Part

"(1) The Regulations may prescribe provisions for the purpose of ensuring –

- (a) that the operation of a managed investment scheme by a responsible entity is kept separate from a legal practitioner's practice; and
- (b) that clients of a legal practitioner are made aware that the operation of a managed investment scheme by a responsible entity does not form part of the legal practitioner's practice.

"(2) The Regulations may provide for any other matters referred to in this Part, including the following:

- (a) the manner in which the Law Society is to be given a notice or information;
- (b) the form of notices and authorities.

"Division 5 – Transitional provisions relating to mortgages

"84S. Definition

"In this Division –

'commencement date' means the date on which this Part comes into operation.

"84T. Fidelity insurance in relation to pre-existing regulated mortgage

"(1) Section 84H(3) does not apply in relation to a regulated mortgage that was created before the commencement date.

"(2) Despite subsection (1), section 84H(3) applies in relation to a regulated mortgage created before the commencement date if –

- (a) whether before or after the commencement date, a client entrusts money to the legal practitioner to be advanced to a borrower for the regulated mortgage; and
- (b) that money is advanced or proposed to be advanced to the borrower on or after the commencement date.

"(3) If subsection (2) applies –

- (a) the legal practitioner must take out and maintain an approved policy of fidelity insurance in respect of the advance of that money and comply with section 84J in respect of that advance; and
- (b) section 84I(1) applies to any claim for compensation for pecuniary loss suffered in respect of that advance.

"(4) If the money referred to in subsection (2) is received by the legal practitioner before the commencement date, the 7 days referred to in section 84J(1) is taken to be 7 days after the commencement date.

"84U. Prohibited conduct in respect of run-out mortgage

"A legal practitioner must not, in acting for a lender or contributor –

- (a) advance to a borrower for a run-out mortgage any money entrusted to the legal practitioner;
- (b) do any work for the purpose of extending the term of a run-out mortgage;
- (c) accept any money from a client for the purpose of advancing the money to a borrower for a run-out mortgage; or
- (d) do anything in contravention of any provision of the Regulations or the professional conduct rules relating to run-out mortgages.

"84V. Substitution of lender or contributor under run-out mortgage

"(1) Despite section 84U, a legal practitioner may receive money from a client and do any work that is necessary solely for the purpose of substituting a lender or contributor under a run-out mortgage.

"(2) Section 84H does not apply in respect of anything done in accordance with subsection (1) and the legal practitioner is not required to obtain fidelity insurance for the purpose of compensating the substitute lender or contributor for any pecuniary loss in respect of the substitution.

"(3) If a client entrusts, or proposes to entrust, money to a legal practitioner for the purpose of substituting a lender or contributor under a run-out mortgage, the legal practitioner must give the client written notice –

- (a) of the effect of section 84W; and
- (b) that the legal practitioner is not required to have fidelity insurance in respect of the substitution under the run-out mortgage.

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"(4) The legal practitioner must not advance money received for the purposes of subsection (1) to a borrower for a run-out mortgage unless the legal practitioner has given the client notice under subsection (3).

"84W. Limited claims against Fidelity Fund by substitute lender

"(1) A person who becomes a lender or contributor under a run-out mortgage after the commencement date is not entitled to apply for compensation from the Fidelity Fund for pecuniary loss suffered in respect of that mortgage.

"(2) Subsection (1) does not apply if the legal practitioner who acts for the person fails to give the client notice under section 84V."
