

**National Competition Policy Review
and statutory review under section 95
of the
Conveyancers Licensing Act 1995
Final Report**



DEPARTMENT OF **FAIR TRADING**

NSW Consumer Protection Agency

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1. Executive Summary and recommendations

Background to the Review

The review has been undertaken as part of the NSW Government's commitment under the National Competition Policy to review all of its legislation which potentially restricts competition. The National Competition Principles Agreement requires that legislation should not restrict competition unless it can be demonstrated that the benefits to the community as a whole outweigh the costs of the restriction and that the objectives of the legislation can only be achieved by restricting competition.

The review also addressed the review requirements of section 95 of the Conveyancers Licensing Act 1995.

The review was carried out by the Department of Fair Trading in consultation with other government agencies and community input.

This report presents the findings of the review of the Conveyancers Licensing Act 1995.

The regulation of Conveyancers

Introduction of the Conveyancers Licensing Act in 1992 acknowledged a role for non-lawyers in conveyancing but limited this role to residential properties of less than ten hectares. In 1995 the Conveyancers Licensing Act 1995 was introduced to increase competition and provide consumers with greater choice in who they could use for their conveyancing needs. The Act expanded the work of a licensed conveyancer and transferred regulation of conveyancers from the Law Society of New South Wales to the former Property Services Council.

The Department of Fair Trading now regulates licensed conveyancers. The Conveyancers Licensing Act 1995 provides a licensing scheme for conveyancers with provisions for the licensing process, the conduct of conveyancing business, compliance and discipline.

The Act's objectives

Although there are no specific objectives stated in the Act, the second reading speech indicates that the introduction of licensing for conveyancers was intended to increase competition in the

provision of conveyancing services by allowing other qualified professionals apart from solicitors to undertake conveyancing work.¹ 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. The 1995 Act reinforced this intention by broadening the scope of work able to be undertaken by conveyancers and thereby increasing consumer choice.

This review has also identified another implied objective of the legislation: to protect consumers of conveyancing services by providing that conveyancers must be licensed, accountable and meet certain standards of competence.

Justification for government intervention

While competition is generally consistent with economic efficiency goals and the interest of the community as a whole, there may be situations where there is conflict with certain social objectives, for example, the protection of consumers, employees and the environment and the control of socially undesirable activity. In such situations government may consider it appropriate to intervene with regulatory action. Government may also implement restrictions on competition for reasons of 'market failure', arguing that it is in the 'public interest' to restrict competitive outcomes in such instances.

While not explicitly referencing market failure, some of the Act's objectives could be seen to be addressing perceived failures or the imperfection of an unfettered market. On the whole, the objectives of the Act target consumer protection concerns, particularly those related to information asymmetry. Consumers of conveyancing services face a significant level of information asymmetry. They are often not in a position to judge whether the services are necessary or sufficient for the proper transfer of property. Because consumers buy and sell property infrequently they have little opportunity to learn about the process through repeat consumption.

Under the Competition Principles Agreement, the merits of proceeding with anti-competitive legislative reform are subject to a public interest test. Following an assessment of the conveyancing industry, the review determined that there is market failure in the

¹ Conveyancers Licensing Bill 1995. Second reading speech. Mrs F Lo Po' MP, Minister for Consumer Affairs, Minister for Women, 20 September 1995.

industry and that the risks are high enough to warrant government intervention.

Effects of the licensing regime on competition

The review examined whether the current regulatory regime is the most appropriate mechanism to achieve the implied objectives of the Act. In assessing whether the licensing regime established by the Act is the most appropriate regulatory mechanism for achieving those objectives, the review examined the effects of the licensing regime on competition. The Conveyancers Licensing Act 1995 regulates both the right to practise as a conveyancer and the method by which such persons conduct their business. In this regard, the licensing regime was found to impact on competition by placing:

- Controls on entry and exit;
- Restrictions on the types of work undertaken;
- Restrictions on business structures; and
- Restrictions on the way a conveyancing business is operated.

Evaluation of the net public benefit of the current regime

Over the past 10 years pro-competitive changes to conveyancing regulation have brought benefits including improved market information, a wider choice of service providers and lower prices. The number of licensed conveyancers has increased by over 500% in the past 5 years. The Australian Institute of Conveyancers estimates that in New South Wales the proportion of residential conveyances conducted by conveyancers has increased from 5% in 1992 to about 20% in 1999.

Before the reforms, the Australian Consumers Association had estimated that the conveyancing monopoly cost New South Wales consumers \$290 million a year. At that time, 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 indicates that the average cost of a residential conveyance is now considerably lower, ranging from \$400 to \$1,000. The data available indicates that the cost of the conveyance for the sale or purchase of a small business has also been reduced as result of the pro-competitive reforms. It is expected that over time, licensed conveyancers will take up a greater market share and there will be further cost savings to consumers.

Consumers transacting with a conveyancer are faced with a number of potential risks arising from the fiduciary relationship, poor quality of service, business failure and information asymmetry. The current regulatory regime manages these risks through licensing requirements, providing for business behaviour, disciplinary processes and compensatory and indemnity mechanisms.

Although the current regulatory regime places restrictions on competition and accordingly imposes costs on the community, the review found (refer Chapter 7) that an assessment of the identified costs and benefits indicate that the benefits as a whole outweigh the costs.

Alternate regulatory options

Following an assessment of the regulatory impacts on competition, the review examined alternate regulatory options to the current licensing regime. A detailed assessment of these options is set out in Chapter 8 of the Report. However, in summary the review concluded that:

- A *business licensing regime* is likely to impose fewer costs on conveyancers, however it would be ineffective in achieving the objectives of the Act. The shift in regulatory focus from the individual to the business would have negative implications for consumer risk. It would be more difficult to identify the person responsible for unacceptable behaviour and would require enforcement action to stop that behaviour. Restrictions on business practices and behaviour would need to be increased to address aspects of consumer risk that would no longer be covered by educational and practical experience requirements.
- A *negative licensing regime* would lower entry costs for potential conveyancers, however it would considerably increase consumer risk. A negative licensing regime would be based on legislation prescribing acceptable standards for a conveyancer. It would not require conveyancers to hold a licence as such, but it could exclude those who fail to meet practise requirements, who are not 'fit and proper', who are unable to obtain the required insurance and who do not abide by the legislation. As the government focus would move from prevention to reaction some consumers may be seriously affected before the government becomes aware and takes action. The potential for defalcation would increase significantly and compensatory mechanisms would be reduced. Information asymmetry would increase as consumers would face additional difficulties in identifying a competent conveyancer.

- A *co-regulatory model* has the potential to increase conveyancing costs for consumers due to the increased cost of administering a two-pronged regulatory regime. While such a scheme would increase industry autonomy and lower regulatory costs for government, it would also increase consumer confusion about the identity of the regulatory authority and this would increase search costs. There would also be valid consumer concern about the impartiality of any disciplinary processes administered by the industry body and the possibility of industry failing to implement industry codes and follow through with effective dispute resolution.
- *Removal of regulation*, that is the total removal of regulation of conveyancers, which would allow any persons, irrespective of their competence and probity to offer their services as conveyancers. The performance and conduct of conveyancers would be determined by market forces, and reliance on the common law, consumer protection and fair trading legislation would be the only means of consumer redress. As there would be no entry licensing costs or requirements, de-regulation may reduce the cost of a conveyance. However, the increase to consumer risk would be considerable as there would be no mechanisms by which to identify unscrupulous operators or exclude them from the marketplace. Search costs for consumers would increase as there would be no easy or reliable means for identifying a competent conveyancer.

Conclusions

The review concluded that there is a continuing need for regulatory intervention in the conveyancing industry to provide appropriate safeguards for consumers.

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.

The need for protection recognises that consumers are, as a group, relatively ill-informed compared to licensed conveyancers, because their property transactions are infrequent. De-regulation of the industry would widen this information imbalance between conveyancers and consumers and could lead to increased instances of market failure.

The review determined that the potential losses arising from the risks associated with a conveyance are substantial. Those risks relate to:

- the safety of monies held in trust;
- incompetence in the conveyance transaction; and
- quality of service provided in the transfer of property.

The review further determined that the current occupational licensing model is the regulatory option which best achieves the objectives of the Act and provides the greatest net public benefit in that it:

- reduces the risk of the community as a whole in transactions involving the transfer of property; and
- reduces the risk of financial loss to consumers who are directly involved in a property transaction.

The Conveyancers Licensing Act 1995 achieves this by setting entry standards, regulating the behaviour of conveyancers and providing for their professional development, mandating professional indemnity insurance and providing a compensatory mechanism in the event of consumer loss.

Recommendations

As a result of the review, a number of questions were raised about the efficiency of some provisions of the Act. An evaluation was undertaken of the current provisions to identify ways in which these may be improved so that they respond to marketplace needs in a more flexible and dynamic manner. Chapter 9 of this Report contains an assessment of the costs and benefits of the current legislative requirements, and identifies ways in which transacting can be made more efficient. Consequently, the review has made certain recommendations to:

- make the legislation more effective and efficient in achieving its objectives;
- reduce the regulatory burden for conveyancers; and
- clarify and make more consistent some aspects of the Act's operation.

The recommendations have been assessed in terms of their costs and benefits. Specifically, it is recommended that:

Regulatory model

1. The current regulatory model should be retained

Market boundary issues

2. The boundaries of conveyancing work as set out in the Conveyancers Licensing Act 1995 should be retained in their current form.
3. The limitation for providing services in relation to mortgages on non-residential property where the amount secured exceeds \$7 million should be reviewed. The review of this restriction should take place following an actuarial study of the impact on the Property Services Compensation Fund.

Licensing

4. The definition of a disqualified person for the purpose of the Act should be revised to include:
 - persons disqualified from holding an equivalent licence in a corresponding Australian jurisdiction; and
 - persons who are not 'fit and proper'.
5. The category of persons who hold a solicitor's or barrister's practising certificate should be removed from the list of disqualified persons under the Act.
6. The licence re-application process in the Act should be replaced with annual licence renewal.
7. Competency standards should be introduced as part of the licensing criteria for conveyancers.
8. The general guidelines for course content and practical experience should be reviewed.
9. Renewal of a licence should be linked to a requirement under the Act for annual continuing professional development of 10 hours
10. The Director-General should determine guidelines which would be applied to continuing professional development.
11. The requirements for professional indemnity insurance and contribution to the Property Services Compensation Fund should be retained as a prerequisite for licensing.

Business behaviour

12. Requirements for the keeping of trust accounts should be retained but they should be assessed for possible streamlining and simplification, ensure that they meet current accounting and banking practices.
13. Trust accounting should be specified in the requirements for continuing professional development.
14. 'Rules' similar to solicitors' rules should be prescribed for conveyancers.
15. A breach of the rules should be an offence and subject to a penalty notice, or should lead to disciplinary action such as suspension or cancellation of the licence.
16. The restriction of sharing the staff of legal practitioners should be lifted but that of sharing staff with a real estate or other agent licensed under the Property, Stock and Business Agents Act should be retained.
17. The disqualification of corporations from becoming licensed should be removed and a similar model to that under the Legal Profession Act should be adopted for conveyancers subject to the condition that 'fit and proper' checks be undertaken on other directors, and that incorporation involving persons licensed under the Property, Stock and Business Agents Act 1941 should be prohibited.

Disciplinary process

18. If the problems with the disciplinary system identified by the review are not resolved by the review of Part 10 of the Legal Profession Act the matter will be given further consideration in consultation with the Attorney-General's Department, industry and other interested parties.
19. The level of penalties in general should be revised.
20. A penalty should be introduced for failure to account for money held on behalf of another.
21. Penalty notices should be introduced for some minor breaches of the Conveyancers Licensing Act 1995 and its Regulation by licensed conveyancers.

22. The Director-General of the Department of Fair Trading should be given the capacity to investigate and take action against unlicensed conveyancer trading.

2. Background to the Review

National Competition Policy and statutory review obligations

The review of the Conveyancers Licensing Act 1995 has been undertaken as part of the NSW Government's commitment under National Competition Policy to review, by July 2002, all of its legislation which restricts competition.

The aim of the National Competition Policy is to promote and maintain competition in order to increase economic efficiency and community welfare, while continuing to provide for consumer protection. The Government believes that, provided the public interest is safeguarded, competition will benefit the people of NSW by creating a stronger and more vital economy.

The National Competition Principles Agreement establishes principles for pro-competitive reform of government business and removal of impediments to markets where they are not in the public interest. The Agreement requires that legislation should not restrict competition unless it can be demonstrated that the benefits to the community as a whole outweigh the costs of the restriction and that the objectives of the legislation can only be achieved by restricting competition.²

A presumption of the National Competition Policy review process is that restrictions on competitive behaviour impose costs on the community. The onus in undertaking a review is to demonstrate a net public benefit from applying or retaining a particular restriction.

The Conveyancers Licensing Act 1995 specifies who can provide conveyancing services and prescribes how these services are to be provided. These specifications and prescriptions reflect the special nature of many property purchases and sales which, for most people, are large and infrequent, and commonly involve conveyancers handling large sums of money on behalf of other people.

All NSW legislation has been examined to determine whether it establishes market entry barriers and requires conduct which has the potential to restrict competitive behaviour in the market.

² Competition Principles Agreement. Sub-clause 5(1)

The review also addressed the requirements of section 95 of the Conveyancers Licensing Act 1995 for the responsible Minister to review the Act to determine whether:

- the policy objectives of the legislation remain valid; and
- the terms of the act remain appropriate for securing those objectives.

The statutory review must be undertaken as soon as possible after 5 years from the date of assent of the Act. A report on the outcome of the review must be tabled in each House of Parliament within 12 months after the end of the period of 5 years. A report outlining the outcome of the review of the Conveyancers Licensing Act was tabled in Parliament in November 2001.

This report presents the findings of the Department of Fair Trading's review of the Conveyancers Licensing Act 1995.

Market failure and consumer protection

Competition provides the best available spur to efficiency, innovation and value. Nevertheless, there can be circumstances where unrestricted competition would have undesirable outcomes.

Consumer protection legislation is generally developed as a response to problems experienced by consumers when purchasing goods or services. Typically, these situations arise where information available to consumers is poor or unavailable, limiting their ability to make informed choices when seeking service providers or when the transaction involves risks of fraud. Such problems may be the result of what economists term *market failure*.

Regulation may also have the effect of restricting competition among service providers. This may result in new problems or costs for business, consumers and government that are not justified in relation to the nature of the problem which the intervention is seeking to address. Alternatively, regulation may not be effective in addressing the identified problems.

The licensing of conveyancers was primarily introduced as a pro-competitive measure to break the monopoly of solicitors in the provision of conveyancing services. The provision of conveyancing services was the sole responsibility of lawyers prior to the introduction of the Conveyancers Licensing Act 1992 allowing conveyancers to undertake residential work only. The legislation was subsequently amended in 1995 to enable licensed conveyancers to offer a wider range of conveyancing services to the public. The legislation set in place a number of mechanisms designed to provide

consumer protection and to otherwise establish the standard of services provided by licensed conveyancers.

The purpose of the review of the Conveyancers Licensing Act was to consider:

- the objective of government regulation of licensed conveyancers;
- whether regulatory intervention is still justified;
- the impact of the current Act on competition within the industry; and
- whether the government objective could be met by any less restrictive mechanism.

The approach taken by the review does not necessarily mean 'the fewer rules and restrictions the better'. The review is intended to identify regulations that facilitate efficient conveyancing services. That could involve the dismantling of existing legislation and greater reliance on competition as a means of ensuring good service. It could also involve retention or modification of existing regulation.

The review process

It is the Government's policy to ensure that the review process takes into account the full range of public benefits and costs of the legislation and that all views are thoroughly considered before any reforms are considered. To achieve this, a steering committee chaired by the Department of Fair Trading was formed to oversight the review. A reference group was also formed to assist the Steering Committee consider particular issues raised by the review. (Box 2.1 contains a description of the main components of and steps taken in the review.)

Preliminary discussions were held during August and September 1999 with industry representatives, educational providers and a consumer representative. An Issues Paper was prepared and released in April 2000. The Issues Paper posed a number of questions for comment – written submissions were received by the Steering Committee until 12 May 2000. A meeting was held with the Reference Group to further clarify the issues as well as discuss matters raised during the consultation process. Appendix 'A' contains a list of organisations and individuals who made written submissions to the review.

In conjunction with the review, a survey of licensed conveyancers was undertaken to obtain information to develop a profile of the industry and assess some of the impacts of the introduction of the

Conveyancers Licensing Act 1995. The survey was sent to 215 licensed conveyancers³. Of those surveyed 101 (or 46%) responded. Until now there has been little comparative data available to assess the effects of those reforms and in particular the effect of regulating conveyancers. The survey findings has provided valuable information which has been included in the report and provides a basis for future impact studies.

A comprehensive process of evaluation involving detailed research and further consultation was applied to the review findings.

Box 2.1 Description of review process

| | |
|---------------------|--|
| Objective: | To review the Conveyancers Licensing Act 1995 under the terms of the <i>National Competition Principles Agreement</i> for the New South Wales government. |
| Responsible Agency: | The Department of Fair Trading |
| Steering Committee: | Attorney-General's Department New South Wales Treasury The Cabinet Office Department of Fair Trading Licensing and Registration Division Department of Fair Trading Compliance and Standards Division Chair, Department of Fair Trading Policy Division |
| Reference Group | Australian Institute of Conveyancers New South Wales Conveyancing Society Law Society of New South Wales Macquarie University New South Wales TAFE Office of the Legal Services Commissioner |

Key steps:

- Preliminary meetings and discussions with industry representatives, educational providers and a consumer representative
- Meetings of Steering Committee
- Preparation of the Issues Paper
- Circulation of Issues Paper
- Public consultation through New South Wales
- Submission of responses to review
- Review of submissions and drafting of report
- Consideration of issues by the Reference Group
- Evaluation by the Steering Committee
- Drafting of final report

The Final Report

The Steering Committee has prepared this Report for consideration by the Minister for Fair Trading and the NSW Government to satisfy the requirements of the Competition Principles Agreement. It is

³ At the time the survey was undertaken there were 215 licensed conveyancers in NSW.

based upon the Committee's analysis of the issues raised during the review including those provided by way of written submission.

3. The Conveyancing Industry in NSW

In May 2000, in conjunction with this review, a survey of all licensed conveyancers was undertaken by the Department of Fair Trading to assess the effects of the 1995 reforms on the conveyancing industry. Although the regulatory scheme which broadened the scope of work for conveyancers is still relatively new, it was considered that the survey would give an indication of the impact of the reforms. The following section draws on material from the survey.

The size of the industry

Over the past 10 years there has been a considerable growth in the conveyancing industry in New South Wales. There are currently 253 licensed conveyancers. Of the 253 licensees, 21 hold restricted licences that allow them to undertake residential work only and 232 are licensed to undertake the full scope of work including commercial and rural conveyancing. The industry has increased by more than 500% since the introduction of the Conveyancers Licensing Act in 1995 when there were only 43 licensees holding residential licences.

The greatest impact in volume on the conveyancing industry comes from residential sales. In 1999/2000 there were 115,558 residential property transactions in NSW which created the need for conveyancing. Although the volume of residential property transactions fluctuates from year to year, there was an overall increase in the sale of houses and units in NSW between 1993 and 2000. Table 2.1 provides details of the variations in the residential sales in NSW for this period.

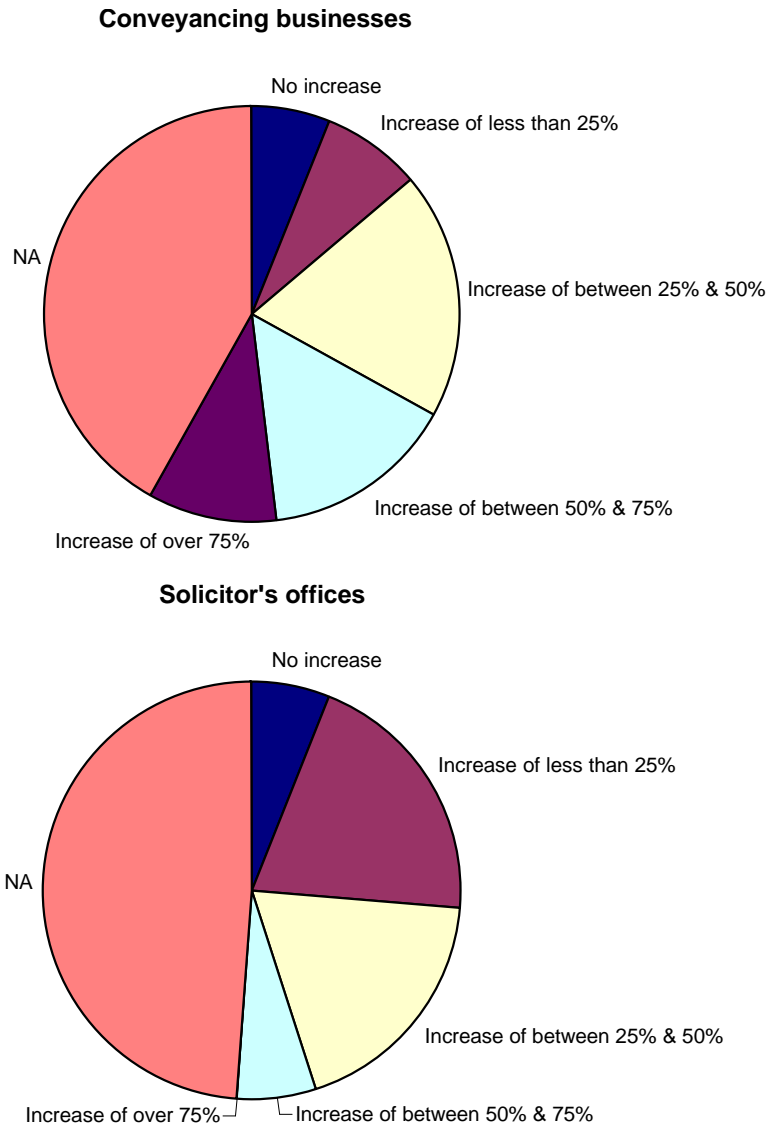
| New South Wales Residential Sales Volume Activity 1993-1999 | | | | | | |
|---|---------|--------|--------|--------|--------|---------|
| 1993 | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 |
| 88,065 | 104,575 | 85,837 | 87,443 | 99,100 | 95,058 | 115,588 |

Source: Real Estate Institute of New South Wales Property Market View, June Quarter 2000-10-20

Table 3.1 Residential sales activity in NSW

The amount of sale activity is reflected in the volume of work undertaken by conveyancers working in both conveyancing businesses and solicitor firms. Most surveyed indicated that the volume of conveyancing work has increased substantially over the past three years. Only 6 % indicated there has been no increase.

Diagram 3.1 Changes to the volume of conveyancing work 1995-2000



Source: Department of Fair Trading Survey of Licensed conveyancers, May 2000

Role of a licensed conveyancer

A conveyancing transaction involves the preparation and giving of advice on the many and varied documents in relation to the transaction. Most commonly, a person buys a property such as land, a house, a home unit or an office building and instructs a conveyancer to complete the transaction. To be able to do this work a conveyancer must know about contracts, land division, survey, property development, property management, strata administration, insurance, taxation and business analysis.

In relation to the sale of land, licensed conveyancers typically undertake the following range of services:

- Preparation and advising on a contract for the sale of land

- Conduct of title searches and making enquiries of government departments
- Preparation and advising on mortgage documentation
- Attending to exchange of contracts and settlement procedures
- Preparation and advising on lease documentation
- Preparation and advising on documents ancillary to the conveyance

One of the most important aspects of this role is the fiduciary duty a conveyancer has to his or her client. This duty arises from a relationship of trust where the conveyancer is able to exercise discretion or power in undertaking the management of certain work for a client where specific conduct and results may not be clearly set out. The relationship of trust may include holding money on behalf of the client.

Range of work

Currently, unrestricted licence holders may, in addition to residential work, carry out a broad range of commercial property transfers, ranging from the sale or purchase of factories or shops in a shopping centre to the whole shopping centre itself. They can also undertake transactions for small businesses, including the transfer of 'goodwill' and 'stock-in-trade' and act on the sale of farms and other rural property, regardless of whether the property is zoned or used wholly or partly as commercial or residential.

Most conveyancing businesses and solicitors offices employing conveyancers undertake a range of different types of conveyancing work. However, the majority of work undertaken relates to residential transactions.

For all conveyancing businesses surveyed, residential work represents 70% or more of the work. The great majority of conveyancing businesses located in the Sydney metropolitan area (78%) undertake primarily (90%) residential work. For those businesses operating in other large urban areas or in regional New South Wales, the proportion undertaking over 90% residential work is lower (about 60% of businesses). Of those surveyed, 17% of conveyancing businesses and 4% of solicitor firms undertake residential work only.

Other types of conveyancing work represent a minor proportion of the total workload. For about 52% of conveyancing businesses, commercial work represents less than 10% of the work; for 40%,

retail and commercial lease work and sale of businesses represents less than 10%; and for 49%, rural work corresponds to less than 10% of work.

Business transactions handled by conveyancers have probably not yet increased substantially since the introduction of the 1995 Act as the retail and commercial sector has not been found to be as accessible as the residential sector. In part, this may be because clients with this type of work use their solicitor who undertakes a range of other services. It also appears to relate to a lack of awareness on the part of the general public as to the range of work a conveyancer is able to carry out. In addition, there seems to be reluctance by some conveyancers to take on retail and commercial work which they see as being too complex. In contrast to this, other conveyancers are actively seeking out the business community for work relating to retail leasing, business sales and purchases.

Businesses employing licensed conveyancers

Of the 101 licensed conveyancers who responded to the survey, 51.5% work in conveyancing businesses and 49.5% work in a solicitor's office. The introduction of conveyancer licensing in 1992 does not appear to have operated to reduce the market share of the legal profession. Rather, a complementary relationship based on efficient specialisation appears to have developed between the two groups.

It appears that the larger solicitor firms are employing licensed conveyancers as specialists in conveyancing. They appear to be fulfilling roles previously undertaken by legal or clerical staff, who would in the absence of licensed conveyancers carry out some conveyancing duties without formal recognition of their role. Legal firms employing conveyancers either specialise in or actively promote their conveyancing expertise and compete in the market with conveyancing firms.

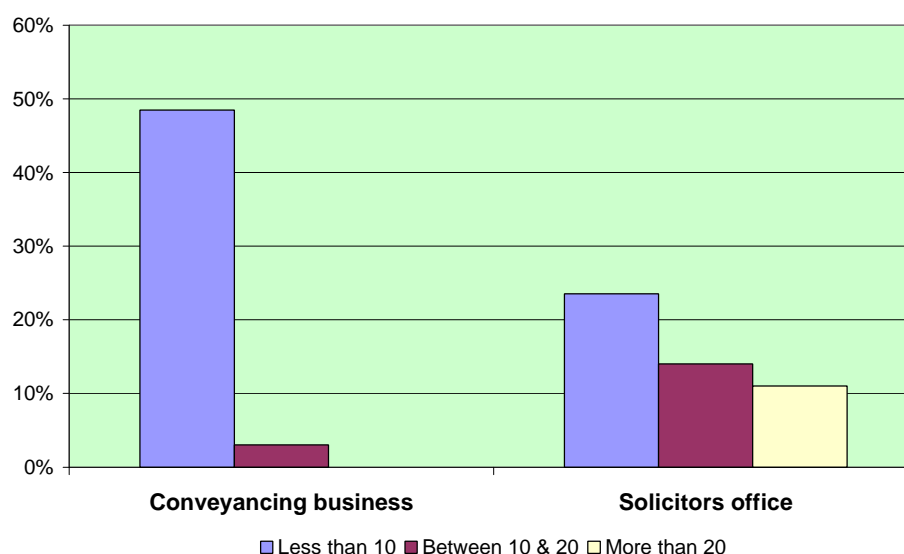
The licensing of conveyancers allows scope for employees in a solicitor's office to become trained in a particular aspect of the law and have that training recognised and properly remunerated. It also allows the legal practitioner to place the specialised work of conveyancing in the hands of a person who has the skills and authorisation to undertake the tasks associated with this work with minimal supervision.

This trend is similar to South Australia and Western Australia where conveyancers have existed for longer than in New South

Wales. In those States some of the larger firms have conveyancing departments which only employ licensed conveyancers.

Most licensed conveyancers (72%) work in a small business employing less than 10 persons. Of those, 48.5% work in conveyancing businesses and 23.5% work in a solicitor's office. In contrast to this, 25% of conveyancers are employed in solicitors' offices with over 10 employees and almost half of those work for larger firms employing over 20 people.

Diagram 3.2 Size of businesses employing licensed conveyancers (May 2000)

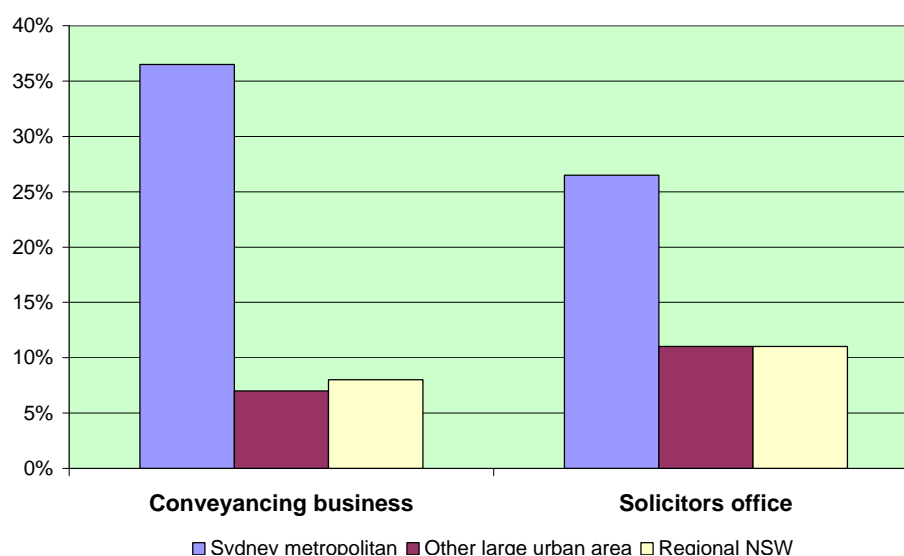


Source: Department of Fair Trading Survey of Licensed conveyancers, May 2000

Location of businesses employing licensed conveyancers

The majority of businesses employing licensed conveyancers operate in the Sydney metropolitan area (63%). Of those, 36.5% work in conveyancing businesses and 26.5% in a solicitor's office. Relatively few licensed conveyancers work in regional and rural New South Wales – 8% in conveyancing businesses and 11% in a solicitor's firm. The remaining 18% work in other large urban areas such as Newcastle and Wollongong. Of those, 7% work in a conveyancers business and 11% in a solicitor's office.

Diagram 3.3 Location of businesses employing licensed conveyancers



Fees for conveyancing services

Prior to the lifting of restrictions on advertising fees, fee scales and the introduction of non-lawyer conveyancing, the Australian Consumers Association estimated that the conveyancing monopoly cost New South Wales consumers \$290 million a year. It was estimated that the legal fees associated with a \$125,000 house purchase and mortgage ranged from \$1,100 to \$1,550.⁴ The recent survey of licensed conveyancers indicates that the average cost of a residential conveyance is now considerably lower than this, ranging from \$400 to \$1000.

Various methods are used for calculating conveyancing fees. However, the majority of conveyancing businesses (77%) calculate all fees on a flat fee basis. About 6% use a flat fee for residential conveyancing and another method for other types of conveyancing.

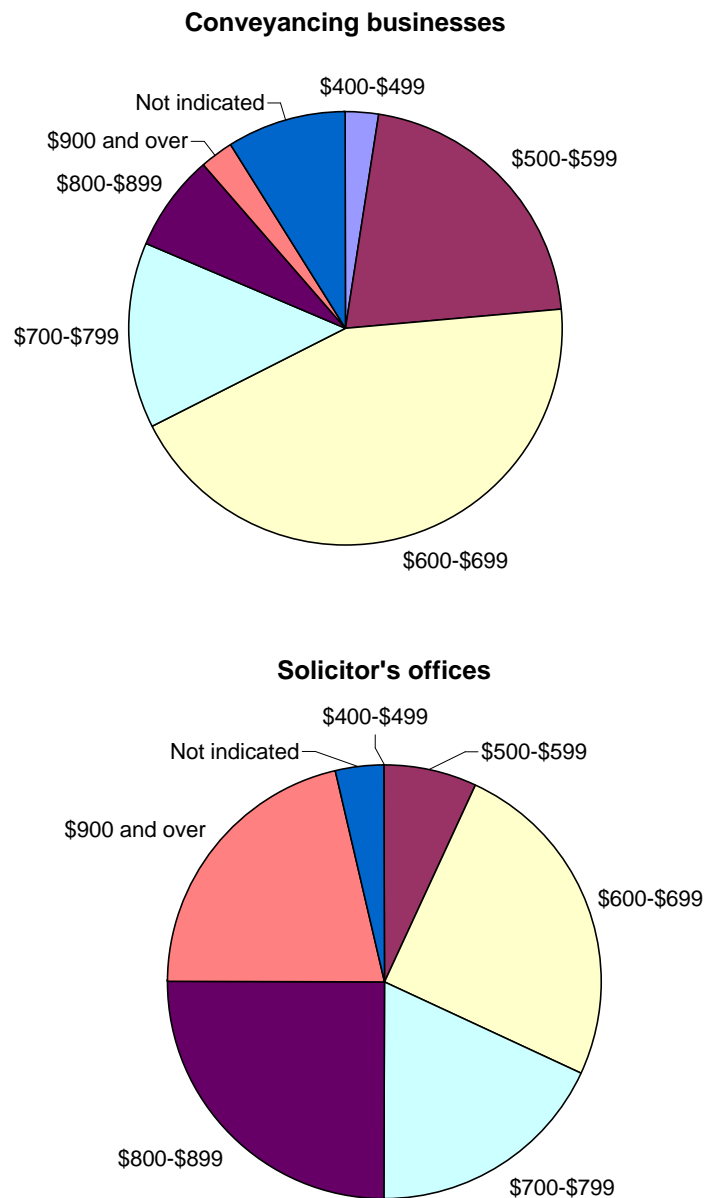
In contrast, almost 50% of solicitor firms use methods other than a flat fee to calculate fees. In part, this may relate to the fact that solicitors undertake an array of other types of services and use a standard method (eg hourly rate) to calculate all fees. However, it should be noted that there are currently a considerable number of solicitor firms charging a flat rate and advertising competitive rates for a range of services.

Fees charged by both solicitors and conveyancers for a residential conveyance currently fall within an average range of \$400 to \$1,000. Fees applied by solicitors have traditionally been set higher than those for non-lawyers. However, it now appears that, where there is competition from non-lawyer conveyancers, some solicitors are discounting fees and may match or discount below the price charged by the non-lawyer. For example, some Sydney law firms advertise a flat rate fee of between \$390 and \$590 for a residential conveyance. This is similar to the fees charged by conveyancers operating in Sydney.

The level of discounting in fees could also be a reflection of the state of the market. Although not examined in the survey, it is likely that discounting would flourish in a highly competitive residential market, such as some parts of Sydney, where both conveyancers and solicitors compete for market share through fee discounting.

⁴ Robert Drake "What price justice" Consumer Interest April 1990 p 16

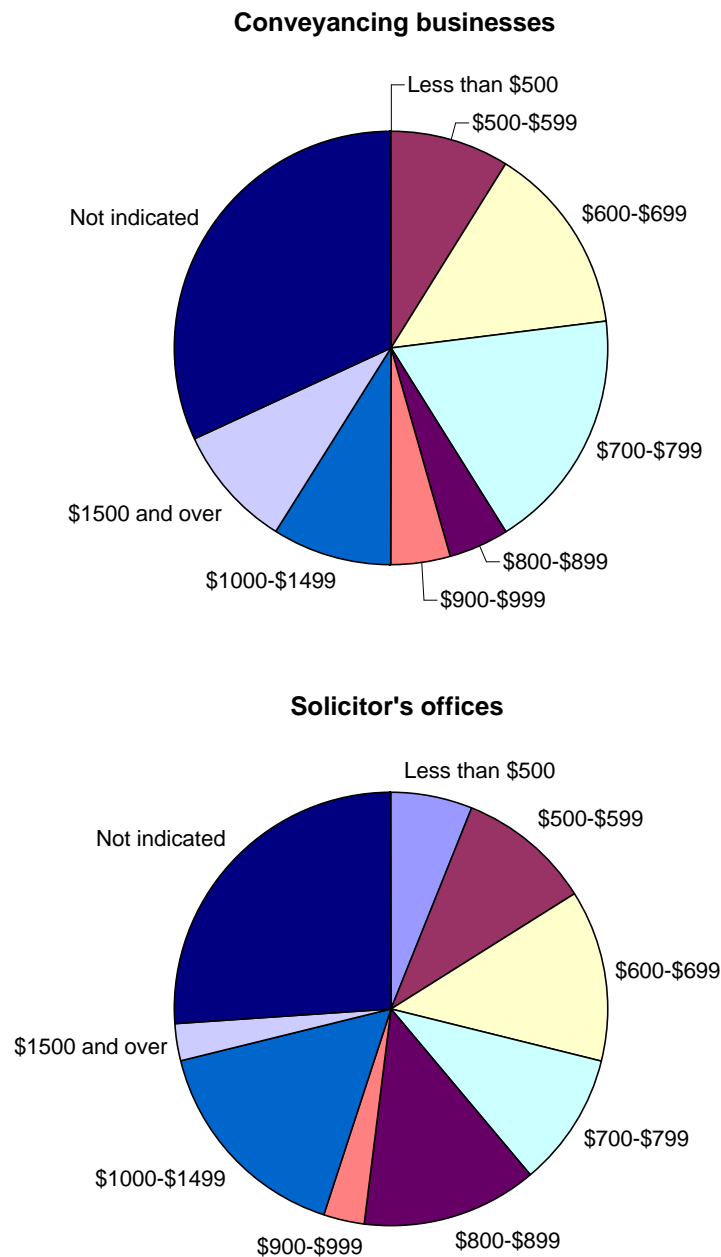
Diagram 3.4 Average fees charged for flat rate residential conveyancing



Source: Department of Fair Trading Survey of Licensed Conveyancers, May 2000

The majority of conveyancer businesses responding to the survey generally charge less than solicitor firms for the sale of a small business. Fees for the sale of a small business range from \$500 to \$1,500 with an average fee of \$600 to \$799 being applied by conveyancer businesses.

Diagram 3.5 Average fees charged for the sale of a small business conveyancers



Source: Department of Fair Trading Survey of Licensed Conveyancers, May 2000

While there are still relatively few conveyancers handling business transactions, it is anticipated that this will increase over time. As more service providers in all types of conveyancing work enter the marketplace and public awareness is raised about the range of work conveyancers can undertake, the resulting benefit will be further reductions in the cost of business conveyancing.

4. The Regulation of Conveyancers

History of the regulation of conveyancers in NSW

In the early years of New South Wales, conveyancers practised without any legal status or recognition. In 1847 a system of certified conveyancers was established. The Practice of Conveyancing Act (2 Vic 33) provided that a person could apply to the Supreme Court to become a certified conveyancer.

There were never more than 73 certified conveyancers in New South Wales and in 1935, when the number dropped to 55, the Legal Practitioners (Amendment) Act 1933 provided that no further certificates to practise as a conveyancer would be granted. In 1967, those remaining practising conveyancers were granted unrestricted Solicitor's Certificates by the Law Society of New South Wales.

In 1992 the Conveyancers Licensing Act was introduced. The Act acknowledged that there was a role for non-lawyers in conveyancing but restricted that role to residential conveyancing of properties of less than ten hectares. The regulation of conveyancers was made the responsibility of the Law Society of New South Wales.

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 Conveyancers Licensing Act 1995 was introduced to expand the work of licensed conveyancers and transfer regulation of conveyancers to a body independent of both the legal profession and the conveyancing industry, the former Property Services Council. In 1997 the Property Services Council was abolished and the Department of Fair Trading now regulates licensed conveyancers.

The Conveyancers Licensing Act 1995

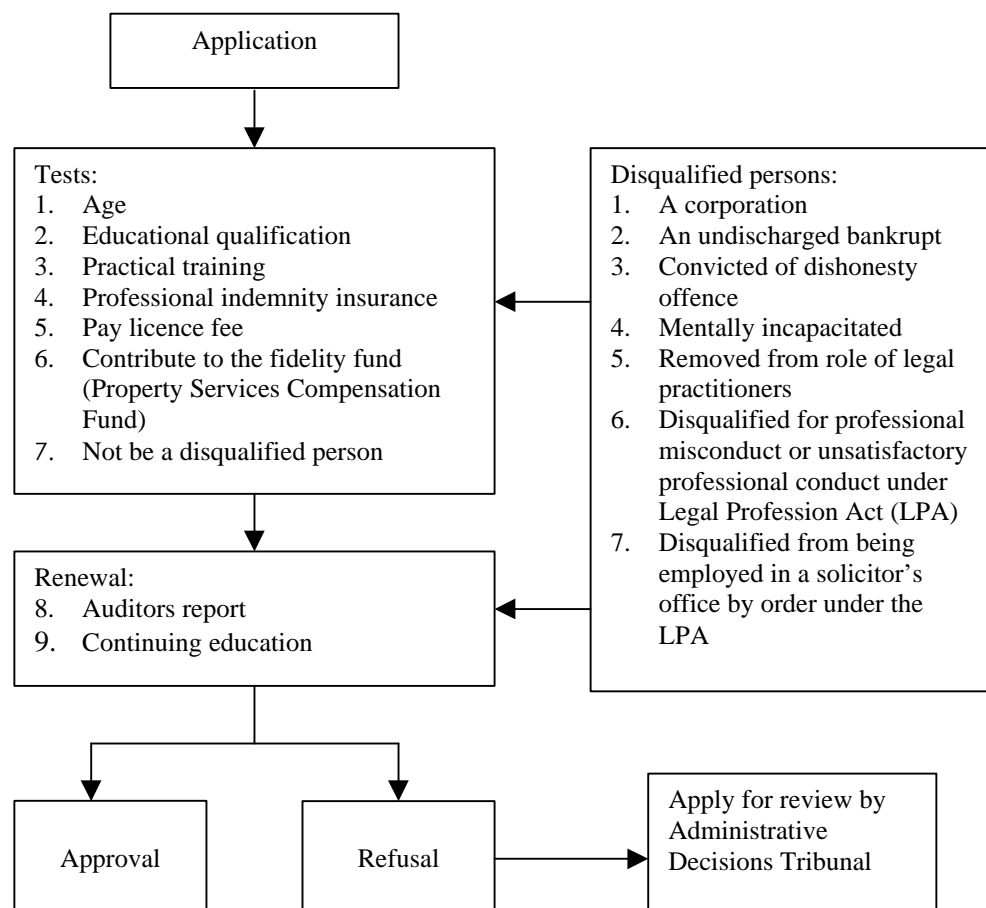
Main Features of the Licensing Scheme

The Conveyancers Licensing Act provides a licensing scheme for conveyancers entailing provisions for the licensing process, the conduct of a conveyancing business and compliance and discipline.

The licensing process

The Act requires that any person who is not a solicitor and who wishes to carry on the business of a conveyancer be licensed. The stages in the licensing process are set out in Diagram 4.1.

Diagram 4.1 The Licensing Process



To be granted a licence an applicant must:

- be at least 18 years of age;
- have approved educational qualifications, practical training and conveyancing experience; and

- not be a disqualified person;
- have paid the licence fee and the required contribution to the fidelity fund (Property Services Compensation Fund);
- be insured for the period of the licence under an approved policy of professional indemnity insurance.

A conveyancers licence expires each year on 30 June. For the licence to be re-issued, a licensee must fulfil the above requirements as well as:

- lodge an auditor's report if money has been held on behalf of a client in the preceding year; and
- comply with any conditions placed on the licence, for example, a requirement to undertake continuing education. Currently all licensees renewing a licence are required to complete 5 hours of continuing education in accordance with guidelines issued by the Director-General of the Department of Fair Trading.

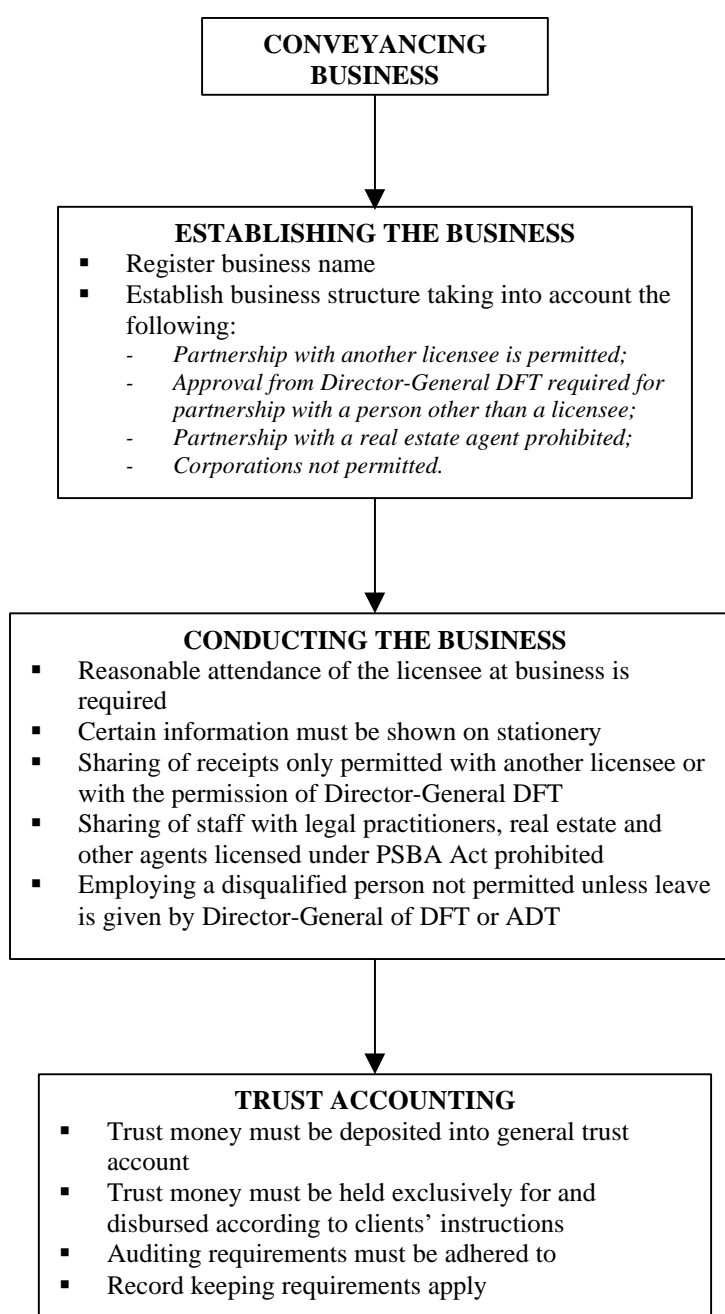
Conduct of the Business

The Act specifies the way in which a conveyancing business should be conducted, as follows:

- there must be reasonable attendance of the licensee at the business premises;
- a business name must be registered;
- certain information must be shown on a licensee's stationery;
- licensees must deposit all trust money into a general trust account at a bank in NSW before the end of the next banking day or, as soon as practicable, pay the money into another account if directed by the client;
- trust money must be held exclusively for and disbursed according to the instructions of the client;
- licensees must adhere to auditing requirements for trust accounts;
- licensees must comply with detailed and comprehensive record keeping requirements for trust accounting;
- the sharing of receipts is prohibited unless the other person is a licensee or has been approved by the Director-General of the Department of Fair Trading;

- partnerships are only permitted with another licensee or a person approved by the Director-General. A partnership with a real estate agent is prohibited;
- a licensee must not employ a disqualified person unless leave is given by the Director-General or the Administrative Decisions Tribunal; and
- the sharing of staff with legal practitioners and real estate and other agents licensed under the Property, Stock and Business Agents Act is prohibited.

Diagram 4.2 Conduct of business



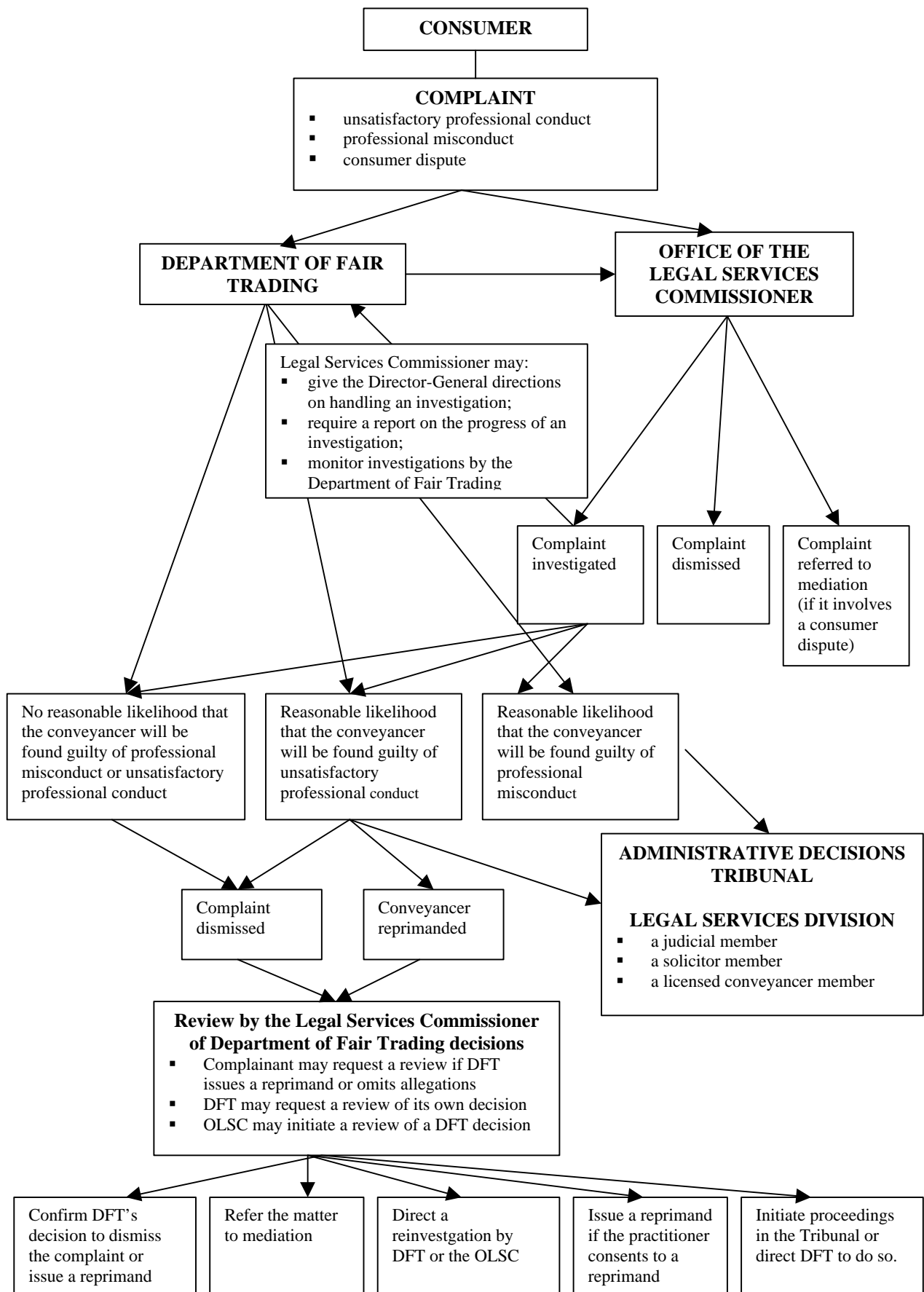
Compliance and monitoring

The Act provides for the Department of Fair Trading and the Office of the Legal Services Commissioner to have a role in compliance. The compliance and monitoring scheme is set out in Diagram 4.3. As part of the compliance process:

- the Director-General must maintain a register of licensees;
- a complaint about a licensee must be sent to the Legal Services Commissioner;
- the Legal Services Commissioner may investigate the complaint himself, refer it to the Director-General or dismiss it;
- disciplinary action may be taken against a conveyancer for professional misconduct or unsatisfactory professional conduct;
- a licence may be suspended or cancelled if the licensee no longer requires a licence; if the fidelity fund contribution has not been paid or the licensee does not hold an approved policy of professional indemnity insurance; if the licensee has become a disqualified person; if the licensee is unable to carry out conveyancing work because of physical or mental illness or infirmity; or if the licensee fails to comply with a condition of the licence, has not complied with trust and controlled money requirements or is convicted of an offence;
- the Director-General may appoint a manager to a licensee's conveyancing business if the licensee has requested it; if the licensee's licence has been cancelled or suspended; if there is or may have been a failure to account by the licensee; or if the Director-General is of the opinion that a person is unable to obtain payment or delivery of property by the licensee because he/she is mentally or physically ill, is bankrupt, is in gaol, has died or has abandoned the business;
- the Director-General may appoint a receiver if he is of the opinion that it is necessary to protect the interests of other persons. To appoint a receiver application is made to the Supreme Court by the Director-General;
- inspectors may be appointed to inspect trust accounts and investigate the affairs of a particular licensee;

- a penalty may be imposed if an offence is committed. The maximum court-imposed fines for offences range from \$550 to \$5,500.

Diagram 4.3 Compliance and Monitoring – relationship between the Office of the Legal Services Commissioner and the Department of Fair Trading



Other Legislation

The Fair Trading Act and the Consumer Claims Act

Like most New South Wales traders, conveyancers are also subject to the Fair Trading Act 1987. The Fair Trading Act mirrors the consumer protection provisions of the Commonwealth Trade Practices Act 1974 and includes a range of provisions which prohibit practices that seek to exploit or misinform the community, for example deceptive conduct, false representations and misleading advertising. A major policy objective of the Fair Trading Act is that consumers can expect that the information they are given about the product or service they are buying is accurate so that they can choose those that best satisfy their needs. If consumers are misled, the Fair Trading Act can require that traders remedy the situation.

In the case of a dispute between a consumer and a licensed conveyancer, the consumer could seek to resolve the dispute by lodging a complaint with the Department of Fair Trading. Depending upon the nature of the dispute, the matter could be investigated under the Fair Trading Act or the Conveyancers Licensing Act.

If the matter cannot be resolved with the assistance of the Department, the consumer may pursue resolution of the dispute in the Fair Trading Tribunal, as provided under the Consumer Claims Act 1998, or he/she could seek redress through the civil court system.

The Legal Profession Act

Because conveyancing work undertaken by licensed conveyancers is the same as that done by solicitors, a number of provisions in the Conveyancers Licensing Act mirror, or have been linked to, provisions in the Legal Profession Act. This was to ensure that all who provide conveyancing services comply with the same standards of honesty, competence and diligence as well as the same ethical and practice standards.

The Conveyancers Licensing Act links the definition of conveyancing work to the Legal Profession Act by providing that legal work in the definition of conveyancing work means work done for a fee by a person who is not a barrister or a solicitor. A licensed conveyancer is permitted to undertake such work without committing an offence under Part 3A of the Legal Profession Act.

The complaints and disciplinary procedures for licensed conveyancers are set out in Part 10 of the Legal Profession Act. Under the two pronged disciplinary system involving the Department of Fair Trading and the Office of the Legal Services Commissioner⁵, investigations into the conduct of licensees and prosecutions or proceedings for contravention of the Conveyancers Licensing Act are undertaken. Certain cases may be referred to the Legal Services Division of the Administrative Decisions Tribunal.

The Property, Stock and Business Agents Act

To obtain a conveyancers licence an applicant is required to make a contribution to the Property Services Compensation Fund established under the Property, Stock and Business Agents Act.

Division 1 of Part 6 of the Property, Stock and Business Agents Act establishes the basis for the fidelity fund common to the conveyancing and real estate industries. Such matters as the composition, administration and operation of the fund, and levies and claims against the fund for failure to account, are set out in the Act. Provision is also made for the Director-General to appoint a manager or a receiver for a conveyancing business if he is of the opinion that there has been a failure to account.

The Conveyancers Licensing Act specifically prohibits licensees under the Property, Stock and Business Agents Act from participating in a conveyancing business. A person licensed or registered under the Property, Stock and Business Agents Act is not permitted to form a multi-disciplinary partnership or share staff with a conveyancer.

The industry associations

Two industry bodies operate in New South Wales to represent the conveyancing industry: the Australian Institute of Conveyancers (NSW Division) and the NSW Conveyancing Society.

Industry regulation in other jurisdictions

In addition to New South Wales, South Australia, Western Australia and the Northern Territory regulate persons who transact business for the sale of land on behalf of another. In other States and the ACT conveyancing is not a separate occupation and solicitors perform conveyancing work.

⁵ More detailed information about the role of the Office of the Legal Services Commissioner can be found on pages 78-79.

The qualifications required and services that are able to be performed vary from state to state. In South Australia conveyancers are regulated under the Conveyancers Licensing Act (SA) 1994. Applicants for registration must meet requirements relating to education and reputation. The range of transactions which may be undertaken by a South Australian conveyancer includes the preparation of all instruments under the Real Property Act 1886 that create, transfer, modify or extinguish any interest in real or personal property, for example contracts for the sale and purchase of land or a business, leases and mortgages but does not include Old System conveyance.

In Western Australia real estate settlement agents perform the procedural functions to transfer title in relation to any type of real estate. A settlement agent is required to obtain a licence and a Triennial Certificate which acts as a practising certificate. The Settlement Agents Act (WA) 1981 authorises an agent to arrange or effect the settlement of any real estate transaction in respect of land under the Transfer of Land Act 1983 or the Land Act 1933. Most of the documents used in these transactions are in a prescribed form. A business settlement agent may arrange or effect a settlement of a business transaction. The work undertaken by a settlement agent relates only to the drawing of a transfer in matters of a procedural or mechanical nature such as the perusal, exchange or registration of documents.

The functions of a Northern Territory conveyancing agent are similar to those of Western Australian settlement agents. The Agents Licensing Act (NT) 1995 allows for an agent to make searches, arrange for the preparation and execution of contracts of sale where the contract is in a prescribed form, arrange settlement and lodgement documents, prepare instruments, including caveats and memorandum relating to the sale and transfer of real property under the Real Property Act, the Unit Titles Act and the Crown Lands Act. There is no specific authorisation to prepare documents which are not in a prescribed form or give legal advice in relation to transactions for the sale of all types of property.

Non-lawyer conveyancers in Victoria provide conveyancing services without a specific regulatory framework. The Legal Profession Practice Act 1996 prohibits conveyancers who are not legal practitioners from doing the legal work involved in conveyancing.

Although there is currently no separate regulation of conveyancers in Queensland it is understood that consideration is being given to introduction of a licensing scheme.

5. Objectives of Government intervention

Government intervention in the conveyancing industry

Prior to 1992, Government intervention in the conveyancing industry took the form of restricting the provision of conveyancing services to solicitors. It had been considered that only lawyers had the skill, training and experience to conduct conveyancing transactions.

As mentioned in Chapter 4, a separate regulatory scheme for conveyancers was introduced in 1992. The regime was intended to encourage a wider market for conveyancing through the statutory recognition of conveyancers, provide greater consumer choice and introduce competition by breaking the monopoly solicitors had on conveyancing.

However, the scheme was found to be a compromise in favour of solicitors as too many barriers remained limiting competition from non-lawyers. In particular there were limitations placed on the types of transactions a conveyancer could undertake and the Law Society maintained control over entry standards and fidelity insurance requirements. The scheme had the effect of reducing the number of conveyancing businesses by preventing a number of previously existing conveyancers from operating because they were unable to meet the licensing criteria.

The Conveyancers Licensing Act 1995 was introduced to transfer administration of the licensing of conveyancers to a body independent of both the legal and conveyancing professions and to expand the scope of work for a conveyancer. Although the Act provides a somewhat regulatory structure for the conveyancing industry, the impetus for the introduction of the scheme was the creation of a more competitive conveyancing environment.⁶

Regulatory objectives of government

The Council of Australian Government [COAG] has agreed that government intervention in markets should generally be restricted

⁶ Conveyancers Licensing Bill 1995. Second reading speech. Mrs F Lo Po' MP, Minister for Consumer Affairs, Minister for Women, 20 September 1995.

to situations of market failure and that each regulatory regime should target the relevant market failure or failures.⁷

The National Competition Council has identified the following market failures which may warrant legislative intervention by government:

| Type of market failure | Description |
|--------------------------------|--|
| public goods | These goods will tend to be under-produced because they are <i>non-excludable</i> (ie people who have purchased the good cannot stop others using it up) and <i>non-rivalrous</i> (ie the good is not used up with use). Typical examples would be the environment and national defence |
| externalities | Externalities are the positive or negative impacts of market transactions which are not reflected in prices, and so lead to non-optimal levels of production and consumption. Pollution is commonly cited as a negative externality (because third parties suffer from its production) and education as an example of a positive one (because third parties can benefit from another person's increased knowledge) |
| natural monopolies | Natural monopolies occur where the costs of establishment, resources or infrastructure mean that setting up competition is socially optimal but not necessarily in the interests of all players in the market. |
| information asymmetries | Information asymmetries occur where information is not evenly distributed throughout the community. Buyers and sellers of goods or services do not have the same knowledge about quality |

In addition to market failure governments may intervene in markets in order to:

- facilitate universal access to essential goods and services;
- allocate limited public resources; and
- protect consumers, employees and the environment [to overcome problems of externalities and imperfect information in the marketplace].

The most relevant of these objectives in relation to Government regulation of conveyancers are information asymmetries and consumer protection. Within the conveyancing industry information asymmetries occur as a consumer may be at a disadvantage in:

- assessing the need for the service, and type and quality of service required;
- distinguishing the competent service provider from the incompetent; and
- assessing the quality of services rendered and whether they are excessive or inadequate for their needs.⁸

⁷ Council of Australian Governments, *Report of the Task Force on Other Issues in the Reform of Government Trading Enterprises*, released as part of the first COAG communique, 1991, p22.

⁸ National Competition Policy Review – Conveyancers Act 1994 (South Australia) Draft Report
July 1999 p 12.

Consumers are often not in a position to judge whether the services are necessary or sufficient for a proper transfer of property. Because consumers buy and sell real property infrequently they have little opportunity to learn about the process through repeat consumption. Accordingly, consumers suffer from a significant level of information asymmetry in relation to conveyancing services.

Can Government intervention be justified?

The Council of Australian Government's guidelines for regulatory action⁹ proposes that a risk analysis be undertaken as the first step in determining whether or not to regulate. These guidelines suggest that risk analysis should consider:

- both societal and individual risk;
- whether there is choice in incurring the risk, or adequate information about the consequences of incurring the risk [whether the risk is voluntary or involuntary]; and
- the probability of the harm occurring.

The following 'decision table'¹⁰ provides a framework for the assessment of justification for government intervention. Similar to the COAG guidelines, the framework considers the following aspects of the risk involved:

- significance¹¹ of the harm caused;
- whether or not the harm is reversible¹²;
- whether the assumption of the risk is voluntary; and
- the probability of the harm occurring.

The framework proposes that, given the compliance costs of intervening in occupations, it is important to limit intervention to cases where the harm has the potential to be significant and irreversible (such as a permanent disability). The framework uses the decision table to determine whether there is a case for intervention in a particular occupation. The only scenario where intervention can be absolutely justified is where there is significant harm, the harm is irreversible, the risk is involuntary and there is a high probability of the risk occurring. In all other cases the

⁹ Council of Australian Governments, Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and standard-setting bodies, November 1997.

¹⁰ New Zealand Ministry of Commerce, *Policy Framework for Occupational Regulation: A Guide for Government Agencies Involved in Regulating Occupations*, June 1999, available at www.moc.govt.nz/gbl/bus_pol/policyframework [accessed 24 March 2000].

¹¹ The paper defines *significant harm* as significant harm to one person or moderate harm to a large number.

¹² Such as a permanent disability, as opposed to a reversible harm such as moderate food poisoning.

justification for intervention needs to be made in terms of the net public benefit arising from intervention.

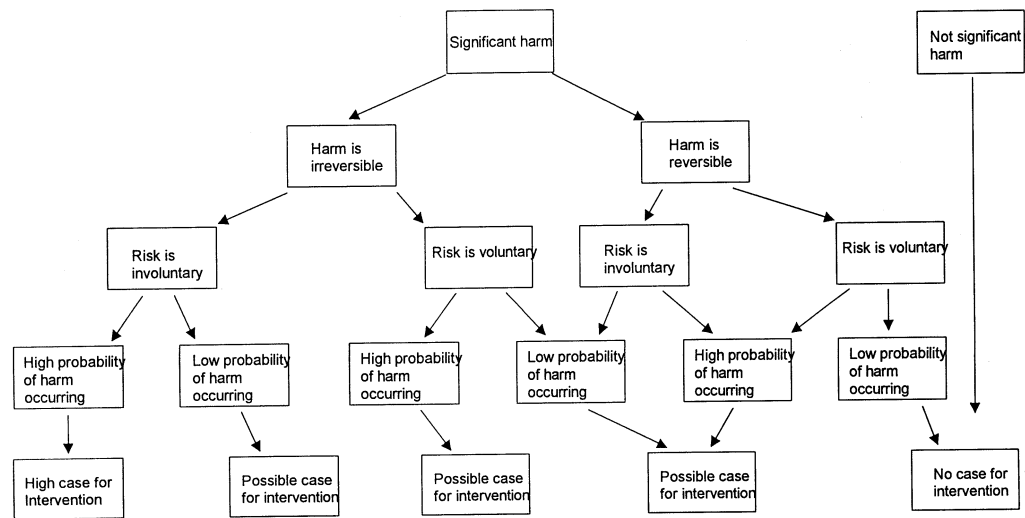


Diagram 5.1: When is there a case for intervention in an occupation?

The need for intervention in the provision of conveyancing services

The need for intervention can be tested by applying the model in Diagram 5.1 (decision table) to conveyancer services in New South Wales.

In 1999/2000, 115,558 residential property transactions took place in New South Wales. For most people the sale or purchase of their home represents the largest investment and financial transaction they will engage in. In New South Wales, homebuyers with housing financing commitments devote 30.7% of the family income to meeting average loan repayments.¹³

Similarly, there may be far-reaching and weighty financial implications in the sale or purchase of a small business. A small business can embody a lifetime of work and the value of the business may include assets such as the premises, fixtures and fittings to include stock and goodwill.

At the other end of the scale, it is estimated that in 1999/2000 there were 6,350 commercial property transactions with a value of \$7,210 billion. Commercial property transactions often involve an

¹³ Real Estate Institute *Economic and Property Review* September Quarter 2000 p5.

important financial transaction such as the sale and purchase of large shopping centres, sporting complexes or development sites.

On the basis of these figures, it could be said that **significant harm** would result if an error were to be made in the conveyancing transaction.

In the course of a conveyancing transaction there are a number of points where errors may occur. For example, a mistake could be made in:

- preparing or examining a contract of sale including disclosure documents (for example: a zoning or planning certificate, plans showing sewer lines, copy of the property certificate, copy of the official plan of the land, copy of all documents creating easements, a notice drawing the purchasers attention to their rights);
- arranging inspections such as a building report, information about whether the property is subject to flooding, a pest inspection and the expected liabilities of the owners corporation in case of a strata or community title property;
- examining a strata inspection report if the property is part of a strata scheme;
- exchanging the contract of sale and paying the deposit;
- preparing and examining the mortgage agreement;
- checking if there are outstanding arrears or land tax obligations;
- finding out if any government authority has an interest in the land or if any planned development could affect the property (eg. local council, Sydney Water, Roads and Traffic Authority);
- finding out any information that may not have been previously disclosed such as a fence dispute or illegal building work;
- calculating adjustments for council and water rates for the property settlement;
- completing any final checks prior to settlement;
- settlement;
- arranging payment of stamp duties;
- overseeing the change of title with the Land Titles Office.

In most cases where an error occurs in a conveyancing transaction the error becomes apparent after the transaction has been completed. The purchaser is already 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. In other words, the harm caused by the error may

be **irreversible** because the consumer is unlikely to be placed in the same position they were in prior to the transaction.

Most consumers use the services of a conveyancer as they prefer to employ a person to read the necessary documents, fill in forms, write letters, attend to searches and so on. They expect that, having employed a conveyancer, the transaction will be handled by a person with experience and expertise in such matters. Consumers may find it difficult to determine whether the price/quality combination is suitable to their needs especially if they have little knowledge about the quality of service being offered. There is a risk involved in placing the transaction in the hands of a licensee. For the consumer such risk is involuntary.

For some errors there is a high probability of harm occurring. For example, when building and pest inspections are not undertaken and the property is later found to have significant termite damage; when the appropriate searches are not carried out and after completion of the transaction it becomes apparent that there are easements, unauthorised constructions or heritage listings operating in relation to the property. In another type of situation a conveyancer faced with financial difficulties may use money held on behalf of a client to resolve problems in his own business. In such cases it could be said that there is a **high probability of harm occurring**.

In these types of cases there could be a considerable additional cost to the purchaser to remedy the situation or they may even find the property unsuitable for their purposes. Situations such as these would represent a **case for intervention** to ensure that consumers using the services of a conveyancer are adequately protected.

For many property transactions the process is quite simple - it is relatively well-ordered and proceeds smoothly. Following completion of the transaction no defects become apparent. It could be said that for many transactions there is a **low probability of harm occurring**.

While many transactions do not involve errors and are straightforward, there are potential risks to consumers if complications occur or errors are made. It is not possible to identify prior to commencing the transaction whether it will be simple or not. Every transaction is capable of throwing up complex questions requiring the exercise of professional judgment. Accordingly, in the case of conveyancing there is a **possible case for intervention**.

Conclusion

The Conveyancers Licensing Act 1995 was introduced to break the monopoly that lawyers held on conveyancing. It was considered that, as competition benefits consumers and the community generally by encouraging providers to deliver their services in the most cost effective, efficient and innovative way, the licensing of conveyancing would have a flow on effect for consumers.

The Act itself aims to address consumer protection concerns, particularly those related to information asymmetries. Information asymmetries occur and may disadvantage consumers in respect of:

- assessing the need for the service and type and quality of service required;
- distinguishing the competent service provider from the incompetent; and
- assessing the quality of services rendered and whether they are excessive or inadequate for their needs.¹⁴

Consumers suffer from a significant level of information asymmetry in relation to conveyancing services. They are often not in a position to judge whether the services are necessary or sufficient for a proper transfer of property. Because consumers buy and sell real property infrequently they have little opportunity to learn about the process through repeat consumption

In the case of the conveyancing industry, it could be said that there is market failure and the risks are high enough to warrant the need for government intervention.

¹⁴ National Competition Policy Review – Conveyancers Act 1994 (South Australia) Draft Report July 1999 p 12.

6. Effects of the licensing regime on competition

Objectives of the licensing regime

Although there are no specific objectives stated in the Conveyancers Licensing Act, the introduction of licensing for conveyancers was intended to encourage a wider market for conveyancing services through the statutory recognition of conveyancers, which broke the monopoly of solicitors on conveyancing.¹⁵

The Issues Paper suggested that the implied objective of the licensing scheme, based on the specific provisions of the Act, is protection of consumers of conveyancing services by requiring that conveyancers be licensed, accountable and meet certain standards of competence. Submissions to the review largely supported this interpretation and concurred that the implied objective was valid.

As discussed previously, consumers undertaking conveyancing transactions face a significant level of information asymmetry. The Conveyancers Licensing Act addresses this information imbalance by providing for the licensing of conveyancers. The licensing of conveyancers provides the marketplace with competent individuals able to judge which services are necessary or sufficient for the proper transfer of property. The Conveyancers Licensing Act also provides for quality of service by imposing entry standards; mandating professional indemnity insurance; imposing strict controls on trust accounts; providing a means for removing unsuitable persons from the industry and allowing access to an indemnity fund.

Impact of the legislation on competition

The goal of National Competition Policy is to remove restrictions on competition to enable Australian businesses to compete efficiently while maintaining appropriate levels of community protection. An underlying principle of National Competition Policy is that legislation should not restrict competition unless the benefits to the community as a whole outweigh the costs of the restriction and the objective of the legislation can only be achieved by restricting competition.¹⁶

¹⁵ Conveyancers Licensing Bill 1995. Second reading speech. Mrs F Lo Po' MP, Minister for Consumer Affairs, Minister for Women, 20 September 1995.

¹⁶ *New South Wales Government Policy Statement on Legislation Review*, June 1996.

The National Competition Council has suggested seven ways in which legislation may limit competition¹⁷, as follows:

| Type of restriction | Examples |
|--|---|
| Controls entry or exit | <ul style="list-style-type: none"> Creates or protects a single buyer or seller Limits the number of operators through licences Allows licences to be freely traded Restricts new competitors with similar products from entering the market Restricts who can own or operate a business |
| Controls on price or production | <ul style="list-style-type: none"> Limits the size of the operation Restricts the hours of trading Affects the location of where a business may operate Affects in any way the price that otherwise may be determined by the market |
| Controls quality | <ul style="list-style-type: none"> Imposes quality standards Restricts any range of quality from the market |
| Controls advertising | <ul style="list-style-type: none"> Limits who may promote or advertise Limits how a product or service may be promoted |
| Controls type of inputs | <ul style="list-style-type: none"> Limits access to important infrastructure Prevents adoption of innovative methods of production and/or marketing |
| Imposes significant costs | <ul style="list-style-type: none"> Imposes specific levies which are not applied to all other industries Imposes high administrative or compliance costs |
| Discriminates | <ul style="list-style-type: none"> Advantages one firm over another Restricts consumer access Benefits one group of consumers over another |

Accordingly, there are a number of ways that legislation can restrict competition and innovation. Legislation may impose barriers to entry to an industry by requiring educational or professional qualifications before a person is able to practice, or by disadvantaging new or potential entrants. Legislation may constrain industry operators in terms of the business decisions they are free to make, may impose costs in complying with the provisions of the legislation, or may benefit one class of operator or consumer over another.

¹⁷ National Competition Council Legislation Review Compendium, 1997.

Costs imposed by legislation are usually passed down the line to the consumer in the form of higher prices or lower quality. The question under consideration in this review is whether the costs borne by business and the community are reasonable given the benefits provided.

Occupational licensing is used to regulate persons who can provide services for a fee in the marketplace. Entry into the market is controlled by allowing only licensed providers to supply services. Licensing requirements may extend to education, experience, character, business conduct and mandatory insurance cover. The strictness of the licensing conditions determine the height of the entry barrier. High entry barriers can increase the market power of licensed providers. Where licensing makes new entry difficult, there may be the potential for collusive behaviour to further restrict competition and reduced incentives for efficient production may result.¹⁸

A licensing scheme that requires skills levels which are higher than those required to ensure minimum competence can result in higher prices. Service providers may seek to recover a return on their investment in education and training and would be able to do so because entry is restricted to those with similar investments in personal capital.¹⁹

In New South Wales the provision of conveyancing services is restricted to solicitors and licensed conveyancers. The Conveyancers Licensing Act 1995 currently regulates the right to practise as a conveyancer and the method of doing business of those wishing to carry on the business of conveyancing. An examination of the licensing regime identifies a number of aspects of the regime which have the potential to impact on competition.

Restrictions on entry into or exit from the market

The licensing regime for conveyancing restricts entry into the market by requiring providers to be licensed. To be granted a conveyancers licence an applicant must fulfil certain criteria as discussed below.

Education and practical experience requirements

The educational and practical experience requirements for licensed conveyancers are set down in a Ministerial Order. Currently these

¹⁸ Trade Practices Commission "The legal profession, conveyancing and the Trade Practices Act" November 1992 p 26.

¹⁹ Ibid

requirements entail completion of a course of study at Macquarie University, Sydney Institute of Technology or Southern Cross University, or a law degree. The courses conveyancers are required to undertake have a legal focus and cover similar areas of law relating to conveyancing as those studied by solicitors. Although the level of education is lower than that required for admission as a solicitor, it still involves the equivalent of two years full time study covering a range of topics of both a legal and practical nature.

In addition to the educational requirements, to be granted a conditional licence an applicant must have worked under the supervision of a licensee or solicitor for one year. For an unconditional licence two years experience is required.

Requirement for professional indemnity insurance and contribution to the Compensation Fund

The licensing regime requires conveyancers to have approved professional indemnity insurance cover to ensure that consumers have access to compensation in case of professional negligence which causes financial loss. Professional indemnity insurance also promotes quality of service as those conveyancers considered to be a bad risk may be refused coverage.

Licensees are also required to contribute to a fidelity fund (the Property Services Compensation Fund). The fund provides for cover in cases where a licensee fails to account for his or her client's monies.

The mandatory nature of the professional indemnity and fidelity fund contribution for conveyancers represents a restriction on competition by excluding those persons who are unable to obtain or afford such cover. In 1999/2000 the estimated average premium paid by a licensee was \$4,610.90 for professional indemnity insurance and a \$45 contribution to the Compensation Fund. In a sector where the majority of conveyancing businesses are small businesses, the cost of premiums and contributions may have a significant affect on their profit margins.

Specific exclusions

There are also specific restrictions on certain classes of persons holding a licence. Those disqualified from holding as licence include: a corporation; an undischarged bankrupt; a person convicted of a dishonesty offence; a mentally incapacitated person; someone who has been removed from the roll of legal practitioners; those who have been disqualified for professional misconduct or unsatisfactory professional conduct under the Legal Profession Act;

or those disqualified from being employed in a solicitor's office by order, under the Legal Profession Act.

The re-application process

The Act contains no specific renewal provisions, so that when a licence expires on 30 June each year the licensee needs to apply for the re-issue of the licence. The same criteria for the issue of a new licence apply. In addition, the applicant needs to have lodged an annual audit certificate and fulfilled the requirement for completion of further education. Currently all licensees have a condition placed on their licence requiring the completion of five (5) hours of further education annually in accordance with the guidelines issued by the Director-General.

Restrictions on the types of work undertaken

The Conveyancers Licensing Act defines the boundaries of the work that may be undertaken by a conveyancer. The Act defines conveyancing work as "legal work carried out in connection with a transaction that creates, varies, transfers or extinguishes a legal or equitable interest in any real or personal property."²⁰

Currently, unrestricted licence holders may, in addition to residential work, carry out a broad range of commercial property transfers. Restricted licence holders are permitted to undertake residential work only.

While lawyers are able to provide a range of complementary services such as the preparation of wills, advice on family matters and taxation in conjunction with a conveyance, the Conveyancers Licensing Act specifically excludes conveyancers from carrying out such services. Licensed conveyancers are not permitted to:

- undertake work relating to a mortgage on a non-residential property where the amount secured exceeds \$7 million;
- commence or maintain legal proceedings
- establish a corporation or vary the memorandum or articles of association of a corporation;
- create, vary or extinguish a trust;
- prepare a testamentary instrument;
- give investment or financial advice; or
- invest money otherwise than as set out in provisions of the Act relating to trust money and controlled money.

²⁰ Section 4(1) of the Conveyancers Licensing Act 1995.

Restrictions on business structures

The Act contains a number of provisions that restrict and limit the type of business structure a licensee can adopt to carry on business. A licensee is not permitted to operate as a corporation and there are restrictions on who can participate in a partnership and share receipts with a conveyancer. There are also restrictions on employing certain persons.

Multi-disciplinary partnerships

Under the Conveyancers Licensing Act partnerships are only permitted with another licensed conveyancer or a person approved by the Director-General. In approving a partnership the Director-General must be satisfied that the partnership business will include conveyancing. A partnership with a real estate agent is prohibited by the Act.

A partner who is not a licensee is not able to conduct business, receive a fee, advertise as a partner of the business and share receipts without committing an offence. The provisions of the Act relating to trust money, controlled money and claims arising from failure to account, apply to both the licensee and non-licensee members of the partnership.

Sharing receipts

The sharing of receipts is prohibited unless the other person is a licensee or has been approved by the Director-General of the Department of Fair Trading. Such approval cannot be given if it will result in another person gaining control of the business or will affect the independent conduct of the business and the interests of clients.

Restrictions on employing certain persons

Restrictions apply to the ability of licensed conveyancers to employ certain classes of persons. A licensee must not knowingly employ a person who is a disqualified person unless leave is given by the Director-General or the Administrative Decisions Tribunal. A list of 'disqualified persons' is included in Diagram 4.1 - "The Licensing Process" (p.22).

In addition, the Conveyancers Licensing Act prohibits the sharing of staff with legal practitioners and real estate and other agents licensed under the Property, Stock and Business Agents Act.

Restrictions on incorporating

The Conveyancers Licensing Act prevents a corporation from becoming a licence holder through the provision for disqualified persons. Conveyancers are restricted to working as sole practitioners, employees or partners.

Restrictions on the way the business is operated

The Act restricts the way in which a conveyancing business is conducted by prescribing a number of different business practices that must be followed. The more general requirements include: the reasonable attendance of the licensee at the business premises; the registration of a business name and the display of certain information on a licensee's stationery.

There are also particular and detailed requirements relating to the handling of trust monies. A licensee must deposit all trust money into a general trust account at a bank in NSW before the end of the next banking day or, as soon as practicable, pay the money into another account if directed by the client. Trust money must be held exclusively for the client and disbursed in accordance with the client's instructions and licensees must comply with detailed and comprehensive record keeping requirements for trust accounting and also adhere to auditing requirements.

The operation of these restrictions confers certain costs on the business as a conveyancer is limited in the way records may be kept. This could also impact on the adoption of innovative and more cost effective business systems.

Restrictions on interstate applicants

Differences in conveyancers licensing requirements between states and territories makes it difficult for licensees in one jurisdiction to obtain a licence in another. This presents a complication for recognition of equivalence under mutual recognition laws which provide for a person registered or licensed in one state to be eligible for registration or licensing in another to carry on the equivalent occupation.

The range of work and activities undertaken by conveyancers varies in each state and territory to the extent that there appears to be no equivalent occupation of conveyancer in Queensland, Victoria, Tasmania or the ACT. Commonly, with the exception of South Australia, those undertaking conveyancing work in other states who

wish to practice in New South Wales will be required to complete some additional qualifications to achieve equivalence.

These conditions limit the geographical mobility of conveyancers across Australia and particularly affect conveyancers from states where there is a marked variation in both the licensing conditions and the range of work undertaken. In border towns where business may be transacted on both sides of the state or territory border these differences manifest as serious jurisdictional issues.

Submissions

Submissions to the review strongly support the need for education and practical experience requirements as a prerequisite for licensing. Respondents considered these requirements essential to assure consumers that the person they were dealing with possessed a certain level of skill and knowledge. Given the type of work a conveyancer is required to do, the current requirements were not viewed as overly restrictive.

There was no indication from responses that the professional indemnity insurance requirement and the contribution to the Compensation Fund were restrictive on conveyancing businesses.

Some parties considered the re-application process to be unnecessarily complex and favoured the introduction of a renewal process whereby the licensee lodges an annual audit statement, demonstrates that any conditions on the licence have been met, and provides evidence of appropriate professional indemnity insurance coverage and contribution to the Compensation Fund.

As far as the range of work is concerned, some respondents found current provisions to be restrictive. In its submission, the Australian Institute of Conveyancers stated that “to generate further competition and ensure a level playing field, admission as a licensed conveyancer should entitle the licensee to be sworn in as a Justice of the Peace without further application.” In addition, the Australian Institute of Conveyancers holds that the restrictions applying to: the limitation set for a non-residential mortgage; establishment of a company under the Corporations Law; creating, varying or extinguishing a trust; and preparing a testamentary instrument, should be lifted. The Institute also considers that conveyancers should be permitted to prepare deeds of agreement to satisfy the Commissioner of Stamp Duty in accordance with section 68(1)(b)(iia) of the Duties Act 1997.

Other submissions also regard the current range of work to be restrictive and propose that it be expanded. A number of submissions suggest that a conveyancer be permitted to execute powers of attorney. One response proposed that drawing-up or updating a will, establishing a company, varying the memorandum or articles of association, and provision of financial and investment advice, be included in the range of work.

Several respondents indicated that the range of work is appropriate for current market conditions and that it does not limit competition.

Responses to the issues of sharing of staff and sharing of receipts were mixed. Some respondents regarded the provisions to be appropriate and in the public interest as they ensure that conveyancers are in control of the business and reduce the possibility of conflict of interest. Others considered the provisions to be unnecessary as long as strict rules relating to conflict of interest are adopted. There was some support for lifting the restriction on the sharing of staff with a solicitor firm.

The responses generally viewed the restrictions on business associations as restrictive. One submission described the requirement for conveyancers to work either as a sole practitioner or in a partnership as an “archaic concept”. The respondent went on to say “[c]onveyancers should be permitted the freedom to choose to be licensed as a corporation as will be the case for solicitors later this year. Freedom to choose the business structure is a necessity in the business world and as long as consumers’ rights are appropriately safeguarded, as is proposed by the legislation to allow solicitors to practice as a corporation, there is no reason why the present anti-competitive requirements need to remain in place.”²¹

There was general support for retaining the prohibition on business associations with real estate agents.

Submissions to the review considered the controls on business conduct to be restrictive in that they increase the administrative burden and therefore the cost of conveyancing. However, controls of this type were observed as necessary given the responsibility a conveyancer has for large amounts of money held in trust.

Respondents generally concurred that mutual recognition could not be extended to other jurisdictions. Parties supported the undertaking of additional education as a means of facilitating mobility between States and Territories. The Australian Institute of Conveyancers noted that an exception may be South Australia

²¹ Submission to the review by Murphy Conveyancing.

where, unlike the other jurisdictions, the scope of work does include 'legal work'.

7. Costs and benefits of the Act

Costs and benefits and NCP review requirements

The legislation review requirements under the Competition Principles Agreement state that, where the costs and benefits of a particular policy or course of action are to be measured, or the merits or appropriateness of a policy or course of action are to be determined or an assessment is to be made of the most effective means of achieving a policy objective, the following criteria, where relevant, must be taken into account:

- government legislation and policies relating to ecological sustainable development;
- social welfare and equity considerations, including community service obligations;
- government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
- economic and regional development, including employment and investment growth;
- the interests of consumers generally or a class of consumers;
- the competitiveness of Australian businesses; and
- the efficient allocation of resources.²²

This criteria has been considered in Table 7.1 and ranked for the conveyancing industry. To enable comparison, each of the criteria was rated according to a scale of *low*, *medium* and *high*.

The financial costs and benefits of regulating conveyancers were then assessed and weighed up against the evaluation criteria (Table 7.3) to estimate the net public benefit, or cost.

²² Competition Principles Agreement Clause 1(3).

| <i>Criteria</i> | <i>Description</i> | <i>Priority ranking²³</i> |
|--|--|--------------------------------------|
| Ecological sustainable development | The degree to which the criteria supports ecological sustainable development. | Low ²⁴ |
| Social welfare and equity | The degree to which the criteria supports existing mechanisms to protect the rights of disadvantaged groups, in particular, people with a disability, women and people from a non-English speaking background. | High |
| OH&S and Industrial Relations | The degree to which the criteria supports existing mechanisms to ensure that the industrial and OH&S rights of employees are protected. | Low |
| Employment and investment growth | The degree to which the criteria supports employment and investment growth within the industry. | High |
| Protection of consumers | The degree to which the criteria provides specific protection of consumers who use the services of a licensed conveyancer. | High |
| Competitiveness of Australian business | The degree to which the criteria supports competition within the industry. | High |
| Efficient allocation of resources | The degree of efficiency achieved by the criteria in relation to its allocation of resources for administration, enforcement and compliance activities. | Medium |

Table 7.1 Evaluation criteria

Assessing the costs and benefits of the Act

Costs

The costs of regulatory restrictions on competition usually fall within the following categories:

- administrative, enforcement and compliance costs;
- efficiency losses; and
- imposts on consumers.

Each of these costs will fall differentially upon purchasers, vendors, licensed conveyancers, government and the community generally. This section of the report will examine costs arising from the Act within each of the identified categories.

²³ The importance of the criteria in relation to the specific industry.

²⁴ The impact on sustainable environmental development is considered to be negligible in all options and therefore has not been considered in the further analysis of the options.

| <i>Type of cost</i> | <i>Description</i> | <i>Costs arising from the Act</i> | <i>Impact of the cost</i> |
|---|--|---|---------------------------|
| Administrative, enforcement and compliance costs | Licensing process | Administrative cost to government in administering the licensing scheme, enforcing business control requirements, dealing with consumer complaints and undertaking disciplinary proceedings | High |
| | | Arise for industry from licence fees, contribution to the Compensation Fund, compulsory education, practical training, continuing education and professional indemnity insurance | High |
| Efficiency losses | Limitations are placed on the types of business structures permitted, the persons who can be employed and with whom conveyancers can share receipts. | Arise from the regulatory restrictions on business operations which prevent them from being able to use the least cost combination of inputs | Medium-high |
| Imposts on consumers | Trust accounting and other business procedure requirements. | Higher prices for conveyancing services as a result of the licensing regime. | Low |
| | | Reduced access to a conveyancer as a result of restricted entry. | Very low |

Table 7.2 Costs arising from the Act.

Administrative, enforcement and compliance costs

The costs to industry consist of licence fees, including the contribution to the Compensation Fund; compulsory education and practical training; continuing education and professional indemnity insurance.

For Government, there are the costs of the licence application process. This entails the costs of administration and character and probity checks with police, the Law Society, the Bar Association and against the register of licensees under the Property, Stock and Business Agents Act 1941.

Additional to these entry costs are those business compliance costs associated with record keeping, trust account controls and annual audits. Significant cost is borne by licensees in complying with these requirements. Similarly, the regulatory authority bears a cost burden enforcing these requirements through trust account and

audit inspections, investigations, conduct of disciplinary proceedings, and generally dealing with complaints from consumers.

Efficiency losses

Efficiency losses can arise from the regulatory restrictions on the operations of a business, which prevent it from being able to use the least cost combination of inputs.

For conveyancers, the trust accounting and other business procedures required under the Act could create efficiency costs in relation to the types of processes used. Limitations on how they structure their business, who they can employ, and with whom they can share receipts could also contribute to efficiency losses.

Restrictions on the types of work that can be carried out, the business structure, and those who can be employed in the business, could affect the flexibility of the business and its operating costs.

Imposts on consumers

The costs arising from the Act could also lead to certain impostes for consumers such as reduced access to the services of a licensed conveyancer due to the restrictive entry requirements and the regulatory regime. As a corollary, consumers may be charged higher prices for using a conveyancer.

Benefits

The main benefit claimed for occupational licensing is the establishment of clear entry criteria ensures that the licensed professional will provide services to a minimum quality standard and hence will not exploit consumers.

In relation to licensed conveyancers, the *benefits* of the licensing regime may be that:

- consumers can get on with the business of completing a property transaction by engaging the services of a conveyancer who has satisfied certain educational and practical experience requirements. This may reduce search costs in relation to identifying a competent conveyancer;
- consumers are reassured that licensees must comply with established procedures in holding money in trust or handling controlled money; that if these procedures are not followed and divergence is detected, disciplinary action will follow; and that if

failure to account for these funds occurs a compensation fund exists to recompense consumers;

- consumers are reassured that licensees must comply with established procedures in performing their part in property transactions;
- consumers can take comfort in knowing that they are protected against the risk of professional negligence if it causes them to suffer a loss;
- unsuitable persons are disqualified from becoming a licensee through the use of police record checks, checks with the Law Society and the Bar Association and checks against the register of licensees under the Property, Stock and Business Agents Act.

Evaluation of net public benefit or cost

Over the past 10 years a number of reforms have taken place in the conveyancing industry to develop a more competitive environment.²⁵ The pro-competitive changes to conveyancing regulation have brought benefits to consumers including improved market information, a wider choice of service providers and lower prices, without a noticeable drop in quality.

Consumers now have the choice of using specialist conveyancers or solicitors. The introduction of licensed conveyancers has opened up a field of choice where consumers can make decisions which reflect their preferences about the range of price/quality combinations on offer in the conveyancing market.

The number of licensed conveyancers has increased considerably in the past five years. The volume of work they are undertaking indicates that consumers are exercising choice in shopping around for the best deal and service to suit their needs.

The data available indicates that the cost of the conveyance for the sale or purchase of a small business has also been reduced as a result of the pro-competitive reforms. The broadening of the scope of work undertaken by licensed conveyancers seems to have had a positive impact on the costs associated with conveyancing in this sector of the market. It is expected that in time licensed conveyancers will take up a greater market share and there will be further cost savings to consumers.

²⁵ The reforms include deregulation of solicitor fees, lifting of bans on fee advertising by solicitors, introduction of non-lawyer residential conveyancing and later for all conveyancing work, rapidly increasing numbers of conveyancers offering services and changes to the commercial environment in which conveyancing services are offered.

Consumers transacting with a conveyancer are faced with a number of potential risks arising from the fiduciary relationship, poor quality of service, business failure and information asymmetry. The regulation of conveyancers provides protection for consumers through licensing requirements, providing for business behaviour and disciplinary processes.

The current regulatory regime manages the risk of incompetence through a combination of education, professional indemnity insurance, continuing education and, in the event of a finding of professional misconduct or unprofessional conduct, licence suspension or cancellation.

| <i>Evaluation Criteria</i> | <i>Current Licensing Regime</i> | |
|----------------------------|---|--|
| | <i>Benefits</i> | <i>Costs</i> |
| Consumer protection | Reduction in costs associated with identifying a competent conveyancer Protection of money held in trust Compensation for failure of licensee to account for funds Protection against risk of professional negligence Exclusion of unsuitable persons from practising | Some of the costs of licensing may be passed on to consumers in the cost of conveyancing services |
| Competition | Breaks the monopoly lawyers had on providing conveyancing services Wider choice of service providers and type of service Reduction in the cost of conveyancing | Restrictions on entry Restrictions on business practices Restrictions on business procedures |
| Social welfare | Provides a less costly alternative for those on the lower end of the economic scale requiring conveyancing services | |
| Industrial relations | | |
| Employment growth | High growth industry providing employment opportunities | |
| Resource allocation | | Cost to government in administering the licensing regime, enforcing business controls and undertaking disciplinary proceedings |

Table 7.3 Assessment of the current regulatory regime against the evaluation criteria.

Although the current regulatory regime places some restrictions on competition and accordingly imposes costs on the community, an

assessment of the identified costs and benefits of the current licensing regime against the evaluation criteria indicates that the benefits as a whole outweigh the costs.

Table 7.3 assists in determining the net public benefit or gain arising from the Conveyancers Licensing Act.

8. Alternative licensing arrangements

The Issues Paper suggested the following alternatives to the current licensing regime:

- Option 1 Business licensing
- Option 2 Negative licensing
- Option 3 Co-regulation
- Option 4 Remove regulation

Option 1 Business Licensing

While occupational licensing is about specifying particular levels of personal competence, business licensing focuses on the financial aspects of transactions and facilitating efficient contracting.

A business licensing scheme would focus on the business rather than the occupational aspects of regulation. For example, instead of requiring individuals to demonstrate certain qualifications and practical experience, the business could be required to obtain appropriate insurance and ensure its employees are competent in conveyancing work. Restrictions could be placed on the business employing certain types of persons such as those with prior convictions for dishonesty or undischarged bankrupts.

Potential benefits of business licensing include:

- reduction in costs to businesses, individuals and government as the business only, rather than the individual, would be licensed.

Potential costs of business licensing include:

- the shift in regulatory focus from the individual to the business would have implications for consumer risk. Licensing criteria would no longer be based on individual competency, levels of professionalism and quality of service. It is likely that as a result, consumers would be faced with increased risk. This increased risk would be more intense for disadvantaged and vulnerable sectors as they are less able to deal with search costs;
- levels of professionalism and quality of service may be affected by changes to licensing criteria;
- as the focus of licensing moves from the individual to the business it would be more difficult to identify the person responsible for unacceptable behaviour and take enforcement action to stop that behaviour;

- restrictions on business practices and behaviour may be increased to address aspects of consumer risk that would no longer be covered by educational and practical experience requirements; and
- some potential licensees may be deterred by the business operating requirements and the increased responsibility of the licensee in charge for employees.

Evaluation of the net public benefit or cost

Table 8.1 examines the costs and benefits of a business licensing scheme in terms of the evaluation criteria. Based on this it could be said that while a business licensing scheme would offer some consumer protection and would relieve some consumer information asymmetry, it would be less effective than the current regime in this regard. The shift in regulatory focus from the individual to the business would have negative implications for consumer risk.

| <i>Evaluation Criteria</i> | <i>Business Licensing Regime</i> | |
|-----------------------------------|--|--|
| | <i>Benefits</i> | <i>Costs</i> |
| Consumer protection | Consumer money held in trust would continue to be protected and compensation would be available for failure of the licensee to account for funds | Likelihood of increased risk to consumers as focus of licensing system is business risk rather than individual competence Levels of professionalism and quality of service may be affected by changes to licensing criteria Less responsive for consumers as enforcement action focuses on the business rather than the person responsible |
| Competition | Reduction in entry requirements for individuals | Increased restrictions on business practices and procedures |
| Social welfare | Possible reduction in costs for consumers which would increase access to disadvantaged groups | Possible increase in risk to disadvantaged groups |
| Industrial relations | No anticipated impact | No anticipated impact |
| Employment growth | The industry would offer greater opportunities for employment as educational and experience requirements would no longer be a prerequisite for licensing | Some potential licensees may be deterred by the business operating requirements and the increased responsibility of the licensee in charge for employees |
| Resource allocation | Reduction in licensing processing for government as business only would be licensed | Increased compliance costs in identifying the individual responsible |

Table 8.1 Evaluation of the business licensing regime option.

Option 2 Negative Licensing

A negative licensing regime would be based on legislation which prescribes acceptable standards for a conveyancer. It would not require conveyancers to hold a licence as such, but could exclude those who fail to meet practising requirements, who are not fit and proper, who are unable to obtain the required insurance and who do not abide by the legislation.

The term negative refers to an absence of licensing, not an absence of regulation. Negative licensing would be supported by an Act of Parliament that either prescribes what is not acceptable behaviour in the operation of a conveyancing business, or requires conveyancers to obtain certain types of insurance to practice, or both.

Potential benefits of negative licensing include:

- lower entry costs for potential conveyancers;
- lower compliance costs for conveyancers leading to lower costs for consumers; and
- lower administration costs for government. There would be reduced licensing administration costs but there could be an increase in complaint investigation costs. Overall, there should be a small reduction in costs to Government.

Potential costs of negative licensing include:

- without a positive screening process, the number of entrants into the market would grow bringing a potential increase in the number of complaints and exclusion processes by government;
- the government focus would move from prevention to reaction. Some consumers may be seriously affected before the government becomes aware and takes action in relation to breaches of required standards;
- the potential for defalcation would increase significantly;
- compensatory mechanisms would be reduced. There would no longer be a Compensation Fund to address consumer loss in cases of defalcation;
- the information asymmetry would increase because consumers would face additional difficulties in identifying a competent conveyancer;
- increased control by industry bodies could lead to restrictive practices; and
- compliance would be reactive rather than pro-active and therefore more resource intensive. Costs to government would

further increase as fees for licensing would no longer offset compliance costs.

Evaluation of the net public benefit or cost

Table 8.2 examines the costs and benefits of a negative licensing scheme in terms of the evaluation criteria. Based on this it could be said that while a negative licensing scheme has the potential to lower conveyancing costs it also has the potential to increase consumer risk considerably. This would be accompanied by a reduction in consumer protection mechanisms.

| <i>Evaluation Criteria</i> | <i>Negative Licensing Regime</i> | |
|-----------------------------------|---|---|
| | <i>Benefits</i> | <i>Costs</i> |
| Consumer protection | | <p>Lack of compensatory mechanisms. No Compensation Fund unless industry establishes an alternate fidelity fund</p> <p>Likelihood of increased risk to consumers and the potential for an increase in the number of complaints and exclusion of unsuitable operators</p> <p>Some consumers may be affected before the government becomes aware of dishonest or unethical behaviour</p> <p>Consumers may face difficulties in identifying a competent conveyancer</p> <p>Potential for defalcation would increase significantly – it would be difficult to identify a conveyancer to check his/her trust account</p> |
| Competition | <p>Lower entry costs for conveyancers</p> <p>Lower compliance costs for conveyancers leading to lower costs for consumers</p> | <p>Increased control by industry bodies could lead to restrictive practices</p> |
| Social welfare | <p>Possible reduction in costs for conveyancing which would increase access to disadvantaged groups</p> | <p>Possible increase in risk to disadvantaged groups</p> |
| Industrial relations | <p>No likely impact</p> | <p>No likely impact</p> |
| Employment growth | <p>The industry would offer greater opportunities for employment as education and practical experience requirements would no longer be a prerequisite for licensing</p> | <p>Increased control by industry bodies could restrict entry</p> |
| Resource allocation | <p>Reduction in licensing administration costs for government</p> | <p>An increase in compliance costs for government as fees for licensing would no longer offset the costs of administering compliance</p> <p>Compliance would be reactive</p> |

Table 8.2 Evaluation of the negative licensing regime option.

Option 3 Co-Regulation

Co-regulation refers to the involvement of a non-government body in the regulatory framework.

A co-regulatory scheme can seek to substantially devolve regulatory procedures from government to industry associations, requiring them to take responsibility for enforcing their own Codes of Practice. A system of industry monitoring by the government may be necessary to ensure that associations are effectively policing their Codes of Practice. Alternatively the transfer of regulation may be total with government retaining the power to invoke regulation in the event that industry associations are unable to satisfactorily manage their members.

Potential benefits of co-regulation include:

- an increase in industry autonomy and greater regulatory control by industry; and
- lower regulatory costs for government.

Potential costs of co-regulation include:

- consumer concern about the impartiality of any disciplinary processes administered by the industry body;
- consumer confusion about the identity of the regulatory authority and where to go for redress would result in an increase in search costs;
- resourcing of industry bodies to undertake the regulatory role. Administrative costs would be transferred from government to industry with the possibility that costs would increase in the initial phases;
- possibility that industry will fail to implement industry codes and will not follow through with dispute resolution of consumer complaints;
- difficulties arising from lack of industry cohesion due to absence of a single industry body representing the entire industry; and
- increased costs to industry bodies generally to offset administration and monitoring costs.

Evaluation of the net public benefit or cost

Table 8.3 sets out the costs and benefits of a co-regulatory licensing scheme. Based on this it could be said that a co-regulatory scheme has the potential to increase conveyancing costs for consumers based on the increased cost of administering a two-pronged regulatory scheme. In addition, consumers may face difficulties securing redress.

| Evaluation Criteria | Co-regulatory Licensing Regime | |
|----------------------------|---------------------------------------|---|
| | Benefits | Costs |
| Consumer protection | | <p>Lack of compensatory mechanisms. No Compensation Fund unless industry establishes a new fidelity fund</p> <p>Consumer concern about the impartiality of any disciplinary processes administered by the industry body</p> <p>Consumer confusion about the regulatory authority and where to go for redress would result in an increase in search costs</p> <p>Possibility that industry will fail to implement industry codes and will not follow through with dispute resolution of consumer complaints</p> <p>Difficulties arising from lack of industry cohesion due to absence of a single industry body representing the entire industry</p> |
| Competition | | <p>Potential for industry bodies to place additional restrictions on entry</p> |
| Social welfare | | <p>Possible increase in risk to disadvantaged groups</p> |
| Industrial relations | No likely impact | No likely impact |
| Employment growth | | <p>Increased control by industry bodies could restrict entry</p> |
| Resource allocation | Lower regulatory costs for government | <p>Resourcing of industry bodies to undertake the regulatory role - increased industry body costs generally to offset administration and monitoring costs</p> <p>Establishment costs for industry bodies to be able to fulfil new role</p> |

Table 8.3 Evaluation of the co-regulatory licensing regime option.

Option 4 Remove regulation

This option involves the total removal of the current system of licensing conveyancers. This would allow any person, irrespective of education and experience, to offer themselves to any consumer as a conveyancer. The performance and conduct of conveyancers would be determined by market forces, the effectiveness of industry bodies and general consumer protection and fair trading legislation. The sources for consumer redress would be the common law, the Crimes Act and the Fair Trading Act.

Regular and informed users of conveyancers would maintain their own directories of qualified persons who are experienced in the type of work they require and hold professional indemnity insurance as a normal commercial practice. However, the impact of the removal of licensing may mean that conveyancers entering the profession would have difficulty competing with those who have already established a reputation and solicitors who are supported by a licensing system which provides clearly defined avenues of redress for consumers.

Potential benefits of deregulation include:

- a reduction in administrative and monitoring costs for government; and
- industry standards which may be more flexible and responsive than legislated standards.

Potential costs of deregulation include:

- barriers to entry and anti-competitive behaviour through development of restrictive standards; and
- less scrupulous operators would be unlikely to join the industry associations and so they would remain outside any industry based regulation;
- without a screening process, levels of professionalism and quality of service would be affected and consumer risk would increase substantially;
- lack of compensatory mechanisms. No Compensation Fund or requirements for professional indemnity insurance.

Evaluation of the net public benefit or cost

Table 8.4 examines the costs and benefits of deregulation in terms of the evaluation criteria. Based on this it could be said that under

deregulation the cost of a conveyance may be reduced as there are no entry licensing costs or entry requirements. However, the increase to consumer risk would be extensive as there would be no mechanism enabling consumers to identify unscrupulous operators or for eliminating them from the marketplace. Nor would there be a means for consumers to identify a competent conveyancer.

| <i>Evaluation Criteria</i> | <i>Deregulation</i> | |
|----------------------------|---|--|
| | <i>Benefits</i> | <i>Costs</i> |
| Consumer protection | | <p>Likelihood of increased risk to consumers and the potential for an increase in the number of complaints and exclusion</p> <p>Less scrupulous operators are less likely to join industry bodies and would remain unregulated</p> <p>Higher costs for consumers pursuing a general law remedy</p> <p>Consumers would be faced with search costs in identifying a competent conveyancer</p> <p>Lack of compensatory mechanisms. No Compensation Fund unless industry establishes a new fidelity fund</p> |
| Competition | No entry costs | Barriers to entry and anti-competitive behaviour through possible development of restrictive standards |
| Social welfare | | Increase in risk to disadvantaged groups |
| Industrial relations | No likely impact | No likely impact |
| Employment growth | The number of entries into the industry may increase | |
| Resource allocation | No administrative and compliance costs for government | |

Table 8.4 Evaluation of the deregulation option.

Submissions

Although the issue of an alternative regulatory scheme was not specifically addressed in the majority of submissions, it was apparent that respondents to the review support the current regulatory regime. Respondents generally agreed that the objectives of the Act are to protect consumers of conveyancing services by providing that conveyancers be licensed, accountable and meet certain standards of competence. They also indicated that because of the nature of risk to consumers, to provide adequate protection, the regulatory regime should be based on entry requirements, business controls and a disciplinary regime. There was agreement that consumers would suffer if the current licensing regime was removed.

Those who did specifically respond to the issue of whether there was an alternative regulatory option which would provide a more efficient mechanism to achieve the current objectives of the Act held that other options would not achieve the objectives. The Australian Institute of Conveyancers noted that removal of regulation would leave consumers without adequate protection and that a negative licensing system would not provide the necessary checks and balances to protect consumers. The Institute did not consider a business licensing system sufficiently different from the current system to warrant introduction.

Conclusions

In weighing up the benefits and costs of restricting competition, the review concluded that there is a continuing need for regulatory intervention in the conveyancing industry to provide appropriate safeguards for consumers. The information imbalance between conveyancers and consumers may lead to increased instances of market failure if regulation of the industry is removed.

The current regulatory regime has the primary intention of protecting consumers against risks that they are unable to manage themselves or would find too costly to manage in the absence of the scheme. These risks relate to:

- the safety of monies held in trust in the course of many conveyancing transactions;
- incompetence in the preparation and advising on documentation, in conducting searches and making inquiries and incorrect documentation; and
- the quality of service provided in the transfer of property.

The need for protection in these terms is premised on the observation that consumers are, as a group, relatively ill-informed compared to licensed conveyancers, partly because of infrequent transacting, and are vulnerable for that reason.

Moreover, the potential losses associated with errors in a transaction may be significant. Consumers may not recognise that they have been adversely affected until some time after the sale process is finalised. As far as enforcement of legal rights is concerned, common law action requires that the consumer takes the initiative to commence action. This assumes that consumers know their rights and are sufficiently motivated to press them. However, in the

absence of regulation, consumers may not know their rights or fail to take advantage of them.²⁶

In the case of consumers at the lower end of the economic scale, or otherwise vulnerable, the effects are magnified as they are poorly-equipped to tackle such imbalances. Their experience and knowledge in undertaking sale and purchase transactions is likely to be more limited than those on the higher end of the economic scale. Consequently, they are less able to evaluate whether a conveyancer is competent or not and so, are less likely to be able to take remedial action if things go wrong.

An occupational licensing scheme addresses information deficiencies by fixing standards of entry to the industry which ensure that consumers are provided with suitable standards of service.

The current occupational licensing model is the regulatory option which best achieves the objectives of the Act and provides the greatest net public benefit in that it:

- reduces the risk of the community as a whole in transactions involving the transfer of property; and
- reduces the risk of financial loss to consumers who are directly involved in a property transaction.

The Conveyancers Licensing Act 1995 is the backbone of this licensing model. It simultaneously limits occupational entry, regulates the behaviour of licensees and provides for their professional development and is a vehicle for partially funding both regulatory activity and the insurance provided by the Compensation Fund with consequential savings to industry, government and consumers.

However, as a result of the review a number of questions have been raised about the efficiency of some provisions of the Act. An evaluation of the current provisions has been undertaken to identify ways in which these may be improved so that they respond to marketplace needs in a more flexible and dynamic manner.

Recommendation 1

The current regulatory model should be retained.

²⁶ Ross Cranston *Consumers and the Law*, Weidenfeld and Nicholson, London p 25.

9. Evaluating the costs and benefits of current legislative requirements

The current regime seeks to reduce risks for consumers dealing with conveyancers in three ways:

- through occupational licensing conditions, professional indemnity insurance and a fidelity fund;
- by regulating the business behaviour of licensed conveyancers; and
- by providing mechanisms for consumer redress through compensation and dispute resolution.

An assessment of the costs and benefits of the current legislative requirements has been undertaken to identify ways in which transacting can be made more efficient. Appendix C (pp 91-92) sets out the provisions of the Act and assesses their costs and benefits.

Market Boundary Issues

As already noted in Chapter 6 (p 38), the boundaries of conveyancing work are clearly set out in the Conveyancers Licensing Act. The Act defines conveyancing work as “legal work carried out in connection with a transaction that creates, varies, transfers or extinguishes a legal or equitable interest in any real or personal property.” Although “legal work” is usually reserved for solicitors and barristers, the Legal Profession Act provides for certain legal work to be performed by a “licensed conveyancer acting in accordance with a licence under the Conveyancers Licensing Act 1995”.

Licensed conveyancers with an unrestricted licence may carry out residential conveyancing, commercial property transfers, property transactions for small businesses and the sale of rural property. However, they are specifically excluded from:

- undertaking work relating to a mortgage on a non-residential property where the amount secured exceeds \$7 million;
- commencing or maintaining legal proceedings;
- establishing a corporation or varying the memorandum or articles of association of a corporation;
- creating, varying or extinguishing a trust;
- preparing a testamentary instrument;

- giving investment or financial advice; or
- investing money otherwise than as provided for by the Act. [section 4].

Some licensed conveyancers regard their exclusion from this range of legal work as an undue restriction on their capacity to meet the full range of client needs arising from a conveyance. Lawyers are able to provide a range of complementary services such as the preparation of wills, advice on family matters and taxation in conjunction with a conveyance. Submissions to the review call for further expansion of the scope of work to allow licensed conveyancers to also undertake legal work arising out of, or complementary to, a conveyance.

Some submissions proposed that conveyancers undertake some non-contentious aspects of complementary legal work and, where more complex issues arise, refer the matter to a legal practitioner. The difficulty with this approach is that it is often not possible to ascertain the level of complexity prior to commencing a matter. In addition, because of the inherent and potential complexity that exists in most of the proposed areas of work, expanding the scope of work would necessitate an increase in entry requirements which would consequently increase the barriers to entry.

Currently, the making of wills, grant of probate and commencing or maintaining legal proceedings constitute 'legal work' regulated under the Legal Profession Act 1987 and executed solely by legal practitioners. As such, the implications of extending the definition of legal work for conveyancers needs to be considered in the broad context of what constitutes legal work.

The National Competition Review of the Legal Profession Act considered the issue of the anti-competitive effects flowing from the reservation of certain types of work to solicitors and barristers. The Report of the review does not indicate approaches from occupational groups or individuals about non-lawyers undertaking work relating to the making of wills and grant of probate. However, the ACCC did recommend that "if a demand exists, schemes for the training and supervision of service providers who wish to work in some sectors of the legal services market should be developed."²⁷

Adding to the range of legal work that a conveyancer can perform would have competition implications if a person wishing to undertake drafting of wills and probate also needs to be a licensed

²⁷ National Competition Policy Review of the Legal Profession Act 1987: Final Report. Chapter 3 Discussion.

conveyancer. Consideration would need to be given to whether this is the most appropriate way of delivering these types of services by a non-solicitor.

A number of submissions considered that a conveyancer should be permitted to execute powers of attorney. The Land Titles Office Green Paper on Powers of Attorney (released in October 1999) contemplates extending the class of people authorised to issue a certificate of enduring power of attorney to include public trustee employees and licensed conveyancers. This proposal is still under consideration.

Some respondents propose extending conveyancing work to include the provision of investment/financial advice and the establishment or variation of company memoranda. However, these matters are subject to the *Corporations Law* administered by Australian Securities and Investments Commission (ASIC) and any call for entitlement to provide such advice is for the federal Treasurer to consider.

Conveyancers are also restricted in providing services for mortgages on non-residential property where the amount secured exceeds \$7 million. It is unclear as to why the limitation has been set down as there would appear to be little difference in the degree of complexity arising from a conveyance of non-residential property for \$7 million compared to that of a property exceeding \$7 million. The dollar amount specified is now five years old and needs to be revised. However, because lifting the restriction completely may have an impact on the Property Services Compensation Fund, which is shared with those regulated under the Property, Stock and Business Agents Act, an actuarial study needs to be undertaken prior to any amendment.

Although the range of work for conveyancers was extended with the introduction of the 1995 Act, there has only been limited response from the industry to take on the broader range of work. As indicated in the discussion about the range of work in Chapter 3, the majority of work done by conveyancing firms is residential work, with other conveyancing work representing only a minor proportion of the total workload. Existing figures (Chapter 3) do not substantiate a need for further expansion of the scope of work at this stage.

Recommendation 2

The boundaries of conveyancing work as set out in the Conveyancers Licensing Act 1995 should be retained in their current form

Recommendation 3

The limitation for providing services in relation to mortgages on non-residential property where the amount secured exceeds \$7 million should be reviewed. The review of this restriction should take place following an actuarial study of the impact on the Property Services Compensation Fund to explore avenues for extending the Compensation Fund and possible alternatives to the Fund.

Licensing Issues

Application process and disqualified persons

As described in Chapter 4, the Conveyancers Licensing Act provides that anyone who wishes to carry on the business of a conveyancer must be licensed. The current licensing provisions require an applicant to demonstrate educational qualifications, practical training, be over 18 years old, have professional indemnity insurance and contribute to a compensation fund (a detailed explanation of the licensing process appears on p.22).

The rationale for the licensing entry requirements is to ensure that potential licensees are competent to carry out the work of a conveyancer and that they meet 'good character' requirements aimed at reducing the entry of those most likely to commit trust fund offences and engage in dishonest and unethical practices.

The review has concluded that these requirements are largely appropriate and do not impose unreasonable barriers to entry. However, a number of opportunities to simplify the licensing process and make it more efficient have been identified.

Firstly, anomalies exist in relation to the list of persons disqualified from holding a licence. For example, persons disqualified from holding a licence under the current Act or a corresponding Act in another jurisdiction are not covered. Also, a legal practitioner or barrister who is subject to a finding of professional misconduct or unsatisfactory professional conduct, but who has not been removed from the roll of legal practitioners, is not a disqualified person for the purposes of the Conveyancers Licensing Act.

There are also other possible circumstances where it would be considered inappropriate for a person to be granted a licence. However, because they do not fall within the criteria currently prescribed under the legislation, an application for a licence could not be refused.

To address these matters, it is proposed that the definition of a disqualified person for the purposes of the Act be revised to include:

- i) persons disqualified from holding an equivalent licence in a corresponding Australian jurisdiction; and
- ii) persons who are not 'fit and proper'.

It is difficult to anticipate the various circumstances which might render a person unfit to hold a licence. Therefore, inclusion of a 'fit and proper' test would provide an appropriate discretion which could be exercised to exclude those persons who do not fall within the specific criteria contained in the legislation, but are considered to be in any other way not fit and proper to hold a licence. Meeting this test usually involves a police check when a person applies to become licensed. A person will also be disqualified from holding a licence if they are an undischarged bankrupt, mentally incapacitated, or disqualified or suspended from holding a licence under this Act or a corresponding law.

It is also proposed that the re-application process in the legislation be replaced with annual renewal. This will align the Act with other licensing regimes administered by the Department of Fair Trading. Renewal would be subject to provision of an auditor's report where trust moneys have been held in the preceding year, continuing professional development and the holding of professional indemnity insurance for the term of the licence.

The Director-General of the Department of Fair Trading would determine applications for the grant and renewal of a licence with appeals lying to the Administrative Decisions Tribunal.

In addition, the specific disqualification of persons who hold a barrister's or a solicitor's practising certificate under the Legal Profession Act 1987 is considered unnecessary. Practising solicitors and barristers are able to carry out conveyancing work and therefore do not also require a conveyancers licence.

It is estimated that the introduction of a renewal system would provide some cost savings to both industry and government as it would permit simplification of the administrative process. As far as the proposed changes to the disqualified persons provisions are concerned, it is considered that they would improve consumer protection without involving additional costs.

Recommendation 4

The definition of a disqualified person for the purposes of the Act should include:

- persons disqualified from holding an equivalent licence in a corresponding Australian jurisdiction; and

- persons who are not 'fit and proper'.

Recommendation 5

The category of persons who hold a solicitor's or barrister's practising certificate should be removed from the list of disqualified persons under the Act.

Recommendation 6

The licence re-application process in the Act should be replaced with annual licence renewal.

Educational and practical experience requirements

To obtain a conveyancers licence an applicant is required to complete a recognised course of study for a period equivalent to approximately two years of full-time study, or completion of a law degree. In addition, a period of practical experience must be completed.

The educational and practical experience requirements are set down in a Ministerial Order. Guidelines for the educational requirements were originally developed by the College of Law at the time the Conveyancers Licensing Act 1992 was introduced. The guidelines were expanded and amended in 1996 to correspond to the broader range of work set down in the 1995 Act. To ensure that conveyancers have levels of conveyancing knowledge and skill similar to that of legal practitioners, care has been taken to ensure that course guidelines for conveyancers reflect the content of comparable topics in law courses. Members of the Reference Group suggested that the educational guidelines could include additional areas of study in ethics, risk management and business management.

As well as meeting the educational requirements, licence applicants must work under the supervision of a licensee or solicitor for one year to gain a 'conditional licence' and for two years if an 'unconditional licence' is sought.

The review identified some difficulties for student conveyancers in obtaining placements for practical experience. In part, this could relate to the fact that the industry is still relatively small and opportunities to obtain practical experience remain limited. However, the current trend where many licensees are gaining work in solicitors' offices would suggest that practical experience may be gained in legal firms as well as in conveyancing businesses.

Difficulties were also raised in relation to obtaining meaningful practical experience. For practical experience to be meaningful, the

supervising conveyancer or solicitor needs to be committed to taking the time to oversee the work of the student and provide a range of different tasks. This can place considerable demands on an employer's time. As most conveyancing businesses are small businesses often operated by a single licensee, and quality supervision is necessarily intensive, these businesses may not be in a position to offer effective practical experience.

The traditional approach to learning, based on the completion of a course and a period of training after a fixed time, has long been recognised as inflexible. Courses are not perceived as being based on a thorough analysis and identification of workplace requirements. As part of the National Training Reform Agenda, in 1989 a national competency-based approach to training was endorsed to provide more flexibility and give industry a much greater role in identifying and determining the standards and outcomes of training. Since then a number of industries, including the conveyancing industry, have developed competency standards under the guidance of the appropriate national industry training body. 'Competency' is the identified measure of knowledge and skill necessary to achieve the performance standards required for a specified workplace activity

Competency standards could be introduced to replace the current education and practical experience requirements with a set of entry-level competencies based on National Competency Standards. The introduction of competency standards would have the effect of combining practical experience and knowledge-based coursework. More practical components could be provided within the conveyancing courses either as part of the assessment criteria or as separate modules. This would assist in addressing current and future problems associated with fulfilling the practical experience aspect of licensing requirements.

The introduction of competency standards would provide an opportunity for a general review of current guidelines for conveyancer courses and practical experience. The review would consider whether course requirements continue to adequately address areas of consumer risk and whether there are any additional areas of study that need to be included.

Recommendation 7

Competency standards should be introduced as part of licensing criteria for conveyancers.

Recommendation 8

The general guidelines for course content and practical experience should be reviewed.

Continuing Professional Development

Currently, as a condition of their licence, conveyancers are required to undertake five (5) hours per year of continuing education in accordance with guidelines issued by the Director-General. This requirement recognises the dynamic and changing nature of the marketplace and provides a flexible approach to meeting the ongoing competency levels of professionals.

While there was general support in submissions for retaining requirements for professional development, some expressed the view that the current quota for continuing education is insufficient. It was suggested that between 8-10 hours per year would be more appropriate. This would be consistent with the current requirements for solicitors which is currently for 10 hours per year.

In relation to the relevance of continuing professional development, the Legal Services Commissioner suggests that greater emphasis should be placed on business management, legal ethics and communication.

While legal ethics is a component of the courses currently approved for licensing purposes, there appears to be a need for on-going education in aspects of ethics specific to conveyancing. Continuing education could address this through practical problem-solving legal ethics courses designed to assist conveyancers with the day-to-day ethical questions they face.

The Legal Services Commissioner also identified poor communication as one of the main causes of complaint. Again continuing education would be an effective means of addressing consumer concerns and thereby reducing the level of complaints.

Trust accounting, bookkeeping and office management procedures were also identified by the review as areas where licensees require additional training. These could be covered in a continuing education business management course.

Accordingly, it is recommended that the requirement for conveyancers to undertake continuing education be retained. However, rather than a condition being placed on a licence, continuing education should be a separate requirement for renewal of a licence.

It is also proposed that the number of hours of continuing education be increased for the following reasons:

- the Legal Services Commissioner raised a number of concerns about licensees communication skills and understanding of ethical issues based on the types of complaints received,
- the survey of licensed conveyancers raised concerns about trust accounting practices; and
- inspections undertaken by the Department of Fair Trading indicate a need for additional training in bookkeeping and office management procedures.

It is also recommended that Director-General guidelines for continuing education be developed based on identified areas of concern. Consumer complaints and disputes could provide a way of identifying emerging and persistent problem areas. A regular review of the guidelines will provide a flexible and dynamic means of dealing with concerns which may arise from time to time in relation to the education needs of conveyancers.

The proposed changes to the professional continuing development requirements would signify a cost to industry as licensees would be required to undertake additional hours of training in identified areas of concern. In the current climate, it is well accepted by professionals that they need to constantly be up-dating their knowledge and skills to remain competitive. In recognition of this many professionals would undertake regular training whether or not it is prescribed. In the case of conveyancers, there is also the added responsibility of ensuring that their work is completed in an accurate and ethical manner and that their clients' moneys are properly accounted for. As such, it is considered that the benefits in consumer protection resulting from conveyancers undertaking annual professional continuing development outweigh the costs.

Recommendation 9

The renewal of a licence should be linked to a requirement under the Act for annual continuing professional development of 10 hours.

Recommendation 10

The Director-General should determine guidelines which would be applied to continuing professional development.

Professional indemnity insurance and contributing to the fidelity fund

Conveyancers are required to have approved professional indemnity insurance cover against the risk of professional negligence which causes financial loss to a client. Conveyancers practising in their own right must have their own policy. Employees working for a licensee or a solicitor must be covered by their employer's policy.

The current provisions for professional indemnity insurance were introduced in 1995 to allow conveyancers to be able to negotiate their own policies either individually or as a group. Prior to this, there was only one master policy which meant that conveyancers were not in a favourable position to negotiate cost savings. Coverage is now provided through two master policies provided through the Australian Institute of Conveyancers and the NSW Conveyancing Society.

Conveyancers are also required to contribute to a fidelity fund, the Property Services Compensation Fund, as a part of their licence fee.

The mandatory nature of the professional indemnity insurance and fidelity fund contributions for conveyancers represents a potential restriction on competition by excluding those persons who are unable to obtain or afford such cover.

However, an evaluation of the professional indemnity claims history for conveyancers shows that there are a number of common problem areas including:

- failure to properly advise a client of defects in a property;
- failure to make proper searches on a property before settlement;
- failure to advise the client of restrictions on the rights of use of a property; and
- failure to advise the client of their rights and obligations under a contract to purchase a property and failing to ensure that the client was properly protected under the contract.

It appears that the majority of conveyancing claims arise because conveyancers fail to:

- properly communicate with their clients;
- ensure that clients are adequately advised and their directions followed;
- properly document client instructions.

While professional indemnity requirements impose costs on conveyancers, it is clear that consumers require the benefit of protection against losses which are caused by negligence. Unlike practitioners of other occupations, conveyancers can hold significant sums of money in trust and accordingly, the consumer risk of direct pecuniary loss is higher.

The Compensation Fund established under the Property, Stock and Business Agents Act 1941 is available to compensate consumers who suffer loss because of a conveyancer's failure to account. A failure to account occurs when a licensee fails to account to a person for moneys or property that has been received by the licensee or an employee in the course of the licensee's business. Since February 1996, forty (40) claims totalling \$1.3m have been received in respect of two licensed conveyancers.

In its submission to the review, the Land Titles Office raised concerns about the statutory limits placed on payments from the Compensation Fund. Currently, the Property, Stock and Business Agents Act provides that an individual claim can not exceed \$500,000, and that the total claims in respect of any one failure to account can not exceed \$2 million. Therefore, in cases of many large claims, it may be necessary to apportion the amounts paid to claimants. It is the view of the Land Titles Office that there should be a discretion to pay claims which exceed the statutory limit along similar lines as to that which applies to solicitors under section 89 of the Legal Profession Act 1989. That section allows the Law Society Council to pay claims that are above the statutory limit but which it deems reasonable after taking into account the total liabilities of the Solicitors' Fidelity Fund.

The Compensation Fund is an important component of the current regulatory regime which is aimed at limiting consumer exposure to limiting consumer loss. The review concluded that a compensatory mechanism is a necessary feature of the consumer protection regime.

As the Compensation Fund also compensates consumers of persons licensed under the Property, Stock and Business Agents Act 1941 it is appropriate to seek actuarial advice about the continuing adequacy of the Fund prior to introducing any discretion to pay claims that exceed the current statutory limit.

Recommendation 11

The requirements for professional indemnity insurance and contribution to the Property Services Compensation Fund should be retained as a prerequisite for licensing.

Regulating business behaviour

Trust accounting

The Conveyancers Licensing Act provides that regulations may establish the way in which a conveyancing business should be conducted. In the legislation considerable emphasis has been placed on dealing with monies held on behalf of the client. The Conveyancers Licensing Regulation contains detailed and comprehensive record keeping requirements for trust accounting. Records must be compiled in chronological order and must contain details of a client's name, address, matter number, matter description, client number and bank account number. Requirements for ledger entries, account statements, receipts, transactions and computer records are also detailed in the Regulation. The objective of these provisions is to ensure a clear audit trail and reduce the possibility of misappropriation of funds.

The Survey of Licensed Conveyancers indicates that 45% of those responding to the Survey do not use or manage a trust account. Of those licensees working in a conveyancing business, 69% indicate that they do not deposit monies into a trust account and 28% do use such an account. In contrast, 71% of conveyancers working in a solicitor's office deposit monies into the solicitor's trust account when appropriate, and only 18% of those working in a solicitor's office indicated they do not use a trust account.

The main reasons given for not establishing and using a trust account are that:

- it is too time consuming and too much trouble;
- it is not necessary – no clients' money is held - disbursements are billed at settlement and clients make cheques out to third parties;
- a controlled money account is used;
- it is expensive to set up;
- the compliance requirements are unclear; and
- they signify heavy workload for a small business.

The comments made by conveyancers about the reason for not using a trust account seem to indicate a general assumption that the monies they take do not need to be deposited into a trust account. There appears to be a lack of understanding about what constitutes 'trust money' and the fiduciary duty a conveyancer has to his or her clients.

Submissions to the review indicate strong support for retaining current requirements. Respondents noted that while compliance with trust accounting requirements increases the administrative burden and so, the costs of a conveyancer, they represent a moderate restriction on competition and are justified by the protection offered to consumers. The Office of the Legal Services Commissioner noted that there should be parity between the trust account and controlled money account requirements in relation to both licensed conveyancers and solicitors.

The review provides an opportunity to revise and update trust account keeping requirements. This may involve amendments to the Regulation following further consultation on particular aspects of the provisions.

Recommendation 12

The requirements for trust account keeping should be retained but they should be assessed for possible streamlining and simplification and to ensure that they meet current accounting and banking practices.

Recommendation 13

Trust accounting should be specified in the requirements for continuing professional development.

“Rules” for conveyancers

Section 24 of the Conveyancers Licensing Act makes provision for establishing guidelines for the way in which a conveyancing business should be conducted. Those guidelines may adopt, with or without modification, any rules or guidelines made by the NSW Law Society. To date, no rules or guidelines have been developed under section 24 of the Act.

It is common for legislation to provide for regulations to make rules and guidelines. Under the Legal Profession Act, The NSW Law Society and Bar Association make practice rules which are binding on the legal profession. A breach of the rules may amount to professional misconduct or unsatisfactory professional conduct by a practitioner.

In his submission to the recent review of the Legal Profession Act, the Legal Services Commissioner recommended a need for rules for conveyancers. He considers that rules reduce complaints and serve to illustrate to conveyancers just what constitutes professional conduct. The development of rules would assist in improving consistency and also remove any potentially anti-competitive

differences between the requirements placed on solicitors and conveyancers.

In submissions to the review there was general support for the introduction of rules for conveyancers. The Law Society considers that practice rules comparable to solicitors' rules under section 57B of the Legal Profession Act would be beneficial for consumers, enabling them to enjoy the same levels of protection in relation to services by solicitors and licensed conveyancers.

The Office of the Legal Services Commissioner identifies three roles for practice and conduct rules:

- "Guide practitioners in ethical conduct;
- Assist regulators in determining whether a practitioner is guilty of unsatisfactory professional conduct or professional misconduct; and
- Provide members of the public with a guide to how competent and diligent lawyers should conduct their practice."²⁸

With these objectives in mind it is suggested that rules similar to those which apply to legal practitioners be prescribed under the Conveyancers Licensing Regulation. Such conveyancers' rules could cover the following aspects of conveyancing:

- disclosure of costs - conveyancers must disclose costs whereas solicitors are required to do so only where the cost will exceed \$750 (the '\$750 disclosure rule'). This is inconsistent and also onerous for conveyancers – they should be subject to the same rule;
- acceptance and termination of a retainer;
- ownership of documents (title deeds, building reports etc) and exercise of lien;
- provision of information about the conveyancing process;
- responsibility for instructions (during a conveyance) for work on subject property;
- failure to account to both parties; and
- (the place) where settlement occurs.

A breach of the Rules could be subject to the issue of a penalty notice. It could also lead to disciplinary action which would carry the ultimate sanction of licence suspension.

²⁸Office of the Legal Services Commissioner: Submission to the National Competition Policy Review of the Legal Profession Act 1987 p 4.

It is estimated that the introduction of rules would involve a relatively low level of cost to industry, consumers or government. Any costs would be offset by benefits provided in the form of clear guidelines to all sectors about acceptable levels of competence and behaviour.

Recommendation 14

'Rules', similar to solicitors' rules, should be prescribed for conveyancers.

Recommendation 15

A breach of the rules should be an offence and subject to a penalty notice, or should lead to disciplinary action such as suspension or cancellation of the licence.

Multi disciplinary practices

A multi-disciplinary practice has been defined as a business in which members of more than one profession or occupation provide a combination of services for clients.²⁹ In the case of conveyancers, this would involve a conveyancer and a member of at least one other profession practising together.

The Conveyancers Licensing Act regulates the involvement of other professionals in conveyancing practices in a number of ways. The Act places limitations on the types of persons who may be associated with or employed by a licensed conveyancer. There are restrictions on engaging in multi-disciplinary partnerships, the sharing of receipts and employing certain persons in a conveyancing business. Corporations cannot be licensed to undertake conveyancing services.

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. However, they could also be considered anti-competitive. With the increasingly complex marketplace and the current globalisation process, the restrictions placed on multi-disciplinary practices may limit innovation and the adoption of different business strategies.

Multi-disciplinary practices offer the potential to increase the range of choices available to consumers by combining existing

²⁹ Law Council of Australia. National Profession Taskforce Multidisciplinary Practices Working Group. Issues Paper: Multidisciplinary Practices: Legal Profession Privilege and Conflict of Interest. September 2000 .p 1.

professional services and by creating new ones.³⁰ “The convenience of integrated service provision in a transaction requiring advice/input from more than one professional can reduce transaction costs and the duplication of services.”³¹ The ability to form multi-disciplinary partnerships is not only beneficial to larger firms but allows smaller firms to create more flexible business structures that provide a range of complementary services. This may be particularly beneficial to small suburban firms and those located in country towns.³²

The Legal Profession Amendment (Incorporated Legal Practices) Act 2000 permits solicitors to incorporate. Under the legislation, a legal practice may be incorporated under the Corporations Law, with the exception of a managed investment scheme. At least one director must be a solicitor with an unrestricted practising certificate and the solicitor director/s are responsible for the management of the legal services provided in NSW by the practice. Disciplinary proceedings may be taken against a solicitor director for failure to carry out management responsibilities and failures to report and deal with misconduct by employed solicitors. Solicitors retain the professional obligations of a solicitor, which include duties to the court, freedom from conflict of interest, duties of disclosure and ethical rules.

Submissions to the review generally support the incorporation of conveyancers. However, concerns were raised about the need for conveyancers to be subject to directors’ obligations as is proposed for solicitors. There were also concerns about the possible conflict of interest arising between real estate agents and conveyancers. The Office of the Legal Services Commissioner has indicated a need for the preservation of complaint and discipline arrangements in the event of permitting the incorporation of conveyancers.

A similar model could be adopted for the incorporation of conveyancers with the following additional features:

- fit and proper checks on other directors; and
- prohibition of incorporation involving a person licensed under the Property, Stock and Business Agents Act 1941.

The current restrictive aspects of the sharing of receipts and multi-disciplinary partnerships could be amended to make them

³⁰ Law Council of Australia. National Profession Taskforce Multidisciplinary Practices Working Group. Issues Paper: Multidisciplinary Practices: Legal Profession Privilege and Conflict of Interest. September 2000 .p 2

³¹ Ibid

³² T Thomas “Laws shape up for disciplined blend” *Business Review Weekly*, 1 September 2000, p 95.

consistent with this model. In addition, the restriction on sharing staff of legal practitioners could be lifted to allow for efficient business structures to be adopted involving solicitors and conveyancers. However, because of the possibility of conflict of interest, the restriction in relation to sharing staff with a real estate or other agent licensed under the Property, Stock and Business Agents Act would be retained.

Recommendation 16

The restriction on sharing staff of legal practitioners should be lifted but the sharing of staff with a real estate or other agent licensed under the Property, Stock and Business Agents Act should be retained.

Recommendation 17

The disqualification of corporations from becoming licensed should be removed and a similar model to that adopted under the Legal Profession Act should be adopted for conveyancers, with the condition that fit and proper checks be undertaken on other directors, and incorporation involving a person licensed under the Property, Stock and Business Agents Act 1941 be prohibited.

Disciplinary process

Complaint and disciplinary procedures

Under the existing arrangements the Department of Fair Trading and the Legal Services Commissioner share responsibility for the complaint handling and disciplinary process. The complaint and disciplinary procedures for conveyancers are the same as for solicitors in respect of professional misconduct and unsatisfactory professional conduct and are set out in Part 10 of the Legal Profession Act.

The objectives of the complaints and disciplinary procedures are to:

- provide redress for consumers who use a conveyancer's services;
- ensure compliance with standards of honesty, competence and diligence; and
- to maintain sufficiently high ethical and practice standards.

The elements of the scheme are set out in the diagram on page 27 of this report.

It is evident both from comments provided to the review and following an assessment of the complaint handling and disciplinary process, that the linking of the Conveyancers Licensing Act with

Part 10 of the Legal Profession Act and the distinct yet sometimes overlapping responsibilities of the different agencies has resulted in some administrative and regulatory inefficiencies.

The legislative structure does not fully reflect the links between the issues that arise in the regulation of conveyancers. 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.

The current model is based on a two tiered system of referrals and procedures where all complaints must be referred to the Office of the Legal Services Commissioner in the first instance. One of the concerns raised was the time lost in adhering to the requirements of this referral system. It has become apparent that the time factor can operate to compound the extent of harm that can occur. The time factor is crucial in cases involving trust account defalcation where it is essential that action be taken quickly to quarantine the trust account. Although action against the conveyancer may be taken at a later time, it will not always effectively assist consumers. The impact of this may be considerable depending upon the types of concerns raised by the consumer.

Experience has also shown that as an investigation progresses, issues around jurisdiction and powers to investigate and gather evidence arise. The current model can mean that as new evidence is gathered, the agency with appropriate jurisdiction may change. Due to the nature of investigations, the likely outcome and potential remedies may change as additional information is obtained. This has resulted in cases where the best remedy may lie with a different agency to the one which initiates or is acting on the complaint. For both licensees and consumers this presents a confusing picture and reduces the credibility of the disciplinary scheme. For regulators it presents difficulties in coordination and uncertainty about whether they have ventured outside their jurisdiction, protection and powers.

The current New South Wales model was introduced, in response to recommendations by the Law Reform Commission³³ for the need for impartiality and independence of offices investigating complaints about the legal profession. Concerns had been raised about the fairness and impartiality of self-regulation by the legal profession. As a result the Office of the Legal Services

³³ *Report 70 (1993) Scrutiny of the Legal Profession: Complaints against Lawyers*. NSW Law Reform Commission, 1993.

Commissioner was established in 1994 to supervise and monitor the handling of complaints by professional bodies representing solicitors and barristers.

Licensed conveyancers were included in that scheme. However, the need for greater impartiality in the investigation of complaints about conveyancers was required for different reasons to solicitors and barristers. Prior to the establishment of the Office of the Legal Services Commissioner and the introduction of the Conveyancers Licensing Act 1995, conveyancers were subject to a review system managed by a profession against which they were competing for a market share. To separate the regulation of the two professions, the general manager of the former Property Services Council and the Office of the Legal Services Commissioner were given co-regulatory responsibility for the conveyancers disciplinary scheme.

When the Conveyancers Licensing Act 1995 was introduced there were only 45 licensees and it was logical to tie compliance and disciplinary procedures to an established standard. Since then the industry has grown considerably and continues to expand. It may no longer be appropriate to bind the disciplinary procedures for conveyancers to a system which was introduced to supervise industry body handling of disciplinary processes for solicitors and barristers.

Under the current model, the Director-General of the Department of Fair Trading is treated as one of the 'Councils'³⁴ for the purposes of Part 10 of the Legal Profession Act. The legislative scheme does not differentiate between industry associations and the head of a government department. The Director-General has a range of statutory functions and powers under various Acts in respect of fair trading, licensing, registration and consumer protection. The fetter on the Director-General's discretion to act in respect of alleged or suspected misconduct by a conveyancer is inconsistent with his powers and responsibilities under other legislation.

Information about the nature and level of complaints about licensed conveyancers is contained in the Office of the Legal Service Commissioner's Annual Report.³⁵ Of the complaints received about legal practitioners³⁶, the highest percentage relates to conveyancing matters (16.1% in 1998-1999 and 14.3% in 1999-2000). The majority

³⁴ Under section 82(2)(b) references to a 'Council' in Part 10 of the Legal Profession Act are read as references to the Director-General of the Department of Fair Trading as well as the Law Society Council and the Bar Council.

³⁵ Office of the Legal Services Commissioner Annual Reports 1998-1999 and 1999-2000.

³⁶ The Office of the Legal Services Commissioner receives complaints about legal practitioners including solicitors, barristers and licensed conveyancers.

of complaints are about costs³⁷, negligence³⁸, communication³⁹ and ethical matters⁴⁰.

At 30 June 2000, there were 241 licensed conveyancers⁴¹ and 15,324 practising solicitors⁴². In 1999-2000 the Office of the Legal Services Commissioner received 13 complaints about licensed conveyancers and 2554 about solicitors. In comparison 13 complaints were received about conveyancers and 2668 about solicitors during 1998-1999. Of the 13 complaints received only three were referred to the Department of Fair Trading for investigation in 1999-2000 and one in 1998-1999.

None of these complaints gave rise to proceedings in the Administrative Decisions Tribunal for professional misconduct or unsatisfactory professional conduct. Those complaints not referred for investigation were resolved through a range of other action such as providing information, informal and formal mediation.

If we compare the figures for complaints to the numbers of licensees it becomes apparent that for the 1999-2000 period the level of complaint against conveyancers is lower than that for solicitors: 5.3% for conveyancers as opposed to 16.6% for solicitors.⁴³ This may suggest that the consumer faces a different level of risk when dealing with a solicitor compared with a conveyancer. However, there is insufficient specific data available for a detailed risk analysis as part of this review.

Submissions to the review considered that legislative provisions relating to conduct need to be broad enough to cover a wide range of inappropriate behaviour. There also needs to be enough flexibility in the provisions to allow for new types of behaviour emerging as a result of changes in the marketplace.

Respondents to the review regarded the protection of consumers as paramount and emphasised the need for assurance that instances of misconduct would be disciplined. Submissions viewed a disciplinary scheme as necessary to ensure access to consumer

³⁷ For the 1998-1999 period 36.5% of complaints were about costs and for 1999-2000 it was 12.6%

³⁸ For the 1998-1999 period 21% of complaints were about negligence and for 1999-2000 it was 12.5%

³⁹ For the 1998-1999 period 27.9% of complaints were about negligence and for 1999-2000 it was 12.4%

⁴⁰ For the 1998-1999 period 19.3% of complaints were about ethical matters and for 1999-2000 it was 9.4%.

⁴¹ Source: Department of Fair Trading Annual Report 1999-2000.

⁴² Source: Law Society of NSW

⁴³ It should be noted that the annual report for Office of the Legal Services does not distinguish complaints about conveyancing and while complaints about conveyancers would be limited to conveyancing matters, complaints about solicitors can relate to any area of their work.

redress when standards of honesty, competence and ethics are not adhered to. Respondents held that the consumer benefits of the disciplinary scheme far outweigh any costs. An effective complaints and disciplinary system assures the public of protection from the risk of repeat misconduct by a particular licensee and acts as a deterrent to other licensees.

Some respondents to the review including the NSW Conveyancing Society and some licensees indicated that they would have no objection to transferring full responsibility for the disciplinary scheme to the Department of Fair Trading given its role as an “independent” regulator for conveyancers and other professional licensing schemes. Such a move could provide a more seamless complaint and dispute resolution process for both consumers and licensees with a single point of entry for complaints. Because there would no longer be a need for the current referral process the system could be more efficient and effective.

The Law Society’s submission noted that this approach could give rise to certain inequities. For example, disparity could develop in the level of consumer protection for the two professions providing conveyancing services. Currently this is avoided by prescribing disciplinary procedures for conveyancers and solicitors in Part 10 of the Legal Profession Act.

Similarly the Office of the Legal Services Commissioner considers that as licensed conveyancers and solicitors undertaking conveyancing work are doing the same work, they should be treated in a similar way. The Legal Services Commissioner also considers his role in the regulatory scheme to be different to that of the Director-General in that he focuses on resolving complaints and influencing practitioners to change their behaviour.

In other jurisdictions, risk has been successfully managed by adopting more straightforward models where the licensing authority is provided with mechanisms to deal with inappropriate behaviour. In Western Australia, the Settlement Agents Supervisory Board has the power to investigate and inquire into whether a settlement agent is complying with the requirements of the Settlement Agents Act 1981 and detect whether an offence has occurred. The Board can also conduct disciplinary proceedings into the conduct of an agent. Appeals about a decision of the Board are to the District Court.

In South Australia complaints that constitute grounds for disciplinary action against a conveyancer are heard in the District Court. The Commissioner for Consumer Affairs or any other person

may lodge a complaint with the Court. If the Court finds there is cause for taking disciplinary action, orders may be made ranging from a reprimand, a fine, suspension or cancellation of registration to disqualification under the Conveyancers Act 1994.

Two disciplinary options were considered by the Steering Committee. First, retaining the current system with possible modifications, and second removing the links to the Legal Profession Act and providing for all aspects of compliance and discipline in the Conveyancers Licensing Act.

Option 1

Under this option, the Department of Fair Trading and the Legal Services Commissioner would continue to share responsibility for the disciplinary process and Part 10 of the Legal Profession Act would continue to set out the regulatory framework for the process.

As is currently the case, disciplinary action could be taken against a conveyancer for professional misconduct or unsatisfactory professional conduct. Professional misconduct would include: unsatisfactory professional conduct if the conduct involved a substantial or consistent failure to reach reasonable standards of competence and diligence; conduct otherwise than in connection with a conveyancing business that would find a conveyancer of not being of good fame and character; and conduct declared to be professional misconduct by any provision of the Conveyancers Licensing Act. Unsatisfactory professional conduct would include conduct that “falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonable competent conveyancer.” (Dictionary, Conveyancers Licensing Act 1995).

In addition, as is presently the case, action could be taken to suspend or cancel a licence in certain circumstances. Some of those circumstances would relate to licensing provisions, for example:

- if the licensee no longer requires a licence;
- if the fidelity fund contribution has not been paid;
- if the licensee does not hold an approved policy of professional indemnity insurance;
- if the licensee has become a disqualified person; or
- if the licensee fails to comply with a condition of the licence.

Others would relate to compliance and include:

- non-compliance with trust and controlled money requirements set out in Division 2 of Part 3 of the Conveyancers Licensing Act 1995 and regulations;
- conviction of an offence under Act;
- imprisonment; or
- the failure to comply with requirements to provide certain information and documents relating to a licensee's conduct.

All complaints about licensed conveyancers would be referred to the Legal Services Commissioner in the first instance. The Commissioner can investigate a complaint himself, refer it to the Director-General of the Department of Fair Trading for investigation, or dismiss it. If, following investigation into the conduct of a licensee, there is reasonable likelihood that the licensee would be found guilty of professional misconduct or unsatisfactory professional conduct, it can be referred to the Legal Services Division of the Administrative Decisions Tribunal.

The Legal Services Commissioner would continue to play a monitoring and review role in the disciplinary process. The Commissioner would give the Director-General directions on the handling of a complaint or require a report on the progress of an investigation and would also have a responsibility to monitor investigations by the Department. A complainant could apply to the Legal Services Commissioner for review of a decision by the Director-General to dismiss a complaint, to reprimand a licensee or to omit certain allegations in information laid before the Tribunal.

The composition of the Tribunal for hearing a complaint against a conveyancer would still be one solicitor member, one conveyancer member and one lay member with the solicitor member presiding at the hearing.

Evaluation of Option 1

| <i>Evaluation Criteria</i> | <i>Disciplinary process - Option 1</i> | |
|----------------------------|--|---|
| | <i>Benefits</i> | <i>Costs</i> |
| Consumer protection | <p>Ensures compliance with standards of honesty, competence and diligence</p> <p>Maintains ethical and practice standards</p> <p>Provides the means to remove practitioners found to be behaving inappropriately</p> <p>Provides an impartial disciplinary scheme independent of industry</p> <p>Focuses on resolving disputes and influencing practitioners to change their behaviour</p> | <p>Because of the dual point of entry for complaints, consumers may be confused about how and where to make a complaint</p> <p>The involvement of two regulatory instruments can cause conflicting priorities, coordination issues and issues around jurisdictional powers to investigate and gather evidence</p> <p>Referral system can operate to compound extent of harm eg in case of defalcation</p> <p>Potential for complaints</p> |

| | | |
|----------------------|--|---|
| | | becoming 'lost' in the system |
| | | System not flexible enough to deal quickly with new types of emerging behaviour |
| | | Information sharing difficulties |
| Competition | Consistency in disciplinary outcomes for all those providing conveyancing services | |
| Social welfare | No likely impact | No likely impact |
| Industrial relations | No likely impact | No likely impact |
| Employment growth | No likely impact | No likely impact |
| Resource allocation | | Cost to government of administering dual regulators |

Table 8.2 Evaluation of Option 1 – retain the current disciplinary scheme with responsibility for the disciplinary scheme shared between the Department of Fair Trading and the Office of the Legal Services Commissioner.

Option 2

Under this option, the disciplinary process would be regulated under the Conveyancers Licensing Act and the links to the Legal Profession Act would be removed. Accordingly, complaints received about conveyancers would no longer be forwarded to the Legal Services Commissioner. Instead, the Department of Fair Trading would receive and carry out the investigation of complaints. The Director-General would be responsible for determining disciplinary matters.

Grounds for disciplinary action would be specified in the Conveyancers Licensing Act and include offences under the Act, serious and persistent breaches of the “rules” or failure to undertake work in an ethical, competent and diligent manner. Giving the Director-General responsibility for disciplinary action would be consistent with other legislation administered by the Department of Fair Trading. It would also be in line with the Director-General’s powers under section 64A of the Fair Trading Act which allows a trader’s licence to be suspended in urgent circumstances.

The Administrative Decisions Tribunal would continue to play a role in the disciplinary system. However, rather than hearing matters in its original jurisdiction, the Tribunal would consider matters relating to conveyancers in its review jurisdiction. Conveyancers would be able to appeal decisions of the Director-General of the Department of Fair Trading through the Tribunal.

It has been suggested that changing the role of the Administrative Decisions Tribunal in the disciplinary process may impact on the concept of professionalism for conveyancers. However, there is no evidence to suggest that levels of professionalism and standards of

honesty, competence and ethics would be sacrificed in any way. They 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.

Because of the nature of conveyancing work, a breach of the Conveyancers Licensing Act by a licensee can have serious repercussions. It is proposed that the circumstances in which the Director-General has the power to suspend or cancel a licence be extended to include any breach of the Act. This would provide consumers with additional protection, as the conveyancer concerned would not be able to operate in the marketplace pending resolution of an investigation.

To ensure that ethical and conduct standards are upheld, conveyancers would continue to be required to fulfil educational and experience requirements, adhere to 'rules' and undertake professional continuing education.

The disciplinary system should act as a resource for identifying emerging and persistent problem areas. The current lack of clarity in responsibility for different aspects of the disciplinary process affects the transfer of information about identified problems into the educational aspects of licensing. Consolidation of responsibility for the disciplinary system under the Director-General would allow for areas of concern to be addressed in the Director-General's guidelines for continuing education and for the appropriate amendments to be made to the prescribed educational requirements.

Evaluation of Option 2

| <i>Evaluation Criteria</i> | <i>Disciplinary process - Option 2</i> | |
|-----------------------------------|--|---|
| | <i>Benefits</i> | <i>Costs</i> |
| Consumer protection | <p>Ensures compliance with standards of honesty, competence and diligence</p> <p>Maintains ethical and practice standards</p> <p>Provides the means to remove practitioners found to be behaving inappropriately</p> <p>Provides an impartial disciplinary scheme independent of industry</p> <p>Because of the single point of entry for complaints, consumers are more readily able to access the system</p> | <p>Transition costs in changing to a new model and the educating those using and providing conveyancing services</p> <p>Possible perception that the involvement of the Office of the Legal Services Commissioner represents/fosters higher levels of ethical behaviour by conveyancers</p> |

| | | |
|----------------------|--|--|
| | Information sharing problems would be eliminated eg information about compliance and disciplinary matters would be more readily available as for developing professional continuing education requirements | |
| Competition | | Different disciplinary regimes for solicitors and conveyancers undertaking similar work. |
| Social welfare | No likely impact | No likely impact |
| Industrial relations | No likely impact | No likely impact |
| Employment growth | No likely impact | No likely impact |
| Resource allocation | Possible reduction in compliance administration costs for government | |

Table 8.2 Evaluation of Option 2 – transfer of full responsibility for the disciplinary scheme to the Department of Fair Trading

Both the Department of Fair Trading's Compliance Division and the Office of the Legal Services Commissioner were invited to present their views to the Steering Committee on the current compliance and disciplinary scheme.

The Department of Fair Trading's Compliance Division considers the main problem with the disciplinary scheme derives from the involvement of two instruments regulating conveyancers approaching compliance from two different perspectives. Provisions addressing similar problems in the two Acts take different approaches resulting in confusion about the appropriate course of action. As a result, there is jurisdictional uncertainty, uncertainty of process and uncertainty of appeals processes. This imposes a higher cost on conveyancers than, for example solicitors.

The Legal Services Commissioner considers that the roles of the Office of the Legal Services Commissioner and the Department of Fair Trading are distinct. The Department has a licensing and investigative role and the Legal Services Commissioner has a monitoring role. The focus of the Office of the Legal Services Commissioner is to resolve complaints and influence the practitioner to change his/her behaviour rather than taking disciplinary action. The Commissioner considers that the problems with the current system are about the management of the investigative process rather than the regulatory regime.

While both regulators identified difficulties with the current scheme, the Steering Committee resolved that any decision about changes to the scheme should await the outcome of the NSW Law Reform Commission's review of Part 10 of the Legal Profession Act.

Recommendation 18

If the problems with the disciplinary system identified by the review are not resolved by the review of Part 10 of the Legal Profession Act the matter will be given further consideration in consultation with Attorney-General's Department, industry and other interested parties.

Penalties

There are a number of provisions in the Conveyancers Licensing Act that provide for penalties where an offence is committed. Offences under the Act include:

- employing a disqualified person (section 21) - maximum penalty 10 penalty units;
- failure to comply with audit requirements (section 27) - maximum penalty 10 penalty units;
- failure to deal with unclaimed money in accordance with the Act (section 28) - maximum penalty 5 penalty units;
- failure to produce records or provide information to an inspector (section 32) - maximum penalty 10 penalty units;
- unauthorised disclosure by an inspector, his/her assistant, a solicitor or an officer or agent of the Director-General (section 35) - maximum penalty 10 penalty units;
- hindering, obstructing or delaying an inspector in his or her functions (section 36) - maximum penalty 10 penalty units;
- hindering, obstructing or delaying an appointed manager in his or her functions (section 54) - maximum penalty 50 penalty units;
- failure to provide information about receivable property (section 60) - maximum penalty 50 penalty units;
- improper dealing with receivable property (section 62) - maximum penalty 20 penalty units;
- failure of a terminated receiver to transfer or deliver receivable property according to directions given by the Supreme Court (section 80) - maximum penalty 10 penalty units; and
- hindering, obstructing or delaying a receiver in his or her functions (section 81) - maximum penalty 50 penalty units.

■

The penalty regime has not been revised since the introduction of the Act in 1995. The maximum court-imposed fines for offences presently ranges from \$550 to \$5,500. The current penalties do not appropriately reflect the nature of offences under the Act. It is critical that integrity of the regulatory structure be supported by an appropriate penalty regime which operates to deter unacceptable behaviour and signals to the community the serious treatment of such conduct. Penalties need to be revised to appropriately reflect the degree of seriousness of each offence.

There is currently no penalty for failure to account for money held on behalf of another although it does constitute professional misconduct. Because of the seriousness of the action, failure to account for moneys entrusted to a licensee or an associate of a licensee should attract a penalty. Given the gravity of this offence a significant penalty should be applied. Similarly, a significant penalty should be applied for other serious offences such as hindering, obstructing or delaying an investigation in any way. In these cases a maximum penalty of 200 penalty units to an individual and 1,000 penalty units to a corporation is recommended. For other penalties the monetary penalty should be doubled.

Recommendation 19

The level of penalties in general should be revised.

Recommendation 20

A penalty should be introduced for failure to account for money held on behalf of another.

Penalty notices

The Department of Fair Trading currently uses a range of strategies to deal with unsatisfactory conduct by traders. These include education programs, assisting in the development of industry codes of practice; formal warnings, enforceable undertakings, prosecutions, injunctions, civil remedies, disciplinary action, public warnings and naming of unsatisfactory traders. The use of penalty notices is another type of compliance strategy which has now been introduced in a number of Acts administered by the Department of Fair Trading. The Fair Trading Act, the Business Names Act, the Trade Measurement Administration Act, the Motor Dealers Act, the Employment Agents Act, the Pawnbrokers and Second-hand

Dealers Act, the Property, Stock and Business Agents Act and the Home Building Act all have provisions for penalty notices.

Penalty notices provide an additional tool for compliance with fair trading laws, which allows offenders to choose to have a breach dealt with without the need to attend court. Penalty notices do not remove a person's right to have the matter determined by a court, but if the alleged offender wishes to by-pass a court process, he or she may simply pay the penalty. Where the penalty is paid, no further proceedings may be taken in respect of the alleged offence. Payment of the penalty does not constitute an admission of liability. Nor does it prejudice any civil claim or proceedings relating to the same occurrence. The amount of the penalty is prescribed and cannot exceed the maximum amount which can be imposed by the court.

It is proposed that a penalty notice scheme be introduced for licensed conveyancers. These penalty notices would apply to minor breaches of the Act - breaches which are easily identified and where the application of a penalty notice would be likely to change the behaviour of the conveyancer. Penalty notices would be for smaller amounts. A penalty notice action would be noted on the public register against the licensee's name.

Recommendation 21

Penalty notices should be introduced for some minor breaches of the Conveyancers Licensing Act 1995 and its Regulation by licensed conveyancers.

Unlicensed operators

The Law Society raised the issue of those who "sidestep" licensing requirements and advertise or otherwise hold out to be a "conveyancer" without either a licence or a current practising certificate.

The Conveyancers Licensing Act does not currently allow for the Director-General to take action against unlicensed operators. Action against a person undertaking conveyancing work while unlicensed can only be taken by the Law Society Council for a breach of the Legal Profession Act.

Consumers using the services of an unlicensed conveyancer do not have the advantage of access to the Compensation Fund in case of defalcation nor are they able to make a claim against a professional indemnity insurance policy in case of negligence. Because these consumers may be exposed to considerable risk, the Director-

General of the Department of Fair Trading needs to be able to act quickly to stop this type of activity once it is identified.

It is proposed that the Conveyancers Licensing Act be amended to give the Director-General the capacity to investigate and take action against unlicensed conveyancer trading.

Recommendation 22

The Director-General of the Department of Fair Trading should be given the capacity to investigate and take action against unlicensed conveyancer trading.

Receivers and Managers

The Conveyancers Licensing Act mirrors the provisions of the Legal Profession Act in its requirements for the appointment of managers and receivers (Part 8A of the Legal Profession Act for Managers and Part 8 of the Act for Receivers).

There has been no indication that this arrangement is inadequate or inappropriate. It is proposed that these provisions be retained.

Appendix A

Terms of Reference

1. The review of the Conveyancers Licensing Act 1995 shall be conducted in accordance with the principles for legislation reviews set out in the *National Competition Principles Agreement*.

The guiding principle of the review is that legislation should not restrict competition unless it can be demonstrated that:

- a) the benefits of the restriction to the community as a whole outweigh the costs; and
 - b) the objectives of the legislation can only be achieved by restricting competition.
2. Without limiting its scope, the review is to:
 - a) clarify the objectives of the legislation;
 - b) identify the nature of the restrictive effects on competition;
 - c) analyse the likely effect of any identified restriction on competition on the economy generally;
 - d) assess and balance the costs and benefits of the restrictions identified;
 - e) consider alternative means for achieving the same result, including non-legislative approaches.
 3. The review shall also:
 - a) identify any issues of market failure which need to be, or are being, addressed by the legislation; and
 - b) consider whether the effects of the legislation contravene the competitive conduct rules in Part IV of the *Trade Practices Act 1974 (Cth)* and the NSW Competition Code.
 4. The review shall consider and take account of relevant regulatory schemes in other Australian jurisdictions, and any recent reform proposals, including those relating to competition policy in those jurisdictions.
 5. The review will consider the general effectiveness of the legislation and examine issues of concern to consumers and industry.
 6. The review shall consult with and take submissions from consumer groups, business organisations, government agencies and other interested parties to ensure that all aspects of the public benefit are considered.

Appendix B

Submissions to the Review

1. Mr Aaron Sainsbury, Australian Institute of Conveyancers
2. Mr Neil Smith
3. Mr Ian A Fraser
4. Ms Sharyn Murphy, Murphy Conveyancing
5. Mr Mark Bodycoat, Commissioner for Consumer Affairs, Office of Consumer and Business Affairs
6. Ms Wendy Hanslow, Michael Haydon & Associates
7. Mr David Mulcahy, Director of Land Titles, Land Titles Office
8. Mr Steve Marks, Legal Services Commissioner, Office of the Legal Services Commissioner
9. Mr P Hennessy, Executive Director, NSW Law Reform Commission
10. Ms Cellene Hoogenkamp, General Manager Business Development, Public Trustee

Appendix C

Main provisions of Act and their benefits and costs

| | Benefits | | | Costs | | |
|---------------------------------------|---|---|---------------|---|---|-------------|
| | Type | Beneficiary | Likely impact | Type | Incidence | Likely size |
| Pre-entry conditions | | | | | | |
| ▪ Age requirement | | Consumers | Small | Entry barrier | Conveyancer | Small |
| ▪ Education | Quality of service & competence | Licensed conveyancers, employers, Consumers | Significant | Investment/entry barrier | Employers, conveyancers, Consumers | Significant |
| ▪ Practical training & experience | Quality of service & competence | Licensed conveyancers, employers, Consumers | Significant | Investment/entry barrier. Flexibility loss, labour and management costs increased | Employers, conveyancers, Consumers | Significant |
| ▪ Not be a disqualified person | Reduced risks to consumers through character and probity checks. Also reduces the risk of defalcation & fraud | Consumers, community | Significant | All applicants undergo a number of preliminary checks. eg Department of Fair Trading screening, Police checks | Entry participants, community | Significant |
| ▪ Compensation Fund | Trust money security & reduction of consumer risk | Consumers | Significant | Surrogate Insurance premium | Conveyancers | Moderate |
| ▪ Professional indemnity insurance | Quality of service, and reduces harm occurring due to negligence | Consumers | Significant | Insurance premium | Conveyancers and Consumers through increased fees | Moderate |
| Licence re-application | | | | | | |
| ▪ Audit certificate | Trust money security & reduced risks to consumers | All Consumers | Significant | Business operation cost | Conveyancers & possibly Consumers | Moderate |
| ▪ Continuing professional development | Quality of service & competence | Licensed conveyancers, employers, Consumers | Argued | Business operation cost & investment | Conveyancers & possibly Consumers | Moderate |

Appendix C Main provisions of Act (continued)

| | Benefits | | | Costs | | |
|--|---|---|----------------------|--|------------------------------------|-------------|
| | Type | Beneficiary | Likely size | Type | Incidence | Likely size |
| Business controls | | | | | | |
| ▪ Restrictions on business structures | Conveyancing businesses restricted to sole trader or partnerships | Consumers | Small-moderate | Investment & entry barrier | Conveyancers & other professionals | Significant |
| ▪ Restrictions on employing certain persons | Unable to employ disqualified persons unless leave given by Director-General. Sharing staff with legal practitioner or real estate agent prohibited | Consumers, conveyancers | Moderate | Entry barrier, labour and management costs | Conveyancers, potential employees | Moderate |
| ▪ Restrictions on the types of work undertaken | Work is undertaken by a competent professional | Consumers | Significant | Reduces opportunity for efficient management of work as clients may need to be referred to other professionals | Consumers | Moderate |
| ▪ Restrictions on operation of business | | | | | | |
| ▪ Trust money controls | Trust money security. Reduced risk to consumers | All Consumers, Department of Fair Trading | Moderate-significant | Licensee compliance, inspection & audit | Licensed conveyancers, Consumers | Significant |
| ▪ Record keeping requirements | Trust money security. Reduced risk to consumers | All Consumers, Department of Fair Trading | Moderate-significant | Licensee compliance, inspection & audit | Licensed conveyancers, Consumers | Significant |
| ▪ Use of a business name | Reduced risk to consumers | All Consumers, Department of Fair Trading | Significant | Licensee compliance | Licensed conveyancers, Consumers | Small |
| ▪ Attendance of licensee at business | Reduced risk to consumers | All Consumers, Department of Fair Trading | Moderate | Licensee compliance | Licensed conveyancers, Consumers | Significant |
| Disciplinary process | Quality of service; consumer access to redress | Consumers, conveyancers consumers | Significant | Compliance costs | Agents initially | Significant |

