

1995

THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

LEGAL PRACTITIONERS (AMENDMENT) BILL (NO 2) 1995

EXPLANATORY MEMORANDUM

Circulated by authority of

**GARY HUMPHRIES MLA
ATTORNEY-GENERAL**

LEGAL PRACTITIONERS (AMENDMENT) BILL (No 2) 1995

BACKGROUND

The *Legal Practitioners (Amendment) Act 1994* (the 1994 amending Act) amended the *Legal Practitioners Act 1970* (the Principal Act), among others, to provide for 'controlled moneys' to be brought within the audit requirements in Part XI of the Act. The definition of 'controlled moneys' includes 'valuable securities'. The term 'valuable securities' may cover a range of items such as share scrip and real property title documents. The 'valuable securities' element in the definition of 'controlled moneys' has produced unintended difficulties for legal practitioners in relation to a number of the audit requirements of the Act and can be removed without detriment to the consumer protections afforded by the Act.

The Legal Practitioners (Amendment) Bill (No 2) 1995 (the Bill) removes 'valuable securities' from the definition of 'controlled moneys' with retrospective effect to the date of the commencement of the 1994 amending Act.

While it is inappropriate that a 'receipt' be given by a solicitor to a client in relation to controlled moneys (because such moneys are not received in the usual sense), some form of acknowledgment of a solicitor having been given authority to control a client's money, and of the use by a solicitor of that authority, should be required.

The Bill provides for a solicitor to provide a client with an acknowledgment of the solicitor being given control over funds of a client and for the solicitor to prepare and provide to the client a quarterly statement of payments made out of the funds of a client controlled by the solicitor. The intended effect being that transactions involving 'controlled moneys' are recorded, the records relating to 'controlled moneys' are within the documents noted in section 103 of the Principal Act and may be audited.

SUMMARY

The intention of the Legal Practitioners (Amendment) Bill (No 2) 1995 is to amend the *Legal Practitioners Act 1970* (the Principal Act) to-

- provide a definition of 'controlled moneys' which refers only to money;
- provide definitions of 'control'; and 'third party payment';
- provide that a 'third party payment' is not to be included in the audit requirements of the Principal Act;

- provide that, on being given control of a client's money, a solicitor is to give the client an acknowledgment of that control and of the terms under which the control may be exercised;
- provide that, if in any quarter a solicitor makes a payment or payments out of the funds of a client controlled by the solicitor, the solicitor is to prepare and forward to the client a quarterly statement giving particulars of the payments made;
- reinstate references to documents which are 'valuable securities' in the meaning of 'trust property of a solicitor' for the purposes of a receiver in Part XIII of the Principal Act;
- provide that the application of Part XI in relation to 'controlled moneys' is to be taken to have operated from the date of commencement of *Legal Practitioners (Amendment) Act 1994* up to the date of commencement of the Bill as enacted; and
- redraft certain of the provisions relating to 'trust moneys' and 'controlled moneys' to clarify them or render them more accurate.

DETAILS OF THE BILL

Clauses 1 and 3 provide for the citation of the amending Act and the Principal Act.

Clause 2 provides for commencement of the amending Act on gazettal.

Clause 4 amends section 3 which is the definition section of the Principal Act.

Subclause 4(a) amends the definition of 'controlled moneys' in section 3 of the Principal Act to provide for a definition of 'controlled moneys' which does not refer to 'valuable securities' and which excludes 'trust moneys' and 'a third party payment'.

Subclause 4(b) inserts definitions of 'control' and 'third party payment' into section 3 of the Principal Act. These definitions are as follows:

(a) 'control' means, in relation to moneys, the direct or indirect control a solicitor has over moneys of a client;

(b) a 'third party payment' means a payment in the form of a cheque, bank cheque, bank draft or money order received by a solicitor from or on behalf of a client with instructions that the payment is to be made to another person, not being the solicitor, or a partner of the solicitor, or the solicitor's firm.

Subsection 87(4) of the Principal Act describes the various forms of payment which are third party payments and which are to be excluded from subsection 87(1) (which requires that all moneys received by a solicitor in connection with the solicitor's practice for or on behalf of a client are to be held in trust). The definition of 'third party payment', in effect, reproduces the relevant part of subsection 87(4).

Clause 6 omits subsection 87(4) and inserts a new subsection 87(4) which provides that subsection 87(1) does not apply in relation to a third party payment.

Clause 5 amends the heading to Part XI. The heading 'TRUST MONEYS AND CONTROLLED MONEYS' will more accurately reflect the purpose and content of that Part.

Clause 6 amends section 87 of the Principal Act by omitting subsection 87(4) and substituting a new subsection 87(4) which gives effect to the drafting change discussed at subclause 4(b) above. The effect, that a third party payment is excluded from subsection 87(1) which require certain moneys to be held in trust, is unchanged.

Clause 7 repeals section 87A. Section 87A was inserted by the 1994 amending Act to include 'controlled moneys' in certain provisions of the Principal Act. The Bill includes a Schedule which amends the sections listed by section 87A which include 'controlled moneys' to actually insert into the relevant provisions a reference to 'controlled moneys' as appropriate. This change is intended to, and should, make the Principal Act easier to understand.

Clause 8 inserts new section 99A to provide for records of controlled moneys to be prepared by a solicitor and given to a client whose money is controlled by the solicitor.

New subsection 99A(1) provides that, where a solicitor is given control of moneys of the client, the solicitor is to give the client, as soon as is practicable, a written acknowledgment of the giving of that authority and retain a copy of that written acknowledgment.

New subsection 99A(2) provides that the acknowledgment is to identify the funds which are under the solicitor's control and shall specify the terms on which control over the funds may be exercised.

New subsection 99A(3) provides that, if, during a quarter, a solicitor makes a payment out of the funds of a client controlled by the solicitor, the solicitor is to prepare a statement specifying particulars of such a payment.

New subsection 99A(4) requires the statement to be prepared within 14 days of the end of a quarter or within 1 month of the end of a quarter which ends on the last day of December.

New subsection 99A(5) provides that, as soon as is practicable after preparing the quarterly statement, the solicitor is to forward a copy of the statement to the client on whose behalf the solicitor controls the funds to the last known address of the client.

New subsection 99A(6) provides that "quarter" means the period of 3 months ending on the last day of June, September, December, or March in each year. 'Quarter' in respect of "controlled moneys" thus has the same meaning as is provided for the requirement under section 103 of the Principal Act for a solicitor to prepare a quarterly statement of trust moneys held.

The intention is that an acknowledgment under new subsection 99A(1) and a quarterly statement under new subsection 99A(3) are to be included in the documents which an auditor may require a solicitor to produce for audit under section 103 of the Principal Act.

Clause 9 amends section 148 of the Principal Act.

Subclause 9(a) omits subsection 148(2) and inserts a more modern and easily understood form of the content of that subsection without changing the meaning of the subsection.

Subclause 9(b) omits paragraph 148(3)(a) from the Principal Act and inserts new paragraphs 148(3)(a) and (b). Paragraph 148(3)(a) was amended by the 1994 amending Act in consequence of the inclusion of the expression 'valuable securities' in the meaning of 'controlled moneys'. Now that the expression 'valuable securities' is removed from the meaning of 'controlled moneys' it is necessary to reinstate the references to documents which are valuable securities in the section.

New paragraphs 148(3)(a) and (b) provide that trust moneys, controlled moneys and documents evidencing title to land are included in the term "personal property" for the purposes of section 148 of the Principal Act.

Subclause 9(c) amends paragraph 148(3)(c) by adding securities to the items which are included in the term "personal property" for the purposes of section 148 of the Principal Act.

Clause 10 amends section 200 of the Principal Act by omitting subsection 200(5). Subsection 200(5) was inserted by the 1994 amending Act to include controlled moneys in those which, if unclaimed, are to be paid to the Territory. Section 200 is amended in the Schedule to include controlled moneys in the ambit of the section.

Clause 11 refers to the amendment of the Principal Act by the Schedule - see clause 7 above.

Clause 12 provides that the operation of the provisions of Part XI of the Principal Act shall be as if the expression 'valuable securities' did not apply in the meaning of 'controlled moneys' from 23 November 1994. The date is that of the commencement of the 1994 amending Act. The intention is that the requirements of the 1994 amending Act in respect of 'valuable securities' are to be taken to have had no effect.