



THE LAW SOCIETY
OF NEW SOUTH WALES

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30 July 2015

Proposed Conveyancers Licensing Regulation 2015
Policy and Strategy
NSW Fair Trading
PO Box 972
PARRAMATTA NSW 2124

By email: policy@finance.nsw.gov.au

Dear Sir/Madam,

Proposed Conveyancers Licensing Regulation 2015

Thank you for the opportunity to comment on the draft Conveyancers Licensing Regulation 2015 ("draft Regulation").

The draft Regulation has been reviewed by the Property Law Committee ("Committee") of the Law Society of NSW.

The Committee noted the importance of a robust and effective regulatory regime for conveyancers, not only in protecting consumers and others with whom conveyancers deal, but also to maintain confidence in the integrity and efficiency of the operation of the property sector in New South Wales. The Committee therefore supports the draft Regulation.

The Committee also believes that, in general, the regulatory framework governing conveyancers should be as rigorous as the provisions regulating solicitors when those solicitors are undertaking conveyancing work. It is detrimental to consumers and other stakeholders to have solicitors and conveyancers operating on two markedly different playing fields. The Committee supports, for example, the inclusion of a rule of conduct dealing with honouring undertakings, and notes that this rule has been retained in the draft Regulation.

The Committee makes the following comments on specific clauses of the draft Regulation:

1. Clause 6(1)

The Committee has concerns with the proposal to change the insurance requirements for licensees. Clause 6(1) in the *Conveyancers Licensing Regulation 2006* ("current Regulation") provides:

- (1) A licensee must be insured under a policy of professional indemnity as provided in subclause (2).

The proposed amendment in the draft Regulation limits the requirement to insure to "when [the licensee is] carrying out conveyancing work".

In the Committee's view the suggested provision lacks clarity as to, among other things, the precise scope of when the licensee is carrying out conveyancing work, which is not resolved by reference to the *Conveyancers Licensing Act 2003* ("Act"). It was also unclear to the Committee whether it would be possible for a conveyancer to hold a licence off and on during the financial year, and whether that circumstance would be covered in the AIC master policy which covers most conveyancers (or any other approved policy).

Under the current regime, determining a conveyancer's right to practise and insurance status is a straightforward, one-step exercise. The proposal may lead to those dealing with a licensee being put to further inquiry as to whether the licensee currently holds insurance and maintains cover for the relevant period. Issues may arise under the proposed provision about whether negligence occurred in the period when the conveyancer was insured.

The Committee believes that the better approach would be to maintain the existing arrangements; that is, to require insurance as a precondition of being licensed. That approach would reflect the requirement imposed on Australian legal practitioners under the *Legal Profession Uniform Law (NSW)*. This would ensure a "level playing field" as far as this aspect of insurance coverage is concerned, and would assist in maintaining public confidence in the professions of property practitioners.

The Committee notes the comments in the Regulatory Impact Statement ("RIS") to the effect that the change has been made in order to give flexibility. In the Committee's view, the perceived benefits of flexibility do not outweigh the potential harm to a person if a conveyancer acts negligently and is not insured.

While the cost of insurance coverage should not be determinative of how this issue is dealt with, the Committee understands that the premium for a sole practitioner licensed conveyancer would typically be lower than the premium for a sole practitioner solicitor, even if that solicitor practised solely in the area of conveyancing.

2. Clauses 6(3) and 7(1)(d)(ii)

Reference to the *Legal Profession Act 2004* should be updated to reflect the commencement of the *Legal Profession Uniform Law (NSW)* on 1 July 2015.

3. Clause 11

Clause 11 of the current Regulation identifies four modes of service of an itemised account. Draft clause 11 also lists four methods, but replaces fax service with service by email.

The Committee has no objection to allowing service by email, but queried the desirability of removing reference to service by fax. Facsimile machines are still in relatively common use and the conveyancing process explicitly allows some important documents to be served by facsimile (for example, cooling off certificates under s 66W(4) of the *Conveyancing Act 1919*). The Committee believes all five methods of service should be permitted.

4. Clause 16(4)(a)

The Committee believes the reference to clause 31 may have referred to an earlier draft and should instead refer to clause 28.

5. Clause 32

The Committee supports the extension of the retention period from 6 years to 7 years. For consistency, the same change should be made to rule 14(3) in Schedule 3.

6. Rule 23 in Schedule 3

The Committee notes that this Rule draws significantly from the former Solicitors Rule 58 (previously Rule 45). Under the Legal Profession Uniform Law framework, Rule 58 has been further refined, and is now Rule 11 of the *Legal Profession Uniform Legal Practice (Solicitors) Rules 2015*. One significant change is the requirement to identify the proposed signatory to whom advice is being given “using the Verification of Identity Standard contained in Schedule 8 to the *Model Participation Rules* determined by the Australian Registrars’ National Electronic Conveyancing Council (as adopted and made by each jurisdiction pursuant to s 23 of the *Electronic Conveyancing National Law*)”. It would be helpful in mitigating the risk of identity fraud and maintaining confidence in the integrity of the conveyancing process if that obligation could similarly be incorporated into Rule 23.

7. The absence of any reference to the PEXA Source Account in the draft Regulation

The Committee noted the comments on this issue in the RIS, and in particular that, in Fair Trading’s view, “there is uncertainty about whether money paid into the PEXA Source Account is “trust money” for the purposes of the Act.

The current Act and Regulation have no concept of “power money” or “transit money”, which are concepts familiar to solicitors under their regulatory provisions. It is unfortunate that references to “controlled money”, which appeared in the earlier Act (and which are reflected in clauses 42 to 45 of the current Regulation) were removed in the current Act.

The Committee believes that the regulatory framework for conveyancers should deal with the concepts of “power money” and “transit money” in order to enhance consumer protection, facilitate the adoption of electronic conveyancing and create a level playing field between solicitors and conveyancers. The Committee strongly supports further consideration of the sorts of amendments to the Act and the Regulation contemplated at page 25 of the RIS.

8. Property Services Compensation Fund

The Committee queries the suggestion in the RIS that the Property Services Compensation Fund will respond to a claim for a conveyancer’s defalcation of money from the PEXA Source Account. The Committee is concerned that this would require an amendment to the Act and the *Property, Stock and Business Agents Act 2002* under which the Fund is constituted. The proposed maintenance of the status quo is concerning and may put those dealing with licensed conveyancers at risk.

The key difficulty is that the Compensation Fund is designed to deal with claims arising from a failure to account. It serves a similar function for agents and conveyancers to that served by the Fidelity Fund for solicitors. It is far from clear that the Compensation Fund would respond to a loss suffered by a consumer because of negligence or breach of contract. The provisions governing the fund are silent on negligence, which is the reason why separate professional indemnity insurance is essential.

The Committee notes s 173(1) of the *Property, Stock and Business Agents Act 2002*:

The Compensation Fund is held, and is to be applied, for the purpose of compensating persons who suffer pecuniary loss because of a failure to account.

A failure to account is defined in s 171, which relevantly provides:

- (1) In this Division, a reference to a failure to account is a reference to a failure by a licensee to account for money or other valuable property entrusted to the licensee or an associate of the licensee in the course of the carrying on of the licensee's business as a licensee.
- (2) This Division applies only to a failure to account that arises from an act or omission of the licensee or associate.

The view that there is no risk to consumers in relation to clients' money placed in a PEXA Source Account may not address situations where someone negligently fails to apply money in the PEXA Source Account. The Committee believes this issue should be addressed as a matter of urgency.

Should you have any queries about this letter, please contact Gabrielle Lea, Policy Lawyer for the Committee on 9926 0375 or by email to gabrielle.lea@lawsociety.com.au.

Yours faithfully,



Michael Tidball
Chief Executive Officer