



## NSW Legislative Council Hansard Conveyancers Licensing Amendment Bill

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### Second Reading

**The Hon. HENRY TSANG** (Parliamentary Secretary) [5.17 p.m.], on behalf of the Hon. John Della Bosca: I move:

That this bill be now read a second time.

I seek the leave of the House to incorporate the second reading speech in *Hansard*.

#### Leave granted.

The Conveyancers Licensing Act 2003 was passed by Parliament in May 2003 following a review of the 1995 Conveyancers Licensing Act.

The Act establishes a licensing scheme for conveyancers, and enables them to provide conveyancing services in competition with legal practitioners.

This has brought a number of benefits to consumers in New South Wales by expanding consumer choice, and by breaking the monopoly that solicitors previously held over conveyancing transactions.

The Government continues to support competition in the conveyancing sector, however, a number of amendments need to be made to the 2003 Act before it commences.

These amendments are primarily intended to make administration of the Act simpler and clearer, and are contained in the bill before the House today.

To place the bill in context, I think it would be helpful for me to provide honourable members with a brief summary of the 2003 Act's main provisions.

First and foremost the Act provides a licensing scheme for conveyancers. This ensures that only appropriately qualified, fit and proper persons are able to practise as conveyancers.

Secondly, it removes unnecessary restrictions preventing conveyancing businesses from incorporating, and thus provides for a corporation licence.

Thirdly, the new system tightens the supervision and control of employees and clarifies the responsibilities of licensees in charge of a conveyancing business.

The Act continues to provide for the keeping of trust accounts and records, and allows for Rules of Conduct to be prescribed in the regulations.

It also includes costs disclosure requirements for conveyancers, and provides for the resolution of costs disputes through the Consumer, Trader and Tenancy Tribunal.

And finally, the new Act provides a more balanced and effective disciplinary scheme for conveyancers, replacing the hybrid arrangement under which conveyancers are subject to both the Conveyancers Licensing Act and the Legal Profession Act.

Since the passage of the legislation much work has progressed on the range of administrative tasks necessary to ensure a smooth transition to the new Act.

This has included the development of draft regulations, rules of conduct and supervision guidelines, as well as the necessary administrative preparations for the new dispute resolution and disciplinary schemes.

During the course of preparing for the Act's commencement, it has become apparent that some minor but nonetheless important amendments are needed.

These amendments will ensure that the new framework will operate effectively in the interests of consumers and the conveyancing profession.

The main purpose of the bill before the House today is to clarify these largely operational matters regarding the Conveyancers Licensing Act, and, for several reasons which I will outline shortly, provide that legal practitioners, solicitor corporations, and incorporated legal practices cannot be licensed under the Act.

Other amendments contained in the bill seek to

- firstly, bring the provisions relating to disqualified persons into line with changes in the Property, Stock and Business Agents Act 2002 passed by the Parliament earlier this year
  - secondly, to modernise and streamline the accounting scheme for trust money and reduce red tape for conveyancers and
  - finally, to make several minor amendments to improve the Act's effectiveness in practice.
- I will now turn to the provisions of the bill in detail.

The first set of amendments contained in the Bill seeks to clarify that the Conveyancers Licensing Act 2003 does not apply to conveyancing services provided by legal practitioners.

Under the 1995 Conveyancers Licensing Act still in effect, legal practitioners are "disqualified persons" and therefore not eligible to hold a conveyancer's licence.

The review of the 1995 Act considered, at that time, that the disqualification provisions concerning lawyers were unnecessary and were therefore not included in the 2003 Act.

As a result, it is now possible that a legal practitioner or an incorporated legal practice could obtain a conveyancer's licence under the 2003 Act, even though they do not need to do so in order to carry out conveyancing work.

Following further examination as part of the detailed planning necessary to commence the new Act, it has become apparent that the holding of a conveyancer's licence by a legal practitioner gives rise to several jurisdictional and operational issues.

If these are left unresolved it could cause significant problems for consumers, conveyancers, the legal profession, and the administering agencies once the new Act commences.

If legal practitioners and incorporated legal practices are able to be licensed under the Conveyancers Licensing Act, there would be no way for consumers or the regulators to know whether the Legal Profession Act or the Conveyancers Licensing Act applies to conveyancing work undertaken by them.

For example, if a legal practitioner is also licensed as a conveyancer, and they fail to account for trust money in relation to a conveyancing transaction, the question will arise as to whether the indemnity fund under the Legal Profession Act or the Compensation Fund under the Property, Stock and Business Agents Act is liable to meet any claim.

Similar confusion may arise as to which disciplinary or dispute resolution regime applies in the event of a breach or a costs dispute.

Consumers could be seriously disadvantaged by delays in processing their claims while such issues are sorted out.

And there is also the potential for lengthy legal disputes between legal practitioners, their clients and the regulators thereby undermining the effective operation of both the Conveyancers Licensing Act and the Legal Profession Act.

The bill addresses these problems by amending section 10 of the Conveyancers Licensing Act 2003 to ensure that Australian legal practitioners, solicitor corporations and incorporated legal practices are disqualified under the Act are therefore simply unable to obtain a conveyancer's licence.

When undertaking conveyancing transactions, legal practitioners, solicitor corporations and incorporated legal practices will continue to be covered by the regulatory scheme established under the Legal Profession Act 2004.

The bill simply ensures a clear administrative separation between that Act and the one applying to conveyancers.

I would like to stress that the disqualification of a legal practitioner from obtaining a licence under the Conveyancers Licensing Act has absolutely no impact on their entitlement to run a conveyancing business or to do conveyancing work.

They are still able to do so.

But that entitlement arises under their practising certificate issued by the Law Society, and the regulatory framework established by the Legal Profession Act.

The second category of amendments contained in the bill updates the licence disqualification provisions applying to conveyancers in line with recent changes to the Property, Stock and Business Agents Act.

In introducing those changes, I advised the House that because of the significance of property transactions to consumers and the handling of large amounts of trust money, it is imperative that high standards of probity apply to persons working in the property services industry.

Section 16 of the Property, Stock and Business Agents Act establishes several grounds for disqualifying people from holding a licence, and these provisions are duplicated in section 10 of the 2003 Conveyancers Licensing Act.

In light of the recent changes to the Property Stock and Business Agents Act it is appropriate that these be reflected and updated in the Conveyancers Licensing Act to maintain consistency.

The first of these clarifies the application of the disqualification provisions to a person involved in a failed company.

The current wording of section 10 (1) (b) of the Conveyancers Licensing Act disqualifies a person who is a "director or person concerned in the management of a corporation that is the subject of a winding up order or for which a controller or administrator has been appointed".

This wording does not cover a creditors' voluntary winding up or the appointment a liquidator.

The Bill replaces the current wording with the broader concept of a "director or person involved in the management of an externally administered body corporate". This will capture a variety of situations where a company has been put into administration.

But it will not apply to a situation where a solvent organisation has been wound up voluntarily by its members.

A member's voluntary winding up occurs where a company is solvent and is being wound up because it is no longer needed by its shareholders as a structure through which they wish to conduct some part of their business affairs.

The next matter concerns the provisions which disqualify a director or person concerned in the management of an insolvent corporation at the time it enters into administration.

Section 10 of the Act does not currently specify a timeframe, and so a person may avoid disqualification by resigning shortly, indeed the day, before the appointment of an external administrator.

To address this, the bill provides that a director or person concerned' in the management of a company in the 12 months prior to it becoming externally administered should be disqualified.

Only actions taken by the person while involved in the management of the corporation will be considered.

The bill also amends section 10 of the Act relating to the ability for the Commissioner for Fair Trading to waive the disqualification of an undischarged bankrupt if satisfied that the person took all reasonable steps to avoid the bankruptcy.

This gives a licence applicant or holder the opportunity to demonstrate their financial responsibility and suitability to hold a licence on the basis that they made every effort to avoid the financial failure and protect the interests of others.

However, under the current provision in section 10 (1) (c) of the Act it is unclear as to when the Commissioner's discretion applies.

The bill makes it clear that the Commissioner needs to consider the steps taken by the applicant to avoid bankruptcy when financial difficulties first arose in the business, and not just the steps taken once bankruptcy, liquidation or administration have become imminent.

Under section 10 of the Act, the Commissioner's discretion to grant a licence to an undischarged bankrupt does not apply consistently to a director or person concerned in the management of a failed company.

There is no reason why this discretion should not apply equally.

The bill therefore amends section 10 of the Act to ensure that the Commissioner's discretion applies equally to an undischarged bankrupt and to persons involved in the management of an externally administered corporation.

A further amendment relating to disqualification on the grounds of bankruptcy or association with a failed company concerns employees of licence holders.

The current provisions are unduly restrictive and operate to prevent such persons from being employed by a conveyancer, even though they do not handle trust money in their own right and work under the supervision of a licensee.

The bill therefore ensures that a person is not excluded from being employed by a licence holder solely on the grounds of bankruptcy or association with a failed company.

The final provision in the bill concerning disqualification provisions provides that a person who has been the subject of serious disciplinary action under other fair trading legislation is prevented from holding a conveyancer's licence.

Suspension or disqualification is an indicator that a serious offence has been committed.

Accordingly, where disciplinary action has been taken by the Commissioner against the holder of an authority under other fair trading legislation, resulting in the person's disqualification or suspension, the bill provides that that person should also be disqualified under the Conveyancers Licensing Act.

To ensure some flexibility and fairness in this provision, the bill provides that the Commissioner may ignore such a disqualification where it is appropriate in the circumstances.

The third main category of amendments contained in the bill relates to the requirements set out in Part 5 of the Act specifying how licensed conveyancers must deal with money they receive on behalf of others.

The bill aims to modernise the Act's approach to trust accounting, reduce red tape for conveyancers in administering their businesses, and more closely align their responsibilities with the requirements applying to property agents.

Currently, the Conveyancers Licensing Act separately defines "trust money" and "controlled money", and there are separate requirements on conveyancers for investing and accounting for these monies.

The separate rules on controlled monies are based on outmoded provisions that formerly applied to the legal profession, and, for lawyers and property agents, have now been superseded by a single, more streamlined way of dealing with trust funds.

The bill removes the distinction between "trust" money and "controlled" money, and introduces a single comprehensive scheme setting out the accounting requirements relating to all money held by a conveyancer on trust for another.

Consumers remain protected because all money received by a conveyancer must be held in a trust account until it is paid out in accordance with the client's directions or the procedures set out in the regulations.

The streamlining of the trust accounting scheme is expected to bring significant costs savings benefits for conveyancers as a result of removing unnecessary regulatory requirements and reducing the complexity of the accounting system.

The current need to comply with two sets of accounting rules provides no additional benefits for conveyancers or their clients, and needlessly increases annual accounting and auditing bills.

Two further minor amendments to the trust money provisions are contained in the bill, and also flow from recent changes to the Property, Stock and Business Agents Act.

The first of these relates to the names in which trust accounts opened for specific clients are held.

All trust accounts, both general and separate, must include the name of the licensee.

For separate trust accounts, the name of the client is generally also included in the account name, for example "Smith sale to Jones".

To help facilitate trust account identification, the bill amends section 53 (5) to clarify that the name of the licensed conveyancer or corporation is to appear as the prefix of the account name, followed by any other necessary identifier of the trust account.

This will make accounts easier to identify and assist with auditing, and any enforcement or disciplinary procedures.

The other minor amendment updates the procedures under which the Office of Fair Trading deals with unclaimed trust money.

The Act requires that unclaimed money held by Fair Trading be remitted to Treasury following the end of each year, along with details of the persons entitled to the money and the amount to which they are entitled.

Under section 65, Treasury must pay money to an entitled person on application.

Treasury has recently changed its requirements and now requires government agencies to keep their own unclaimed money register of the persons entitled to money.

Claims by entitled persons are made to and paid by the agency, and the agency then recoups the money from Treasury. The bill seeks to amend these provisions to reflect current Treasury requirements.

The final matters contained in the bill are minor miscellaneous amendments to clarify the procedure for surrendering a licence and to add a regulation making power for the waiver or refund of fees.

In relation to the surrendering of a licence, the bill simply seeks to align the conveyancers licensing framework with that of property agents and valuers.

This is achieved by specifying that the Licensing and Registration (Uniform Procedures) Act applies in respect of the surrender and cancellation of a conveyancer's licence, as it does for property agents and valuers.

And finally, the bill amends the general regulation making power in section 172 of the Act to include a power to make regulations enabling the Commissioner to waive, reduce or refund fees payable under the Act.

This amendment puts beyond doubt the power to make a regulation to provide for waivers or refunds of fees in appropriate circumstances.

A similar amendment was made to the Valuers Act in the statute law revision program last year, and it is appropriate to make the same amendment to the Conveyancers Licensing Act in order to maintain consistency.

The bill that I have outlined today aims to clarify some important issues concerning the new legislative framework governing the conveyancing profession.

These amendments are necessary to provide greater certainty and clarity in the licensing scheme, and to ensure that there are clear jurisdictional boundaries between the regulation of conveyancers and legal practitioners in New South Wales.

It is essential that the legislative schemes be able to be administered effectively and that the avenues for dispute resolution and consumer redress in the event of problems are clear and straightforward.

The bill also seeks to improve consistency with other Fair Trading licensing schemes by aligning the licence disqualification and trust accounting provisions of the Act with those that apply to property agents.

The benefits to conveyancers in particular will be streamlined accounting procedures and reduced red tape.

Other minor amendments in the bill clarify or update procedural matters to improve the Act's effectiveness in practice.

A draft of the bill was recently forwarded to major stakeholders, including the Australian Institute of Conveyancers and the Law Society of New South Wales, for their consideration and comment.

These bodies are supportive of proposals to ensure that any conveyancing work performed by a legal practitioner or legal practice is clearly covered by the provisions of the Legal Profession Act, and not the Conveyancers Licensing Act.  
The bill achieves this.

Several submissions were received on the draft Bill and have been taken into account in the final drafting.

I want to thank those organisations for their input to the Bill, and for their ongoing co-operation with Fair Trading on these matters.

I commend the bill to the House.