



Conveyancers Licensing Bill.

Second Reading

The Hon. JOHN DELLA BOSCA (Special Minister of State, Minister for Commerce, Minister for Industrial Relations, Assistant Treasurer, and Minister for the Central Coast) [8.15 p.m.]: I move:

That this bill be now read a second time.

As the speech is lengthy, and given that it has already been delivered in the other House, I seek leave to incorporate it in *Hansard*.

Leave granted.

The Conveyancers Licensing Bill 2003 repeals the Conveyancers Licensing Act 1995 and replaces it with a new Act which improves consumer protection, allows conveyancers to incorporate, introduces rules for conveyancers, clarifies and updates existing legislation and reforms the disciplinary scheme.

In New South Wales, the provision of conveyancing services has developed as a highly competitive area of business over the past 10 years. In part this can be attributed to property market conditions and the volume of residential transactions that take place. But it is also the result of breaking the monopoly solicitors held on providing conveyancing services and freeing up the conveyancing market to allow open competition.

Licensing for conveyancers was first introduced in 1992. It was intended to increase competition in the provision of conveyancing services by allowing other qualified professionals apart from solicitors to undertake conveyancing work. It was considered that, as competition benefits consumers and the community generally by encouraging providers to deliver their services in the most effective and cost efficient way, a separate licensing scheme for conveyancers would have this effect.

However, it was found that the Conveyancers Licensing Act 1992 was only partially able to expand consumer choice and break down the monopoly that solicitors held on conveyancing. Reforms were proposed that would permit licensed conveyancers to undertake a broader scope of work covering commercial, rural and residential transactions as well as personal property. The 1995 Act expanded the work of licensed conveyancers and transferred regulation of conveyancers to a body independent of both the legal profession and the conveyancing industry.

The pro-competitive changes to conveyancing regulation have brought a number of benefits to consumers. The benefits have accrued through improved market information, a wider choice of service providers and lower prices, without any drop in quality.

Before the reforms the Australian Consumers Association had estimated the conveyancing monopoly cost New South Wales consumers \$290 million a year. It was estimated that in 1990, the legal fees associated with a \$125,000 house purchase and mortgage ranged from \$1,100 to \$1,550. A recent survey of licensed conveyancers undertaken by the Office of Fair Trading indicates that, although the value of residential property in New South Wales has risen, the average cost of a residential conveyance has dropped considerably, now ranging between \$400 and \$1,000.

The survey also indicated that the conveyancing costs associated with the sale or purchase of a small business have been reduced as a result of the pro-competitive reforms. Broadening the scope of work undertaken by licensed conveyancers has had a positive impact on this sector of the market. It is estimated that as time goes by licensed conveyancers will take up a greater market share and there will be further cost savings to consumers.

There are currently 404 licensed conveyancers in New South Wales. Of the 404 licensees, 17 hold restricted licences that allow them to undertake residential work only and 387 are licensed to undertake the full scope of work including commercial and rural conveyancing. The industry has increased by more than 800 per cent since the introduction of the Conveyancers Licensing Act in 1995 when there were only 43 licensees holding residential licences.

The proposed reforms contained in the bill are based on the recommendations of a National Competition Policy review of the Conveyancers Licensing Act 1995. The review found that consumers experience risks in their dealings with conveyancers, and that these risks justify continued regulation of the conveyancer industry. The

main risks faced by consumers of conveyancers' services are: the level of competence of the conveyancers and the safety of monies held in trust.

Given these risks, the review concluded that the objectives of the Conveyancers Licensing Act 1995 remain valid. These objectives are:

- increased competition in the provision of conveyancing services by allowing other qualified professionals apart from solicitors to undertake conveyancing work;
 - to protect consumers of conveyancing services by providing that conveyancers must be licensed, accountable and meet certain standards of competence.
- The basis for the current regulatory framework is the premise that consumers are, as a group, relatively ill-informed compared to conveyancers, partly because of infrequent transacting, and are vulnerable for that reason.

The sale or purchase of property, whether for domestic or investment purposes, is a significant transaction for most people. It often involves a substantial financial and personal commitment, and usually occurs only infrequently in a person's lifetime. Therefore appropriate regulation can assist efficient transacting in the property marketplace.

The review recommended retaining the current occupational licensing model as the regulatory option which best achieves the objectives of the Act. As part of the review process some aspects of the regulation of conveyancers were identified as requiring legislative reform.

I will now take the opportunity to outline some of the main changes proposed in the bill.

Before I outline the proposals, I should mention that the bill retains the current boundaries for the legal work a conveyancer may undertake. Licensed conveyancers with an unrestricted licence may carry out a range of work including residential conveyancing, commercial property transfers, preparing and advising on mortgages, property transactions for small businesses and the sale of rural property. The existing provisions relating to the keeping of trust accounts and records and management and receivership have also been retained.

The proposals in this bill fall into three broad categories:

- licensing requirements, general conduct of licensees,
- discipline and enforcement.

Licensing

The bill retains the current requirements that, to be granted a licence, a person must be at least 18 years of age, fulfil certain qualification requirements, not be a disqualified person and contribute to the compensation fund established under the Property, Stock and Business Agents Act. Licensees are still required to be covered by professional indemnity insurance.

Because of the nature of conveyancing work, demonstrating competence plays a fundamental role in the licensing requirements. Previously this has been achieved by setting educational and practical experience requirements. To keep abreast of changes to the national approach to training, competency standards will be introduced as part of the qualification criteria.

Including competency standards as part of the qualification criteria provides the opportunity for a general review of current guidelines for educational and practical experience. The Office of Fair Trading will soon commence consultation to revise these guidelines.

The current Act limits the involvement of other professionals in conveyancing businesses in a number of ways. There are restrictions on engaging in multi-disciplinary partnerships, the sharing of receipts and employing certain persons in a conveyancing business.

The provisions disqualifying certain persons from becoming a licensee have been amended to include persons barred from holding a licence in another jurisdiction and persons who are not "fit and proper". The restriction on the category of persons who hold a solicitor's or barrister's practising certificate has been removed.

The provisions restricting business relationships are intended to support the requirements in the Act for professional and ethical standards by ensuring a properly qualified person maintains control of the business.

To provide conveyancers with freedom to choose the most appropriate business structure, the restriction on conveyancers incorporating has been removed. This may be particularly beneficial to small suburban firms and those located in country towns.

For a corporation to become licensed, at least one director must be a licensed conveyancer. Non-conveyancer directors will be subject to "fit and proper" checks and incorporation with a director who is licensed under the Property, Stock and Business Agents Act will be prohibited. This will ensure that professional and ethical standards are adhered to and any possible conflict of interest between real estate agents and conveyancers will be avoided.

The bill expands the current requirements relating to continuing professional development. The bill provides for the renewal of a licence on condition that licence-holders undertake continuing professional development each year. Licensees, like many others in business, need a wide range of skills to competently perform their functions. Equally, they need to keep abreast of changes and developments in their fields of competence. Continuing professional development recognises the changing nature of the marketplace and provides flexibility to educate conveyancers in identified areas of concern. Continuing professional development requirements will be based on identified emerging issues and persistent problem areas and cover topics such as trust accounting, ethical issues, communication skills, electronic conveyancing and office management.

Consultation will be carried out with industry and other interested parties to develop the requirements for continuing professional development. It is envisaged that guidelines will provide for a variety of ways for a person to be able to satisfy the requirements, for example, by attendance at courses and seminars or through multimedia channels such as video or the Internet. The Government is conscious that a flexible approach should be adopted so that people, especially those in remote areas, can participate in continuing professional development without disrupting their business activities.

Before moving on to the topic of conveyancer conduct, I should point out that decisions of the commissioner with respect to the issue, renewal or restoration of licences or the imposition of conditions will continue to be reviewable by way of appeal to the Administrative Decisions Tribunal.

Conveyancer conduct

As I indicated earlier, the reforms up-date and streamline requirements relating to the way conveyancers conduct their business.

For most people the sale or purchase of their home represents the largest investment and financial transaction they will engage in. Similarly, there may be far-reaching and weighty implications in the sale or purchase of a small business. An error in a conveyancing transaction can result in significant harm to the consumer. In most cases the error becomes apparent after the transaction has been completed. The purchaser is in possession of a property with a defect and there is no way of reversing the sale process, although the purchaser may have a remedy through the common law.

To reduce the risk of error, the bill tightens the supervision and control of employees and clarifies the responsibilities of licensees-in-charge. Licensees-in-charge will be responsible for the actions of their employees and they will be prohibited from employing people who are disqualified from holding a licence or are otherwise considered not "fit and proper". The bill also requires the reasonable attendance of the licensee at the place of business.

To provide the industry with a clear guide to the standards expected by the public in respect of business dealings and ethical behaviour, the bill allows for Rules of Conduct to be prescribed. The Rules of Conduct will underpin the core elements of the legislation—levels of competency, professional indemnity insurance and continuing professional development. Rules could address matters such as disclosure of costs, ownership of documents, providing information to clients about the conveyancing process, ownership of documents, conflict of interest and arrangements for settlement. Contravention of the rules can result in disciplinary action.

Consultation will be undertaken with the industry and consumers to ensure the development of Rules of Conduct that provide an appropriate level of consumer protection.

Under current arrangements, the obligation for conveyancers to disclose costs and the effect of non-disclosure are regulated under provisions of the Legal Profession Act 1987. These requirements have been brought across to the bill.

The bill also provides for the resolution of costs disputes through the Consumer, Trader and Tenancy Tribunal. The Tribunal replaces the Supreme Court as the forum for resolving costs disputes. Under the new procedure:

- consumers or conveyancers may notify the tribunal about a costs dispute;
- the dispute will be assessed by the Consumer, Trader and Tenancy Tribunal for the purpose of determining whether the matter is appropriate for resolution by an independent expert;

- an independent expert will be selected from a panel of experts approved by the chairperson of the tribunal. The intention is that the expert will quickly make contact with the parties with a view to prompt resolution of the dispute; the independent expert will be required to prepare a written report on the dispute and provide it to the parties within a time limit specified by the tribunal;
- if the parties reach an agreement during an assessment by the independent expert, that agreement must be put in writing by the expert, signed by the parties and filed with the tribunal;
- if the dispute cannot be resolved through this early intervention dispute resolution system, a costs claim can be lodged with the tribunal in order to have the matter heard and determined.

Now I would like to move on to the provisions dealing with discipline and enforcement.

Discipline and enforcement

The Review of the Conveyancers Licensing Act 1995 found that complaint and disciplinary arrangements applying to conveyancers are unnecessarily complex. This is because provisions of both the Legal Profession Act and the Conveyancers Licensing Act come into play with regards to a particular dispute.

The linking of the Conveyancers Licensing Act to Part 10 of the Legal Profession Act and the distinct yet sometimes overlapping responsibilities of different agencies has resulted in an inefficient administrative structure with gaps in the regulatory framework. In addition, the links which exist between the licensing function and the investigation of unlicensed activity and the separation of responsibilities to different agencies creates conflicting priorities, significant coordination issues, issues around jurisdiction and powers to investigate and gather evidence.

It was also found that the current disciplinary scheme is anti-competitive and does not provide competitive neutrality for all persons providing conveyancing services. Solicitors are subject to one disciplinary system administered under the Legal Profession Act 1987 while licensed conveyancers must comply with requirements of both the Legal Profession Act and the Conveyancers Licensing Act.

The Government has responded to these inefficiencies and inequities by including a new disciplinary framework in the bill to provide a more balanced and fairer disciplinary scheme for licensed conveyancers.

The disciplinary provisions of the bill allow the Commissioner for Fair Trading to investigate complaints, initiate show cause proceedings, suspend licences and issue penalty notices for some minor breaches of the Act.

The Commissioner will be able to initiate disciplinary action through the issue of a notice to a licensed conveyancer to show cause as to why he or she should not be subject to disciplinary action. A person to whom a show cause notice has been issued will have at least 14 days to provide evidence or make a submission.

Grounds for commencing disciplinary proceedings will include a breach of the legislation or Rules of Conduct, for example, a failure to account for money held on trust, or failure to comply with a condition of a licence or to properly supervise employees.

The bill provides the Commissioner for Fair Trading with a range of options for disciplinary action, depending on the circumstances. They include:

- issue of a caution or reprimand;
- requirement to comply with an enforceable undertaking;
- cancellation or suspension of a licence;
- imposition of conditions on a person's practice;
- imposition of a monetary penalty of up to \$11,000 for an individual or \$22,000 for a partnership or corporation.

Where urgent action is needed to protect consumers from significant loss or harm, the bill enables the Commissioner to:

- issue, where public risk is immediate, a public warning alerting consumers to the risks of dealing with a particular person;
- in situations of serious risk, immediately suspend a licence.

The bill enables the commissioner to appoint a manager to carry on the business of a conveyancer whose licence

has been suspended or cancelled, so as to ensure that existing clients are not disadvantaged.

The bill also provides for the Commissioner for Fair Trading to deal with those who sidestep licensing requirements and advertise or otherwise hold out to be a conveyancer without a licence. Consumers dealing with an unlicensed conveyancer may be exposed to considerable risk and action needs to be taken quickly to stop this type of activity once it is identified. The bill provides the commissioner with the capacity to investigate and take action against unlicensed conveyancer trading.

The model for the disciplinary scheme is based on administrative law principles which preserve consistency and certainty in decision making. There will be access to the Administrative Decisions Tribunal for review of all disciplinary decisions.

The current Act requires the Office of Fair Trading to maintain a register containing licence details. The bill expands on this requirement by allowing for the making of regulations to prescribe details of disciplinary action to be included in the register. The regulations will enable the register to include details of:

- outcomes of show cause proceedings, including licence suspension, the appointment of a manager, or receiver;
- the results of any prosecutions.

The aim of the register is to provide as much information as possible to consumers to ensure that they use the services of appropriately licensed and competent persons.

Another important aspect of consumer protection is the Compensation Fund established under the current Act. The bill continues to provide for the fund, which protects consumers who suffer loss because of a conveyancer's failure to account for money received on a consumer's behalf. All licensees will continue to be required to contribute to the Compensation Fund.

To support the new disciplinary regime, the bill sets maximum monetary penalties for all offences. For example, the maximum penalty for unlicensed trading has been set at \$11,000. Trust account fraud will be an indictable offence with a maximum prison term of 10 years.

These reforms to the disciplinary and enforcement regime will provide greater protection to the public by enabling a quicker, more flexible and cost effective response to misconduct on the part of licensees. Under the proposed model, levels of professionalism and standards of honesty, competence and ethics would be upheld through a combination of entry requirements, continuing professional development, prescribed rules and a more efficient and effective complaint handling and disciplinary scheme.

To assist in the smooth implementation of the reforms, I will ensure that the Office of Fair Trading liaises with the Australian Institute of Conveyancers on the relevant aspects of the reforms.

I believe that consumers of conveyancers' services have a right to expect professional, honest and ethical behaviour from conveyancers and that is what is intended by this bill.

I commend the bill to the House.

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