

QUEENSLAND LAW SOCIETY LEGISLATION AMENDMENT BILL 1996

EXPLANATORY NOTES

GENERAL OUTLINE

Objectives of the Legislation

The Bill, which amends the *Queensland Law Society Act 1952* and the *Land Title Act 1994*, has the following objectives:

- (a) to exclude from the coverage of the Fidelity Guarantee Fund liability for defalcations arising out of anything done or omitted to be done by a solicitor in connection with an excluded mortgage in respect of which instructions were given by the client after the date of commencement of the amendment;
- (b) to require solicitors to notify their clients in advance, and receive specific authorisation, in circumstances where cover under the Fidelity Guarantee Fund for the transaction is excluded under this amendment. Failure to do so will constitute professional misconduct; and
- (c) to clarify that there is no right to compensation under section 188 of the *Land Title Act 1994* for any loss excluded from the coverage of the Fund.

Achievement of Objectives

The policy objectives of the Bill are achieved by the amendment to the *Queensland Law Society Act 1952* and to the *Land Title Act 1994*.

Alternative Ways of Achieving Policy Objectives

As the Fidelity Guarantee Fund is set up under legislation, exclusion of liability from the Fund is only achievable by amending the *Queensland Law*

Society Act.

Estimated Costs for Government Implementation

Nil.

Fundamental Legislative Principles

The Bill is not retrospective in that if there is any loss arising from an excluded mortgage in respect of which instructions were given to a solicitor prior to the date of commencement of the amendment, that loss will still be covered by the Fidelity Fund. It is only those excluded mortgages which have not yet been arranged which will be excluded from the coverage of the Fund.

However, in a limited respect, the Bill could be said to be retrospective, because it will apply as and from the date of introduction of the Bill into the House. Where instructions are given to a solicitor as and from that date in respect of an excluded mortgage, any loss arising from out of the excluded mortgage will not be covered by the Fund. However, also as and from that date, solicitors will be required to notify their clients of the fact that the Fund no longer applies. Therefore, clients will be aware of the exclusion before they enter into a transaction in respect of which they will no longer have Fund coverage.

Consultation

The Queensland Law Society has been consulted in relation to the Bill.

NOTES ON PROVISIONS

Part 1—Preliminary

Clause 1 provides for the short title

Clause 2 provides for the Act to commence on 16 May 1996.

Part 2—Amendment of Queensland Law Society Act 1952

Clause 3 provides for the amendment to the *Queensland Law Society Act 1952*.

Clause 4 inserts **Section 24A** and **Section 24B**.

New Section 24A provides that where pecuniary loss arises out of the stealing or fraudulent misappropriation by a solicitor, clerk or employee, in connection with an excluded mortgage, no claim lies against the Fidelity Fund. This section only applies to excluded mortgages in respect of which instructions were given by the client on or after 16 May 1996.

The section defines an excluded mortgage to mean a mortgage other than a direct mortgage. Direct mortgages are those where the lender is a financial institution (which is defined in the *Acts Interpretation Act 1954*), or those where the lender is specified by the borrower unless the lender has been introduced to the borrower by the solicitor, employee or clerk, for the purpose of making the loan.

New Section 24B provides that where the solicitor already holds a client's money and the client proposes to apply those moneys to an excluded mortgage, the solicitor must, prior to accepting the client's instructions, give the client notification that no claim will lie against the Fidelity Fund. It also provides that where the client proposes to entrust moneys to a solicitor for the purpose of an excluded mortgage, the solicitor must give notification to the client before accepting the money. The notice must be in a form approved by the Council of the Queensland Law Society.

Before using the client's money for the excluded mortgage, the client must specifically authorise this. The authorisation must also be in a form approved by the Queensland Law Society.

Where the solicitor fails to give the notification, or uses the money without authorisation, this will constitute professional misconduct, and he or she may be dealt with through the normal disciplinary processes under the *Queensland Law Society Act 1952*.

No claim will lie against the Fidelity Fund despite failure to give the notification.

Part 3—Amendment of the Land Title Act 1994

Clause 5 provides for the amendment to the *Land Title Act 1994*.

Clause 6 inserts section 189(1)(ba) which provides that section 188 of the *Land Title Act* does not apply to any unlawful conduct by a solicitor as defined in section 24A of the *Queensland Law Society Act 1952*. Therefore, any loss in connection with an excluded mortgage in terms of section 24A is not compensable under section 188 of the *Land Title Act*.

The clause also renumbers section 189(1)(ba) to (g) as 189(1)(c) to (h).