

THE CONVEYANCERS' LICENSING ACT 1995 (NSW)

FRANK RILEY

The Conveyancers' Licensing Bill 1995 received the assent of the Governor on 30 November 1995. Its date of commencement was 1 February 1996. The 1995 Act repeals and replaces the *Conveyancers' Licensing Act 1992 (NSW)* with a substantially different scheme for the licensing and regulation of conveyancers.

The 1992 Act¹ exempted persons licensed under the Act from breaching provisions of the former Part 9 (now Part 3A) of the *Legal Profession Act 1987 (NSW)* which might otherwise occur by reason of their engagement in conveyancing work, as defined by the Act. Section 4(1) described "conveyancing work" as "legal work carried out in connection with any transaction that creates, varies, transfers or extinguishes a legal or equitable interest in residential property or that otherwise affects residential property". "Residential property" was expressed to have the same meaning as it has in Division 8 of Part 4 of the *Conveyancing Act 1919 (NSW)* except that it included land having an area of up to, but not more than, ten hectares.

The most significant change made by the 1995 Act is the enlargement of the area of legal work which can be engaged in by licensed conveyancers without their being in breach of the prohibitions on unqualified legal practice, contained in Part 3A of the *Legal Profession Act 1987 (NSW)*. The 'new' s 4 of the Act no longer ties the definition of conveyancing work to residential property. Section 4(1) is in the following terms:

1 Most parts of which did not commence until 10 September 1993.

- (1) For the purposes of this Act, conveyancing work is legal work carried out in connection with any transaction that creates, varies, transfers or extinguishes a legal or equitable interest in any real or personal property, such as (for example) any of the following transactions:
 - (a) the sale or lease of land,
 - (b) the sale of a business including the sale of goodwill and stock-in-trade, whether or not a sale or lease of land or any other transaction involving land is involved, and
 - (c) grant of a mortgage or other charge.

While the 1992 Act contained, in s 4(3), a description of legal work that was not intended to be within the definition of conveyancing work, the 1995 Act substantially changes the former limitations and now excludes from conveyancing work authorised by the section only work carried out for the following purposes:

- (a) commencing or maintaining legal proceedings, or
- (b) establishing a corporation or varying the memorandum or articles of association of a corporation, or
- (c) creating, varying or extinguishing a trust, or
- (d) preparing a testamentary instrument, or
- (e) giving investment or financial advice, or
- (f) investing money otherwise than as provided for by Division 2 of Part 3 (which deals with the maintenance of trust accounts and controlled money accounts).

The new definition of conveyancing work encompasses a very wide area of legal work. A conveyancer licensed under the Act is authorised (by way of an exemption from the prohibitions contained in Part 3A of the *Legal Profession Act* 1987 (NSW) to carry out, for reward, the legal work in connection with any transaction by which an interest, legal or equitable, in any real or personal property is created, varied, transferred or extinguished. Despite the limitations expressed in s 4(3), the scope of the legal work which may be legitimately performed by a conveyancer licensed under the Act is so wide-ranging that no precise boundaries can be drawn.

By the creation of such a broad area of exemption from the *Legal Profession Act's* 1987 (NSW) Part 3A prohibitions on unqualified legal practice, the *Conveyancers' Licensing Act* 1995 (NSW) creates a sub-class of legal practitioner with, at least for the time being, uncertain qualifications and, with some exceptions, an area of operation of uncertain dimensions.

Despite the fact that the Conveyancers' Licensing Committee (established by the 1992 Act) had the principal responsibility for determining the eligibility of licensed conveyancers and the Law Society of New South Wales was the appointed licensing authority, the Government gave no information as to its intended legislation to either body, and despite requests from the Law Society, engaged in no consultation before the Bill was announced to the media on 18 September 1995.

Prior to the enactment of the 1992 Bill, the then Attorney General in his second reading speech, made the following statements:

Licensed conveyancers have been introduced by this Government in response to consumer demand. That demand has, in the main, been associated with domestic conveyancing. It must be questioned whether the additional training and qualifications which would be required to undertake non-residential conveyancing would, for the volume of matter which may be concerned, be of any breach to the consumer.²

Neither the Premier, Mr Carr, nor the responsible Minister, Ms Fay Lo Po, has revealed details of any research undertaken to determine the public need for an expansion of the area of work available to conveyancers. The only evidence of consumer demand on which the Premier appeared to rely was his visit to a take-away food shop at Northmead.³

The Minister, when addressing the Legislative Assembly in relation to the Bill on 11 October 1995 stated:

The leader of the National Party referred to the complication of rural holdings. The Opposition does not recognise that education will overcome that. If one can study all the legal subjects in four years, it makes sense that one can study property conveyancing in half that time.

If that statement represents the Minister's considered view of the legislation it indicates her failure to appreciate that the provisions of the Bill will allow conveyancers to embark upon complex legal work not adequately described merely as 'conveyancing'.

While the Minister may have confidently asserted that education would cure all deficiencies, the Act itself leaves that important requirement entirely at the discretion of the Minister. Section 7⁴ requires an applicant for a license to satisfy the "Council" (the Property Services Council) that the person has "such educational qualifications, practical training and conveyancing experience as the Minister approves by order published in the Gazette." There is provision for the Council to establish an education sub-committee and it may be given the substantial task of devising an educational system that may parallel (if it is to be adequate for its purpose) the courses of education available to legal practitioners. One might well ask why does the public interest require such a duplication of functions and resources when New South Wales has over 12,000 solicitors holding current practising certificates and engaged in very vigorous competition. The Law Society pointed out in its submissions to the Government in relation to the Bill,⁵ that the public interest did not require conveyancing fees charged by lawyers to be further reduced. The following examples of conveyancing costs and charges were included in that submission:

- For the June 1995 quarter the median house price in Sydney, as determined by the Real Estate Institute's *Residential Property Market Trends in NSW* was \$202,000. On that price, a purchaser would pay New South Wales Government Stamp Duty of \$5,563.

2 Attorney-General, Mr John Hannaford, 16 December 1992.

3 Premier Carr, Media Release, 18 September 1995.

4 "Qualifications for a Licence", *Conveyancers' Licensing Act 1995 (NSW)*.

5 Law Society of New South Wales, "Comments on the Conveyancers' Licensing Bill 1995", 29 September 1995.

- The commission charged by the vendor's agent is negotiable, but usually about three per cent of the sale price yielding, on the above median price, an amount of \$6,060 exclusive of any specific advertising costs.
- Fees usually charged by a solicitor to the purchaser of the median priced house (excluding mortgage costs) would be within the range of \$500 to \$900, although current advertising by solicitors indicates that some solicitors are willing to undertake conveyancing work for a flat fee of about \$400.

Most of the conveyancers presently licensed obtained their certificates of eligibility from the Conveyancers Licensing Committee under the transitional, or 'grandfathering' provisions of the *Conveyancers Licensing Act 1992* (NSW). They were then assessed by the Committee on the basis of their experience and knowledge of conveyancing law and practice in relation to residential property conveyancing. Under the 1992 Act, three courses of conveyancing education were accredited by the Conveyancing Licensing Committee on the understanding that they would equip students to undertake residential conveyancing.

The 1995 Act provides that conveyancers licensed at the commencement of the Act will be deemed to hold transitional licences entitling them only to do residential conveyancing work. It is not indicated by the legislation how those licensees will qualify for removal of the transitional condition from their licences. That will, presumably, be determined by the Minister.

The current courses of education would require some amendment in order to assist students to be qualified in the expanded areas of legal work beyond residential conveyancing. The question may fairly be asked as to how those courses can be modified in respect of students already committed to the courses as originally designed.

The Act betrays its hasty composition and the lack of consultation by internal inconsistencies. Section 5⁶ includes within the definition of "disqualified persons" the holders of a barrister's or solicitor's practising certificate. A disqualified person is not eligible to obtain a licence. Section 19⁷ allows the Council to approve multi-disciplinary partnerships involving licensees and s 22⁸ appears to sanction a partnership between a licensee and a barrister or solicitor. The Act thus appears to intend that a licensed conveyancer might enter into partnership with a solicitor or barrister, although a solicitor or barrister could not apply for a licence, as they are by definition, disqualified from so doing.

Section 4(3)(e) excluded from the definition of conveyancing work the "giving (of) investment or financial advice". Section 4(1) in defining conveyancing work refers, by way of example, to the sale of a business. A conveyancer purporting to act for the purchaser of a business would need to be able to give financial advice in relation to the business structures which might be appropriate for the conduct of the business and which could have a significant effect on the acquisition of the business assets and the party's liability to taxation. The other limitations imposed

6 "Disqualified Persons", *Conveyancers' Licensing Act 1995* (NSW).

7 "Multi-Disciplinary Partnerships", *Conveyancers' Licensing Act 1995* (NSW).

8 "Sharing Staff of Legal Practitioners and Real Estate and Other Agents", *Conveyancers' Licensing Act 1995* (NSW).

in s 4(3) might also be considered to be in conflict with the broad definition contained in sub-section (1). That conflict emphasises the ambiguity of the intended functions of licensed conveyancers and of the Act's proclaimed purpose to benefit the consumer. That expected benefit, which the Government claims without reference to any empirical evidence, may be illusory.

The Act abolishes the independently constituted Conveyancers Licensing Committee and also takes from the Law Society its licensing function. When the 1992 Act was proposed, the Law Society then argued that as licensed conveyancers would be transacting their business with solicitors, it would be logical if practitioners operating within the same 'legal' environment should observe the same ethical standards and be subject to the same regulatory system. Licensed conveyancers will still be subject to the disciplinary system established by Part 10 of the *Legal Profession Act 1987 (NSW)* but the Property Services Council (formerly the Real Estate Services Council) will exercise the functions previously exercised by the Council of the Law Society.

The 1992 Act has been in operation only a relatively short period of time and the number of conveyancers licensed under that Act, at present, is less than 50. There is no demonstrated public demand or need for the expansion of their services. The 1995 Act appears to owe more to political invention, than consumer need. The real interest of consumers, although invoked by the Government, do not appear to have been the subject of any objective research or analysis.