

[Act 1995 No 57]



New South Wales

Conveyancers Licensing Bill 1995

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.*

Overview of Bill

The object of this Bill is to repeal and re-enact the Conveyancers Licensing Act 1992 (“**the existing Act**”) with the following changes of substance:

- The scope of the conveyancing work that can be performed by licensed conveyancers is extended to encompass all real and personal property transactions, including the sale or lease of land, the sale of a business (including goodwill and stock-in-trade) and the grant of a mortgage or other charge. At present conveyancing work is limited to residential land transactions. Existing restrictions on the drawing up of mortgages and obtaining consents to subdivision, building and development are also removed.

* Amended in committee—see table at end of volume.

- Existing provisions that require licensed conveyancers to have fidelity insurance (to protect clients from defalcations) are replaced with provisions requiring licensed conveyancers to contribute to the Real Estate Services Council Compensation Fund and providing for defalcations to be compensated from that Fund. That Fund is currently the fidelity fund for licensees (such as real estate agents) under the *Property, Stock and Business Agents Act 1941*. The existing requirement that licensed conveyancers have professional indemnity insurance is not affected.
- Provision is included that will permit multidisciplinary partnerships involving licensed conveyancers but only with the consent of the Real Estate Services Council (“the Council”) and subject to any regulations that may be made restricting multidisciplinary partnerships. Partnership between a licensed conveyancer and a real estate agent or other agent under the *Property, Stock and Business Agents Act 1941* will not be permitted.
- The licensing and regulatory functions conferred by the existing Act on the Conveyancers Licensing Committee, the Association of Property Conveyancers and the Law Society Council are transferred to the Real Estate Services Council (to be exercised by the General Manager of the Council). The membership of that Council is expanded by one part-time member to include a person nominated to represent the licensed conveyancing industry. As a consequence of this transfer of functions, the existing 2-stage licensing process whereby the grant of a certificate of eligibility is a precondition to the grant of a licence is simplified and replaced with a 1-stage process. The Conveyancers Licensing Committee is abolished.

Consequential savings and transitional provisions are enacted and consequential amendments are made to other Acts.

The name of the Real Estate Services Council is changed to the Property Services Council.

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides that the proposed Act will commence on a day or days to be proclaimed.

Clause 3 provides that certain words and expressions used in the proposed Act are defined in the Dictionary at the end of the proposed Act. Important definitions include *conveyancing business*, *Council*, *professional misconduct and unsatisfactory professional conduct*.

Clause 4 defines the expression *conveyancing work*. As explained above, the expression will now include all real and personal property transactions, including the sale or lease of land, the sale of a business (including goodwill and stock-in-trade) and the grant of a mortgage or other charge. At present conveyancing work is limited to residential land transactions. Existing restrictions on the drawing up of mortgages and obtaining consents to subdivision, building and development are also removed.

Clause 5 explains who is a disqualified person for the purposes of the proposed Act. A disqualified person may not hold a licence under the proposed Act. Disqualified persons include corporations, bankrupts, disqualified legal practitioners and persons who have been convicted of an offence involving dishonesty.

Part 2 Licensing

Division 1 Preliminary

Clause 6 provides for the effect of a licence under the proposed Act. A licensee is not liable for an offence under Part 3A (Unqualified practitioners) of the *Legal Profession Act 1987* in respect of conveyancing work done in accordance with the proposed Act and regulations and the conditions of his or her licence.

Clause 7 sets out the qualifications for a licence under the proposed Act. This includes a requirement that the licensee be covered by an approved policy of professional indemnity insurance, unless exempted by the regulations from the need for professional indemnity insurance.

Clause 8 sets out the requirements for an approved policy of professional indemnity insurance.

Division 2 Procedure for obtaining a licence

Clause 9 provides for the making of applications for licences under the proposed Act to the Council.

Clause 10 provides for the determination of applications by the Council. The Council may refuse to grant a licence on any of the grounds on which the Council may suspend or cancel a licence (see clause 13).

Clause 11 provides that a licence may be granted subject to conditions. Possible conditions include a condition prohibiting the licensee from carrying out conveyancing work otherwise than as an employee, a condition requiring the licensee to undertake further studies and a condition limiting the type of transactions that the licensee may work on.

Clause 12 provides for the duration of licences. A licence has no effect during any period in which the licensee does not have any professional indemnity insurance that is required.

Clause 13 sets out the grounds on which the Council may suspend or cancel a licence. These include failure to comply with licence conditions and failure to comply with requirements contained in the proposed Act.

Division 3 Appeals

Clause 14 provides that an appeal may be made to the Commercial Tribunal in respect of a decision of the Council to refuse a licence, suspend or cancel a licence or impose a condition on a licence.

Part 3 Conveyancing practice

Division 1 General

Clause 15 provides that a contravention of a provision of the Division may constitute unsatisfactory professional conduct or professional misconduct but does not constitute an offence unless a penalty is specified in respect of the provision.

Clause 16 provides, that Part 11 of the *Legal Profession Act 1987* applies to fees charged by a licensee in the same way as it applies to costs charged by solicitors.

Clause 17 allows regulations to be made in respect of the conduct of a conveyancing business.

Clause 18 provides that a licensee must not share the receipts of a conveyancing business with another person who is not a licensee unless the Council approves it and that sharing does not contravene the regulations. The clause sets out circumstances in which the Council may not approve a sharing of receipts.

Clause 19 provides that a licensee must not be in partnership with another person who is not a licensee unless the Council approves the partnership and the partnership does not contravene the regulations. The clause sets out circumstances in which the Council may not approve a partnership and provides that a partner who is not a licensee is not, by reason of being a partner in a business that includes a conveyancing business, liable for certain offences under the proposed Act and the *Legal Profession Act 1987*.

Clause 20 provides for the making of regulations prohibiting licensees from conducting other businesses.

Clause 21 restricts the employment of disqualified persons by licensee. It also makes it an offence for a disqualified person to seek employment or payment in connection with a licensee's conveyancing business unless the person has informed the licensee of his or her disqualification.

Clause 22 restricts the sharing of staff by licensees with real estate agents and legal practitioners.

Clause 23 contains general requirements as to advertising by licensees.

Clause 24 provides that the regulations may establish guidelines (or adopt Law Society guidelines) as to the manner in which a conveyancing business should be conducted.

Division 2 Trust money and controlled money

Clause 25 sets out how a licensee is to deal with money received by the licensee, in the course of conducting a conveying business, on behalf of another person. Contravention of the requirements constitutes professional misconduct.

Clause 26 requires a licensee to keep proper accounting records in respect of money received on behalf of another person. Contravention of accounting requirements constitutes professional misconduct.

Clause 27 provides for the auditing of licensee's records.

Part 5 Management and receivership

Division 1 Preliminary

Clause 40 contains definitions of terms used in Part 5.

Clause 41 defines *associate* of a licensee. An associate includes a partner of a licensee, an employee or agent of a licensee and a corporation in which the licensee has a beneficial interest.

Clause 42 explains the meaning of failure to account by a licensee.

Division 2 Management

Clause 43 allows the Council to appoint a manager for a licensee's conveyancing business in certain circumstances.

Clause 44 provides that a manager must be a person who is a licensee or a solicitor who holds an unrestricted practising certificate.

Clause 45 sets out the powers of a manager.

Clause 46 provides that management of a licensee's business can continue during receivership.

Clause 47 provides that an act done by a manager in the course of managing a licensee's business is taken to have been done by the licensee. However, the licensee is not personally liable for any acts of the manager.

Clause 48 allows a manager to be reimbursed by the Council in respect of damages and costs recovered against the manager in relation to the exercise of his or her functions under the proposed Act. It also limits the liability of the manager and the Council for acts or omissions by the manager or Council in the exercise of functions under the proposed Act.

Clause 49 provides for the payment of a manager's expenses.

Clause 50 requires a manager to report to the Council on the management of a licensee's business.

Clause 51 applies Division 2 of Part 3 (trust account requirements) to accounts kept by a manager.

Clause 52 allows regulations to be made with respect to accounts kept by a manager in connection with the conduct of a conveyancing business.

Clause 53 provides for the return of money held by a manager in connection with a licensee's business to the licensee after termination of the management of the licensee's business.

Clause 54 makes it an offence to interfere with a manager in the exercise of his or her functions under Division 2.

Division 3 Receivership

Clause 55 allows the Supreme Court to appoint a receiver in respect of all or any of the property of a licensee on application of the Council.

Clause 56 provides that receivership may extend to the property of an associate of the licensee.

Clause 57 provides that an application for the appointment of a receiver may be heard in closed court.

Clause 58 provides for the service of a copy of a court order for the appointment of a receiver on the relevant licensee or associate.

Clause 59 allows a receiver to take possession of receivable property of a licensee or associate.

Clause 60 requires a person who has information relating to receivable property to give that information to the receiver if required by the receiver to do so.

Clause 61 allows a receiver who believes that money held in a bank account is receivable property to serve on the bank an order prohibiting operations on the bank account. A bank must comply with such an order.

Clause 62 contains offences relating to improper dealings with receivable property.

Clause 63 allows a receiver, in certain circumstances, to recover compensation from a person who improperly took or received receivable property.

Clause 64 allows a receiver or the Council to certify certain matters relating to receivership.

Clause 65 allows a receiver to take proceedings in relation to any receivable property as if the receiver were beneficially entitled to the property.

Clause 66 permits a receiver to deal with receivable property in any manner in which a licensee or associate could deal with it.

Clause 67 sets out certain other general powers of a receiver.

Clause 68 provides that a receiver may give notice to any person that any claim the person has to receivable property must be submitted to the receiver in accordance with the notice. The receiver may disregard any claim not made in accordance with the notice.

Clause 69 provides that a receiver may give notice to a licensee that any claim the licensee has to a lien for costs on receivable property must be submitted to the receiver in accordance with the notice. The receiver may disregard any claim not made in accordance with the notice.

Clause 70 allows the Supreme Court to make an order for the examination of a licensee by a receiver.

Clause 71 contains requirements as to how the receiver should deal with receivable property under the control of the receiver that has not been dealt with in accordance with Division 3.

Clause 72 allows a receiver to invest receivable property in any manner in which trustees are authorised to invest by the *Trustee Act 1925*. Income received from an investment is receivable property.

Clause 73 allows the Council to reimburse a receiver for any damages or costs recovered against the receiver by reason of the exercise of his or her functions under the proposed Act.

Clause 74 provides for the payment of the expenses of a receiver by the Council.

Clause 75 provides that the Supreme Court may, on application by the relevant licensee, review the expenses of the receivership.

Clause 76 provides that the receivable property of a licensee or associate is not liable to be taken in execution of any judgment, order or other process of any court or tribunal.

Clause 77 provides that an application may be made to the Supreme Court for a direction as to the performance of the receiver's functions.

Clause 78 provides that the Supreme Court may give directions to a receiver.

Clause 79 requires a receiver to report on a receivership to the Supreme Court and the Council.

Clause 80 provides for the termination of the appointment of a receiver by the Supreme Court and the transfer of receivable property to a new receiver.

Clause 81 makes it an offence to interfere with a receiver in the performance of his or her functions under Division 3.

Part 6 Disciplinary Proceedings

Clause 82 applies Part 10 of the *Legal Profession Act 1987* to licensees in the same way as it applies to solicitors. (Part 10 deals with professional misconduct and unsatisfactory professional conduct by solicitors.)

Clause 83 provides for the composition of the Legal Services Tribunal when conducting a hearing into a complaint against a licensee.

Part 7 Miscellaneous

Clause 84 sets out the powers of the Council in relation to the exercise of its functions under the proposed Act and Part 10 of the *Legal Profession Act 1987*.

Clause 85 allows the client of a licensee to apply to the Supreme Court for a bill of costs in relation to any conveyancing work done by the licensee and for the return of any of the client's documents.

Clause 86 requires auditors appointed under the proposed Act to be registered company auditors under the *Corporations Law*.

Clause 87 requires the Council to maintain a register of licensees, which is to be open to public inspection.

Clause 88 provides that the Council may certify whether or not a person is a licensee and the conditions of his or her licence.

Clause 89 requires proceedings for an offence against the proposed Act or the regulations to be taken before a Local Court. Proceedings may be brought within 12 months after the date of the alleged offence.

Clause 90 allows the Supreme Court to make an order restraining a person from breaching the proposed Act.

Clause 91 contains a general regulation making power.

Clause 92 repeals the *Conveyancers Licensing Act 1992*.

Clause 93 gives effect to Schedule 1, which contains amendments to other laws.

Clause 94 gives effect to Schedule 2, which contains savings, transitional and other provisions.

Clause 95 provides for the review of the proposed Act by the Minister after 5 years from the date of assent to this Act.

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Schedules

Schedule 1 makes consequential amendments to other Acts and to the regulations under the existing Act.

Schedule 2 contains savings, transitional and other provisions.

Dictionary

The dictionary defines various words and expressions used in the proposed Act.