

AUSTRALIAN INSTITUTE OF CONVEYANCERS (VIC. DIVISION)

RESPONSE TO CONSUMER PROPERTY ACTS REVIEW
ESTATE AGENTS AND CONVEYANCERS
OPTIONS FOR REFORM

It is not the intention of the Australian Institute of Conveyancers (Vic Div) ("AICVic") to comment on the changes to the Estate Agents Act – we will leave that to the REIV who are better able to provide the relevant information.

1. LICENSING OF ESTATE AGENTS AND CONVEYANCERS

The role of the Conveyancer is constantly being expanded and is about to be changed fundamentally with the move toward 100% digital lodgement. Over the past few years the Registrar of Titles has introduced Requirements that align paper conveyancing with the electronic system. With the introduction in 2015 of Verification of Identity ("VOI"), practitioners are now obliged to ensure that a client undertakes a VOI and proves their 'right to deal' with a particular property. From 26th May 2017 the Registrar has mandated that practitioners must obtain signed Authorisations from the client which will mean that they must then sign the Transfer or other instrument on behalf of the client and provide the Registrar with Certifications attesting to various aspects. There is a lot more responsibility on the Conveyancer to ensure that their knowledge and practices are correct. They must comply with the Registrar's Requirements and the ARNECC Rules from time to time just like legal practitioners. Failure to do so could result in a practitioner not having access to the electronic system and jeopardising their livelihood.

Option 1 – Modernise and Revise the definition of 'estate agent'

AICVic agrees with the comments in the last paragraph - S.5 of the Estate Agents Act must include an exemption for Licensed Conveyancers ("Conveyancers").

Option 2 – Remove the definition of 'conveyancing business'.

AICVic agrees with the repeal of Section 3 of the Conveyancers Act 2006 and the amendment of Section 8 to provide that anyone who undertakes Conveyancing work on behalf of another person must be licensed.

Question 2 - Should S.4 of the Conveyancers Act be amended to clarify that 'conveyancing work' does not include legal work carried out for the purpose of preparing powers of attorney?

We do not agree that S.4 of the Act should be amended to exclude Conveyancers from preparing Powers of Attorney, as there are numerous occasions in the course of a Conveyancing transaction where a Conveyancer is requested to prepare documents that are ancillary and necessary for a transaction. This includes preparation of a Power of Attorney, which may be required, sometimes urgently, because the client is going away. There are many skilled Conveyancers who are well experienced in the preparation of Powers as an ancillary document to a transaction.

Section 4 of Schedule 1 of the Conveyancers (Professional Conduct and Trust Account and General) Regulations 2008 ("the Regulations") clearly states that "A licensee must only accept instructions to perform Conveyancing work if the licensee is competent to perform the Conveyancing work concerned". This Section would therefore cover preparation of Powers of

Attorney. Therefore those that are experienced should not be prohibited and those who are not experienced need to comply with the Regulations.

Question 3 - Should Conveyancers be permitted to lodge adverse possession applications under the Transfer of Land Act 1958?

Again, some Conveyancers may be experienced in lodging adverse possession claims due to their education and experience and therefore should not be prohibited. Those not experienced in this area must comply with the Regulations.

1.2 Training and Work Experience

1.2.2 – Conveyancers

Option 5 – Increase training standards and strengthen work experience requirements.

We agree with the comments under “Stakeholder Feedback”. As previously stated by AICVic, Conveyancers carry out the same work as legal practitioners in the area of Conveyancing and deal with legal issues on a day to day basis. They must therefore acquire a good level of knowledge of property law before they should be able to apply for a licence. Some RTOs offer courses on line and of limited duration, which some aspirants to the industry think will equip them to operate independently in the marketplace. Sadly this is not the case.

However, we are strongly opposed to the suggestion that the requirement to attain the Advanced Diploma of Conveyancing qualification be made retrospective. Those currently licensed and operating have already completed a Government approved qualification and would be unduly penalised if they had to undertake further study.

Work Experience:

AICVic has consistently campaigned for a minimum of two years’ work experience in order to obtain a licence. We agree that it is simply not possible for a trainee to gain the necessary experience in twelve months. In addition, the work experience must be documented and relevant, because there are numerous instances where trainees can arrange for a lawyer or conveyancer to ‘sign off’ on the 12 months but, in essence, they have done only data entry or office work in their office.

NOTE: We would question what minimum experience criteria is applied by Business Licensing Authority when considering an application for a licence from interstate. Although the Torrens system exists throughout Australia, the practices and procedures differ vastly in each jurisdiction. With the introduction now of eConveyancing, some interstate licensees believe that they can operate in other jurisdictions without undertaking any further education in the Acts and practices of that jurisdiction. EConveyancing is a misnomer; in fact it encompasses the end process, i.e. settlement, transfer of funds, stamping and registration. It does not cover the basic Conveyancing process from the time of the first instruction from a client up to the settlement. That part still needs to be completed by competent and experienced Conveyancers.

Question 8 - In addition to the 8 units of competency currently prescribed for Conveyancers, what additional competencies should prospective licensees be required to complete, as part of an Advanced Diploma?

The following are some of the competencies should be part of an Advanced Diploma:

- Apply legal principles in Corporations Law Matters
- Develop and implement strategic and business plans.
- Establish legal and risk management requirements of small business
- Manage personal work priorities and professional development
- Develop and nurture relationships with clients, other professionals and third party referrers.
- Make decisions in a legal context
- Develop and manage financial systems
- Establish supervise and monitor practice systems to conform with legislation and regulation

Question 9 - What areas of competency should licence applicants be required to provide evidence of, to meet work experience requirements?

It is essential that the work experience undertaken by Conveyancers is of an adequate standard and we believe it should be tested before a person is granted a licence. A thorough list of competencies would need to be developed and , with the expertise of AICVic and RMIT, for example, a test could be developed which could be applied to applicants to ensure their experience is relevant and they have achieved enough skills to manage a business.

1.3 Continuing Professional Development

Option 6B - Deliver an ongoing and targeted information and training program for estate agents, agents' representatives and conveyancers, in partnership with industry associations.

We note the unanimous support by stakeholders of mandating Continuing Professional Development ("CPD").

AICVic is concerned that some organisations, including software providers, are in the marketplace offering training which is not necessarily adequate for day to day conveyancing.

AICVic has a long history of providing training to members and non-members, that is targeted at current issues and designed to improve the skills of attendees. Over the past year, we have not only provided face-to-face sessions but have also videoed those sessions and made the discs available to members and non-members. In 2015 we undertook a series of regional seminars to inform the industry about the changes in relation to Verification of Identity. During April and May 2017 we have again held a series of regional seminars to inform the industry about the mandating of digital lodgement and changes to State Revenue Office forms. In addition, we are developing webinars on various topics under our Risk Management Program under the Master Policy of Professional Indemnity Insurance. These various methods of delivering information ensure that regional practitioners are not disadvantaged (although many country practitioners attend the face to face sessions, preferring that method of deliver).

As technology becomes more sophisticated, AICVic envisages developing more training packages and would welcome the support of Consumer Affairs Victoria. Our resources are limited and can only stretch so far.

Currently our national body has developed a 1 day training accreditation program in relation to Econveyancing which has been offered to practitioners in Victoria and New South Wales. The feedback has been universally positive and we see more opportunities to assist practitioners to learn about developing issues and trends.

If CPD is not mandated, how can CAV ensure that all Conveyancers will be adequately informed.

(An example of a workable system has been developed by the Federal Attorney-General's Department in relation to the Licensing of Civil Celebrants. Each year the Attorney General decides on what training is required which consists of a compulsory part and other additional topics and then licences a small number of trainers nationwide to provide the training.)

1.4 Ineligibility and disqualification criteria

Option 7 – Strengthen ineligibility and disqualification criteria in the Conveyancers Act.

Agreed.

1.5 – Permission Application Process

Option 8 – Tighten threshold requirements for permission applications under the Conveyancers Act.

Agreed - the proposals to tighten the threshold requirements are sensible. However, we repeat our concerns outlined in the Issues Paper that because there is no transparency in the operations of Business Licensing Authority ("BLA"), we, as the peak body for Conveyancers, have little knowledge of how it works.

We also repeat that there should be a 'fit and proper person' test.

Question 10 – Are there additional circumstances in which conveyancers should be restricted from applying for permission to be licensed or employed?

Alignment of paper and electronic processes has now been mandated by Land Use Victoria ("LUV") which puts more responsibility on the skill, ethics and honesty of Conveyancers. BLA should apply rigorous vetting of Conveyancers prior to granting a licence.

1.6 Licensing Process

Noted.

1.7 Professional Indemnity Insurance

Option 9C – Require Conveyancers and estate agents to obtain professional indemnity insurance in order to be eligible to be licensed.

Option 9C is preferred, which is basically what happens in relation to Conveyancers now. If there was no requirement to obtain insurance prior to licensing, a significant level of administration would be required for both CAV and the individual Conveyancer.

Professional Indemnity Insurance as a pre-condition of licensing guarantees licensing conditions are met. Any move to alter the current method may loosen the insurance requirement and impact on claims.

1.8 Office Management

Option 10 – Amend the Conveyancers Act to facilitate remote supervision of Conveyancing businesses.

We agree that the Conveyancers Act should be amended to remove physical supervision of branches of a Conveyancing business.

Question 11 – Are there any specific risks associated with removing requirements for physical supervision of a Conveyancing business that should be addressed?

There is a risk that the Conveyancing business owner may allow an inexperienced Conveyancer to operate at a branch office with minimal guidelines. Therefore a clear obligation should be placed on the business owner to put in place the necessary policies and procedures to ensure that their legislative obligations are met at each branch level. They should be required to produce a plan of how they intend to supervise remotely. Failure to do so would be an offence.

In addition, the business owner must ensure that staff are continually monitored and trained and kept abreast of changes affecting the industry.

1.9 Licensing Issues Specific to Conveyancers.

Option 12 – Establish a voluntary Licence Suspension Process.

We agree with the proposal to amend the Conveyancers Act to enable a person to voluntarily suspend their licence for up to 3 years. The key features noted are sensible.

As previously advised, AICVic provides training and information to Conveyancers in various ways and we would suggest that we would be an excellent resource to provide such training.

Question 13 – Is the three year timeframe proposed by Option 12 appropriate?

A 3 year period is a reasonable time. Any more and there is a risk that the legislation and practice changes during that time will be too overwhelming for a person attempting to return after an extended period out of the industry.

1.10.2 Cancellation of Licence

Option 13 – Amend the Conveyancers Act to provide for automatic licence cancellation following non-payment of annual fees and failure to provide annual statements.

We agree that the Conveyancers Act should be aligned with the Estate Agents Act and that a Conveyancer should be able to apply to BLA for an extension of time in which to comply.

3.CONDUCT OF CONVEYANCERS

3.1 Professional Conduct Rules – Payment of Commissions (Referral fees)

The concerns expressed by stakeholders regarding Conveyancers paying third parties for client referrals is real and disturbing in that, in many instances, agents put pressure on Conveyancers to pay the fee (or give an incentive which is less traceable). Many of the Conveyancers who experience this pressure are inexperienced in running a business and have not established their credentials through the high quality of their work and reputation.

Option 23A – Prohibit Conveyancers from Paying Commissions in Return for Client Referrals.

This option not only refers to banning commissions, incentives, etc. paid **by** Conveyancers to agents for referrals, it also includes monies or incentives paid **to** Conveyancers from a third party. The latter, we believe, are a legitimate method of compensating a Conveyancer for the administrative cost involved in arranging a benefit for their client, i.e. title insurance, connection of utilities, etc. These areas involved some extra work, over and above the normal work involved in a Conveyancing transaction, and that is recognised by those third parties and therefore compensated. We do not believe that such administrative fees should be banned but their disclosure to clients of the fact that they are received and the amount, should be disclosed.

Option 23B – Prescribe the Form for Disclosure for Commission Payments in Return for Client Referrals.

As previously advised, we agree that payments, etc. **received** by a Conveyancer should be disclosed including what they consist of. A prescribed form should be included in the Regulations incorporating wording clearly stating that a financial benefit is payable to the practitioner and define the benefit. It should also give the client the right to refuse any referral.

We realise that banning the payment of incentives will not guarantee that they will disappear but, likewise, disclosing such payments or incentives may not necessarily guarantee that the true payment/incentive is disclosed. Conveyancers and estate agents may agree to disclose a minimum incentive payment but pay the balance 'under the radar'.

If CAV decide on Option 23B, then we agree that S.49 of the Conveyancers Act should be amended to provide that it would be an offence **not** to disclose a conflict of interest in the prescribed form.

Question 19. Is there value in conducting research on effective consumer disclosure?

This would be expensive and we do not believe that a random sample of consumers would disclose a genuine result that could influence a decision.

3.2 Costs Disclosure

We note the suggestion that Conveyancers' costs disclosures should be aligned with those for legal practitioners. However, this would be counterproductive due to the fact that many Conveyancers charge costs at \$750 or below, which would mean that no costs disclosure was necessary and we do not believe that is in anyone's interests.

7.

Option 24 – Improve Existing Disclosure Provisions in the Conveyancers Act.

We agree that this Option would be beneficial.

Question 20 – What would be a ‘significant charge’ in costs that a Conveyancer should disclose?

There are numerous occasions when a normal Conveyancing transaction can suddenly be altered by, for example, the death of a client, a change of mortgagee, removal of fixtures causing considerable damage and negotiations to reduce price/delay settlement, preparation of Licence Agreement – the list goes on.

4. COMPLIANCE MEASURES

4.1 VCAT inquiries and alternative approaches to address poor conduct

Option 25A – CAV to be given limited disciplinary powers.

Our experience in getting CAV to take action against poor behaviour by Conveyancers has been convoluted and disappointing. The primary focus is surely protection of the consumer and we have had numerous examples of poor behaviour by Conveyancers but those grounds for complaint can never go to VCAT, as they are mainly complaints about incompetence, rudeness, not returning phonecalls etc. Such issues cause much stress to the consumer and bring the professional into disrepute.

This option is preferred. We believe that the mechanics of licensing should be separately handled by BLA as currently exists. However, CAV should take more responsibility for enforcing the Regulations, in particular – the Professional Conduct Rules.

A Disciplinary Committee should be set up within CAV which should include representatives from AICVic and current practitioners to ensure that the behaviour of those brought before the Committee is scrutinised by those who are working in the environment and recommendations then made to CAV. Certain sanctions would be available to CAV for ‘low level offending’. The idea of a demerit point system should be investigated.

An area of great concern is where a Conveyancer gives an undertaking regarding carrying out an action or making a payment and then reneges on that undertaking. We have numerous calls regarding such undertakings where the Conveyancer has simply ignored the promise. Last year a solicitor took action at VCAT against a Conveyancer who had not paid a sum of around \$300 for a readjustment of rates, after giving an undertaking at settlement that she would do so. The Master gave the Conveyancer a lecture on undertakings and the seriousness of them and she was made to pay approximately \$1,500.

A Rule regarding Undertakings should be incorporated into the Regulations along the lines of that contained in the Legal Professional Uniform Law Australian Solicitors’ Conduct Rules.

5. TRUST ACCOUNTING

5.1 Placing money in interest-bearing accounts.

8.

Option 27 – Enable Conveyancers to deposit trust money in interest-bearing controlled money accounts.

We agree with this option which will ensure that there is a level playing field with legal practitioners.

6. ADMINISTRATION AND INSTITUTIONAL ARRANGEMENTS

6.1 Keeping track of Conveyancing records post closure or sale.

Option 31 – Establish stronger obligations for document retention post business closure or sale.

It is essential that this option is introduced into the Conveyancers Act to establish an audit trail of files. Too often a business will close or sell without advising the regulator or anyone else and the work involved in chasing these people is onerous.

Question 21 - Should there be an obligation on Conveyancers to return paper certificates of title, in the event that they close their business?

This is not a simple question to respond to, as we are in the middle of a transition. Land Use Victoria (“LUV”) has already converted paper titles held by the big four banks into electronic titles over which the banks have control. At some point in the not too far distant future, even electronic titles will be eliminated (as has happened in South Australia), in which case it would be establishment of who has the control that would be important and that control would need to be nominated to another Subscriber.

Currently, although LUV and the banks prefer electronic titles, some consumers still prefer to hold a paper certificate of title, which is still an option but for how long is unknown.

6.3 Display of Licence

Option 32 – Remove the requirement for physical display of a licence by a Conveyancer.

We agree with this option. However, many Conveyancers are rightly proud of attaining their licence and would display it in their office anyway.

However, there should be a rule about websites and what must appear on those websites – for example, who owns the business, their name, if they are a Conveyancer or lawyer, who regulates them, etc. In many instances the consumer does not know who to contact if they have issues.

6.4 Roles and Functions of the BLA and the Director of CAV

Option 33 – Develop educational material explaining the roles and functions of BLA and CAV.

Transparency in relation to the roles can only assist practitioners and the consumer.

6.5 Role of and Objectives for the Estate Agents Council

Bearing in mind that the EACs objectives of promoting standards of conduct and competency for industry participants etc. existed before the licensing of Conveyancers, it must therefore be expanded to include the Conveyancing industry.

The EAC has been of benefit to the real estate industry and therefore there is a responsibility to cover other parts of the industry and not remain an exclusive institution.

Option 34C – Replace the EAC with a broader property industry advisory or reference group.

With the changes that are evolving in relation to Conveyancing, we believe that a well informed and modernised reference group would be essential to keep the Minister abreast of current issues.

6.6 Victoria Property Fund

Option 35 – Modernise and clarify the basis for VPF claims and extend the purposes to which excess funds can be applied.

We agree with this Option.

It is clearly inequitable that Conveyancers, who have been licensed for 9 years, have not been included in the remit of the VPF, considering their licence fees, as well as interest earned on their trust accounts, form part of the VPF income.

Real estate agents have received substantial funds in the past and continue to receive some funding for education and training.

The industry has even more reason to ensure that Conveyancers are continuously educated and trained, bearing in mind the significant changes to legislation and practices that are occurring.

7. MODERNISATION OF THE LEGISLATION

Option 36 – Make minor amendments to the Conveyancers Act to reflect modern Conveyancing practice.

We agree with this Option.

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16th May 2017**