



Australian Institute of Conveyancers Inc.

**RESPONSE TO
EXPOSURE DRAFT OF
NATIONAL
OCCUPATIONAL
LICENSING LAW BILL**

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1 INTRODUCTION

This Response is to the Exposure Draft of the National Occupational Licensing Law Bill (*“the draft Bill”*) and its Explanatory Paper circulated by the Council of Australian Governments (*“COAG”*) in November 2009.

The Response draws not only on the draft Bill and Explanatory Paper but also from knowledge gained from the consultation process over the past 12 months and other projects in which the Australian Institute of Conveyancers is involved. Accordingly, the Response reflects refined and developed understanding of the national occupational licensing proposal. It states the current views of the Institute and supersedes any previously expressed views.

At the core of the comments in this Response is the need to protect consumers (who, in the context of conveyancing work, are usually quite unsophisticated, trusting and vulnerable) through appropriate standards of competency, knowledge and conduct.

2 GENERAL COMMENTS

The Institute has various comments that do not relate to particular provisions of the draft Bill but require consideration and, in many cases, amendments of the Bill. These comments relate to –

- the consultation process;
- the proposed model;
- scope of work, competencies and educational qualifications;
- jurisdictional issues;
- financial issues;
- discipline and enforcement;
- penalties; and
- incorporated licensees.

The comments are not intended to deal with issues that must be discussed in the context of the regulations in relation to individual occupational licences.

2.1 The Consultation Process

This Response has been hastily prepared. Several weeks is insufficient time for a consultation on legislation of this nature given the number, complexity and range of issues together with the need for stakeholder bodies to consult internally – particularly at this time of year when inevitably there are several other unexpected government consultations to be dealt with. Further and more refined comments would have resulted if more time had been available.

Every year Governments and their bureaucracies seek to consult on a range of issues with inadequate time frames. This results in a lack of commitment to the best possible consultation.

The Institute is keen to engage in further consultation should the opportunity arise and has well-developed thoughts on many aspect of the proposed legislation and regulation of licensed occupations generally.

2.2 The Proposed Model

The Explanatory Paper notes that the “delegated agency model” has been adopted. As a consequence, it appears from the wording of the Explanatory Paper and draft Bill that –

- there will be a delegation of “*regulatory functions for licensing to existing regulatory agencies (for example issuing of licences)*” and
 - implementation of the national licensing system and individual jurisdictional and
-

industry specific issues are “*reliant on a National Law that is given effect to by an Act of a host jurisdiction ... which is then adopted and applied as a law by participating jurisdictions.*” (our emphasis).

The delegated agency model (as described above) is expedient for State and Territory-based governments who wish to cling to revenue streams and for the State and Territory-based regulators who often seek to cling to their own (regulatory) functions. This model preserves the State and Territory regimes and the inconsistencies and inefficiencies that a seamless economy is intended to remove. Whilst it is understood that the retention of State and Territory regimes is required to facilitate the short-term introduction of a national licensing system, the political expediency of this approach will largely maintain the status quo: this model represent only a small move towards a seamless economy in the designated occupational areas and generally.

Another disadvantage of the delegated agency model is that the public (ie disaffected consumers) will place some responsibility for a national licence on the federal government, even where a State or Territory regulator was responsible for the failure. Current affairs programs and federal parliamentary oppositions will stir up public concern and assign blame without necessarily being clinical in their analysis. Whilst State or Territory governments and regulators will be happy to share the responsibility for a national licensing system, the control of the system should coincide with public accountability and responsibility: the delegated agency model ultimately does not deliver that outcome.

There are various other difficulties with the delegated agency model. However, it is unnecessary to elucidate them in this Response.

A further limit on the move to a seamless economy is that the legislation will apply only to participating jurisdictions. Again, this approach is politically expedient in the short-term but goes only part of the way to achieving a seamless economy. For example, conveyancing is undertaken in every jurisdiction: however, the strong political lobby of lawyers has prevented legislation being enacted in Queensland and the Australian Capital Territory that would enable any person other than a legal practitioner performing that work¹. The result is that largely untrained clerks perform most of the tasks for which the solicitor charges relatively high fees in those jurisdictions whereas qualified licensed conveyancers perform those tasks more efficiently and economically in all other jurisdictions. The application of the legislation solely to participating jurisdictions plus the ability of jurisdictions to opt out of its application in relation to particular occupations (including those that are separately licensed in their jurisdiction) ensures the seamless economy will not extend to those jurisdictions: under the draft Bill, ‘embargoed’ occupations will be completely unable to move into those jurisdictions. The national legal profession reforms already in place enable legal practitioners to practice outside their jurisdictional borders. Those reforms are the subject of a separate COAG review to extend them. With the implementation of an electronic conveyancing system,

¹ Queensland previously enacted enabling legislation. However, the legislation was repealed in the 1950s and existing licensed conveyancers were granted limited practising certificates as legal practitioners. There is nothing unique about the practice of conveyancing in Queensland or the ACT.

conveyancing will be able to be delivered remotely, making the present jurisdictional borders not only absurd but also anti-competitive and commercially unfair: it will give legal practitioners in Queensland and the Australian Capital Territory (particularly the infamous ‘conveyancing factories’ based on the Gold Coast) an advantage over all other legal practitioners and conveyancers because it will protect them in their own State from competition but enable them to pursue business in the jurisdictions where conveyancers can operate. Hence, the draft Bill will facilitate an anti-competitive environment and strengthen those who seek to prevent movement of competitors into those jurisdictions – ie achieve an outcome that is contrary to the objective of the legislation and various other COAG initiatives.

Two changes to the draft Bill will overcome these barriers.

Firstly, the Law must include a timetable for movement to the national single agency model.²

In addition, governments should not be able to opt in for only some licensed occupations. Either a government is committed to a seamless economy (and participate in the funding from the Commonwealth Government) or not. Indeed, allowing a jurisdiction to opt out of one or more licensed occupations is contrary to the objectives of the national licensing system as articulated in the Intergovernmental Agreement and draft Bill (see clause 3(a), (e) and (f)). Governments may need time to develop and/or refine the competencies and related qualifications that are appropriate to the work to be carried out in the jurisdiction. However, a deadline needs to be incorporated for the completion of that task and promulgation of the implementing regulations. This can be achieved if the legislation enables a licensed conveyancer from any jurisdiction to operate in any other jurisdiction after a specified period in the absence of reasonable competencies and related qualifications for the jurisdiction. A jurisdiction that does not pass this legislation should be precluded from being a participating jurisdiction and from participating in the Commonwealth Government funding.

The Institute proposes that the legislation incorporates provisions that –

- require the implementation of the national single agency model within 5 years after the implementation of the legislation but with the Ministerial Council having the ability to extend that period by two year periods (to a maximum of four years);
- enable a person holding an occupational licence under the legislation to operate in any participating jurisdiction after a period of two years from the implementation of the legislation in the participating jurisdiction without limitation unless the participating jurisdiction has established –
 - reasonable competencies and related qualifications that are appropriate to the work to be carried out in the jurisdiction, and

² It is acknowledged that, in the move to a national single agency model, it may be necessary for a short period to maintain restrictions to licences in individual jurisdictions. See **Scope of work, competencies and educational qualifications** below.

- a reasonable process for licensing of that occupation in the jurisdiction.

2.3 Scope of Work, Competencies and Educational Qualifications

The scope and nature of the work as well as the processes involved are not consistent across the States and Territories³ for some licensed occupations and the competencies and qualifications for licensing also vary across the States and Territories. These inconsistencies and variations have been identified previously by COAG's Skills Recognition Steering Committee and it is acknowledged that it will be impossible to eliminate them in the short term. It is also vital that the variations are recognised and in the short term preserved by imposing conditions and limitations on licences. Failure to do so will expose consumers to serious risks.

However, in the medium term, these conditions and limitations on licences will need to be addressed and eliminated (see below). The Institute is vehemently opposed to any approach that will result in the 'dumbing down' of competencies and qualifications.

In the interim, a national occupational licence system must also ensure that each jurisdiction offers 'top up' courses that can be easily accessed by a licensee from another jurisdiction to enable that licensee to obtain the necessary qualifications to carry out work in the jurisdiction without restriction or conditions.

The proper implementation of competencies is critical. For example, a competency relating to 'taking instructions' must be seen in the context of the task and the transaction. Competencies and educational standards are being seriously eroded by some registered training organisations ('*RTOs*'). RTOs have and/or are developing courses that treat a competency as a skill and largely disregard the knowledge and theoretical components required in order to perform a task competently. Regulators in most States and Territories do not have the resources, skills and/or interest to ensure that courses are taught at the appropriate level of competency. Many courses now on offer for conveyancing qualifications are unsatisfactory or inadequate owing to pursuit of profit and/or inadequate resources. Some RTOs treat courses as 'cash cows' and do not commit resources to course development or revision of materials, both of which are essential owing to constant changes in legislation, technology and processes⁴. This erosion of educational standards may be dismissed in the context of the proposed legislation as an educational problem instead of a licensing problem: however, the acceptance of qualifications from these RTOs for the purposes of licensing is effectively an endorsement by government of the adequacy of the course. Hence, any model will not deliver adequate education standards to protect

³ For example, contracts for the sale of real property must be prepared by a solicitor or conveyancer in NSW but may be prepared by a real estate agent in SA. Likewise, disclosure of matters affecting land is dealt with by a solicitor or conveyancer in NSW whereas the real estate agent usually prepares a statutory disclosure statement in SA.

⁴ In the past decade, jurisdictions have seen major changes in legislation (the GST, stamp duties, real property, disclosure statements, community titles, fraud and anti-money-laundering), land registry processes (all registries have adopted more efficient processes plus major adjustments for electronic conveyancing and Victoria has implemented an electronic conveyancing system), technology (affecting office processes, e-commerce and service delivery by government and stakeholders), documentation (contracts, disclosure statements, land registry forms) and numerous other developments (including identity and other forms of fraud).

consumers if it does not incorporate robust educational standards and a mechanism involving stakeholders that ensures the necessary competencies are taught at the appropriate level.

However, a national licence must eventually result in nationally consistent qualifications in relation to comparable work and those qualifications must accommodate the variations in the processes required for the work across the jurisdictions⁵. Legal practitioners undertake a much broader scope of work than conveyancing and they are or soon will be able to undertake conveyancing work in every other Australian jurisdiction without conditions: similarly, conditions imposed by individual jurisdictions upon specialist occupationally licensed conveyancers must be eliminated within 2-3 years.

The introduction of nationally consistent qualifications will require the scope of work to be defined consistently across the participating jurisdictions. Hence, moving towards a seamless national economy in relation to licensed occupations will require a phase beyond the implementation of the proposed Law. It is suggested that planning for this phase should be incorporated in the current activity.

There is a final issue to consider. Because change is constant, it is critical to incorporate a requirement that a licence may not be renewed unless the licensee has completed the prescribed on-going professional development activity. Jurisdictions that have passed enabling legislation for licensed conveyancers in recent years have included this requirement and it is strongly supported by the Institute. This requirement also applies to legal practitioners in some jurisdictions.

2.4 Jurisdictional Issues

Conveyancers are able presently to deliver their services from a remote location. A conveyancer located in one jurisdiction may deal with or handle the conveyance of land or a business in another jurisdiction without ever being physically present in the jurisdiction in which the land or business is located. The advent of a national licence and a national electronic conveyancing system will facilitate and encourage cross-border activity, as will the accelerating use of the internet by consumers to access goods and services (with the enhanced risks and diminished protections that it involves). This situation raises serious issues in relation to licensing, professional indemnity insurance and indemnity funds.

The draft Bill requires the licensee to be licensed in the jurisdiction where he or she “*primarily carries out*” the licensed occupation⁶. The ability of conveyancers to carry out work without being physically present in the jurisdiction where the subject of the work is located means that “*primarily carries out*” needs to be clearly defined to avoid jurisdiction

⁵ For most licensed occupations, the processes will be largely the same and there should be no barriers to adopting a single, ‘best practice’ process nationally. However, some processes are entrenched in a process that extends far beyond the work of the licensee. Preparation of contracts by a real estate agent in some but not all jurisdictions is one example. Changing such processes will be difficult and sometimes impossible. Restrictions and conditions will need to be retained in relation to these wide-ranging processes for several years whilst nationally consistent qualifications and nationally consistent courses are brought on-line that teach the processes for all jurisdictions.

⁶ See the definition of “*primary jurisdiction*” in clause 3.

shopping.

Jurisdiction shopping is not simply about licence fees. Other factors relevant to the primary place of business (at least for conveyancers and real estate agents) are –

- the ease of attaining educational qualifications;
- whether the disciplinary processes are onerous or poorly implemented;
- the level of premiums for professional indemnity insurance; and
- the means by which the indemnity/fidelity fund is funded.

Indemnity/fidelity funds are in place to compensate persons who have suffered loss as a consequence of a defalcation by a conveyancer or real estate agent. In some jurisdictions, indemnity/fidelity funds are primarily funded by the interest generated by the trust accounts of the conveyancers and/or real estate agents. However, at least one jurisdiction requires the conveyancers or agents to bear personally the cost of primarily maintaining the indemnity/fidelity fund.

The related issue is the flow of funds to pools to compensate persons who have suffered loss. Professional indemnity insurance and indemnity/fidelity funds are jurisdictionally based⁷. A national scheme for professional indemnity insurance and a national indemnity/fidelity fund may evolve for conveyancers and real estate agents in the future but may not be achievable in the short term because of different claims histories and different scope of work⁸.

Professional indemnity insurers are likely to impose a levy on licensees who carry out work in another jurisdiction and are likely to impose conditions on such work. This will create complications in relation to premiums and possible refusal of cover for work outside the primary jurisdiction. Regulators will need to review any master policy in place for their jurisdiction. However, these issues will need to be resolved for conveyancers, real estate agents and any other licensed occupations required by statute to have professional indemnity insurance. Without access to affordable professional indemnity insurance, there will be little change in cross-border commerce, particularly for conveyancers.

Indemnity/fidelity funds raise other considerations. It is likely that an indemnity/fidelity fund would be exposed to claims for compensation for defalcations in relation to transactions within their jurisdiction. However, indemnity/fidelity funds only receive funds from persons licensed in their jurisdiction. Hence, indemnity/fidelity funds are exposed to paying claims for which no licensee has made any contribution.

Complicating the issue of indemnity/fidelity funds is that in a least three jurisdictions

⁷ Master policies apply in most jurisdictions for professional indemnity insurance for conveyancers and real estate agents.

⁸ These and related issues are being seriously explored in the design of the legal framework for the national electronic conveyancing system.

(namely Victoria, South Australia and Tasmania) there is a single fund that deals with claims against two licensed occupations, namely conveyancers and real estate agents.

It is suggested that the definition of primary jurisdiction in clause 4 be refined to indicate the factor or factors to be taken into account to determine the primary jurisdiction. Factors to consider include –

- location of the registered office (being the place for service). For obvious reasons, this cannot be the sole criteria;
- location of the postal address (which must be in the same jurisdiction as the registered office);
- jurisdiction in which the greatest number of transactions occurred in the preceding year⁹; and
- jurisdiction in which the greatest gross income was derived in the preceding year¹⁰.

This issue has ramifications for the content and timing of the annual return by the licensee.

It is also suggested that mechanisms should be included in the legislation to enable –

- adjustments where a licensee changes the primary jurisdiction during the year; and
- income raised in a jurisdiction in relation to the indemnity/fidelity fund to be paid to other jurisdictions in proportion to the net fees received for work carried out in those jurisdictions.

2.5 Financial Issues

Various licensed occupations receive and hold money on behalf of clients. These include builders, real estate agents and conveyancers. Dealings with and security of trust moneys are very serious issues from the perspectives of consumer protection, public confidence and government image. Conveyancers and real estate agents are required to undergo annual audit and related reporting of dealings with trust moneys.

Detailed rules relating to such moneys need to be dealt with in the regulations for the particular licensed occupation¹¹. However, the proposed Act should make express reference to the possible dealing with trust moneys, annual reporting, monitoring and enforcement to ensure that adequate powers are given (including the power of immediate suspension and powers in relation to third parties such as financial institutions). The importance of compliance must also be highlighted to licensees, regulators and courts.

⁹ The relationship to the preceding year is required owing to the requirement in clause 24 to advise a change in circumstances within 7 days of change.

¹⁰ See immediately preceding footnote.

¹¹ Regulations will need to address a wide range of matters including the circumstances in which moneys may be taken, receipting, banking, maintenance of records, accounting to the client, audit, interest on deposits and indemnity/fidelity funds.

2.6 Discipline and Enforcement

It is commonplace for Ministers and regulators to talk tough but not follow through on compliance and enforcement. In many cases, regulators are hamstrung by inadequate resources for compliance and investigation. Some jurisdictions also have dysfunctional disciplinary processes (see below).

The ‘show cause’ process does not overcome under-resourcing of the investigatory function. However, it will reduce the extent of the investigative process and the consequential costs in many instances by enabling the Licensing Authority to set out alleged facts and requiring the licensee to provide evidence that allegations are incorrect and/or do not justify the proposed penalty.

The ‘show cause’ process will also cut through many of the problems that presently exist in the protracted and disjointed disciplinary processes of several jurisdictions. Some jurisdictions require legal proceedings to be pursued through a court by an external prosecutor. These prosecutions are subject to problems of privacy (creating communications problems between agencies) and the workload, resources and priorities of the prosecuting agency. They usually take more than a year to be resolved. Hence, the majority of transgressions (which fall in the middle ground for seriousness) are not pursued. The ‘show cause’ process will expedite disposal of most matters and reduce the costs of the disciplinary process for the Government and the licensee.

The Institute strongly supports the ‘show cause’ process and the ability of the Licensing Authority to initiate and deal with various breaches of the Law.

Enforcement beyond a jurisdiction poses major problems. A decision affecting a licence (suspending, cancelling, etc.) will be implemented across all jurisdictions. However, enforcement deals with the conduct of licensees¹². Under the draft Bill, conduct is to be controlled by orders of State and Territory-based courts. Such orders rarely have extra-jurisdictional effect without the process of registering judgments in the jurisdiction where the order is to be enforced. Considerable problems can arise where a conveyancing transaction occurs in one jurisdiction but the primary jurisdiction, work and records are located in another jurisdiction. Many of the problems with inter-jurisdictional enforcement may be overcome by giving concurrent jurisdiction to the Federal Court to deal with matters arising under the proposed Act because its orders apply across Australia without the need for registration.

2.7 Penalties

Penalties for breaches of the Law should be substantial. There are instances under existing occupational licensing legislation where the penalty for non-compliance is considerably less than the income that may be generated through non-compliance.

¹² Conduct that may be subject to orders relates not only to carrying out work but also activities involved in the investigatory process like discovery of documents and responding to inquiries.

Penalties must be either indexed or linked to penalty legislation¹³ that is regularly reviewed to ensure that the penalties keep pace with the value of money.

2.8 Incorporated Licensees

Not all jurisdictions allow a body corporate to hold an occupational licence. The Institute supports the occupational licensing of a body corporate. However, the control and management of an incorporated licensee and the involvement of nominees raises special issues.

The draft Bill does not require any director or the nominee to hold the relevant occupational licence. This situation effectively distances a director and a nominee from liability for offences that are committed by the body corporate. Directors and nominees can resign or be removed, causing an absence of control and management without any responsibility on the former director or nominee to ensure that an appropriate person takes over the control and management and perhaps without anyone else who is competent or responsible.

The draft Bill also does not include any provision similar to the anti-lending provision in clause 13.

It is the Institute's view that the legislation must include provisions –

- requiring the nominee to hold the same occupational licence as the body corporate¹⁴;
- making the nominee vicariously liable for any breach of the Law committed by the body corporate;
- similar to the anti-lending provision in clause 13 but with the modification suggested in relation to clause 13 below;
- preventing a person being a nominee of more than one body corporate in relation to an occupational licence;
- requiring notification of the resignation of a nominee and appointment of a new nominee;
- making it an offence for a body corporate to carry out work pursuant to the licence for more than 14 days without a nominee exercising significant control over the operation and management of the licensee's business; and
- specifying that is a ground for the immediate suspension of the licence for a licensee to carry out a licensed occupation for more than 14 days without a nominee who is exercising significant control over the operation and management of the licensee's

¹³ That is, penalties are specified in penalty units that are set out in legislation establishing penalties for a range of enactments, thereby ensuring that the penalties are regularly adjusted to maintain their relative value.

¹⁴ Having the prescribed qualifications, skills, knowledge and experience (as required by clause 16) is not sufficient.

business.

The Institute is also very concerned about the ownership of conveyancing businesses. Conveyancing work is legal work and a conveyancer owes fiduciary duties to his or her client in relation to carrying out work, giving advice and making recommendations.

Various categories of persons, namely real estate agents, financial institutions, mortgage brokers and legal practitioners, and corporate structures associated with them have a vested interest in the work, advice and recommendations of a conveyancer.

Real estate agents are able to steer ('refer') most vendors and purchasers to the conveyancer of the agent's choice. The conveyancer is obliged to review and advise on the work of the real estate agent that affects the rights, duties and obligations of the conveyancer's client¹⁵ that includes the meaning and effect of contractual documentation and any vendor disclosure statements that may be linked to cooling off rights. It would be a conflict of interest for a conveyancer owned by an agent to be advising a purchaser about termination of contract and cooling off – ie advising the purchaser in relation to a matter that would deprive the agent of a commission of many thousands of dollars.

More than one third of settlements of the sale of real property do not occur on the specified settlement date because the financial institution acting for one of the parties (ie the vendor or the purchaser) is not ready to settle. Often the delay occurs owing to the financial institution identifying a problem during the final checks before settlement – ie at the last moment¹⁶. These delays lead to claims for default interest between the parties and potentially claims for re-imbursement by the financial institution. It would be a conflict of interest for a conveyancer owned by a financial institution to be advising a client about the client's ability to obtain compensation from the financial institution or to make a complaint to the Financial Services Ombudsman (with an automatic cost to the financial institution of \$5,000).

Most purchases of real property involve mortgage finance. A conveyancer can steer ('refer') a purchaser to a particular financial institution or mortgage broker. It would be a conflict of interest for a conveyancer owned by a financial institution or mortgage broker to be advising a client about using the products and services of a financier or mortgage broker, especially given the long-term arrangements, break fees and trailing commissions that apply in such transactions.

The legal advice that may be given by licensed conveyancers is limited. There are numerous examples of legal firms that define conveyancing work narrowly and then

¹⁵ In some jurisdictions, conveyancers are expressly permitted to give legal advice. In other jurisdictions, the extent of the advice is potentially limited (in the same way that the advice that accountants may give is limited) but in any event will extend to recommending to the client that he or she seek legal advice on particular matters.

¹⁶ Common examples of delaying issues found by last minute checks include a collateral loan that is secured by vendor's mortgage (requiring a new security and new documentation), a lost certificate of title (by the vendor's mortgagee), incorrect description of the purchaser on the mortgage (the purchaser's incoming mortgagee has not checked the Transfer, requiring re-execution of the mortgage) and pay-out issues (eg the incoming mortgagee requiring 2 working days' notice of the settlement cheques when the outgoing mortgagee refuses to advise of the discharge amount until the day of settlement – even if it is the same bank!).

charge additional fees for legal (ie ‘non-conveyancing’) advice that would be included as part of the usual fee of a licensed conveyancer. It would be a conflict of interest for a conveyancer owned by a legal practitioner to advise the client about the scope of conveyancing work (including the need for ‘legal’ advice at all) or to advise the client to seek legal advice other than from the owner of the conveyancing business.

The above examples are not the only situations where a conveyancer’s fiduciary obligations to frequently unsophisticated and vulnerable consumers would be in conflict with the commercial interests of the owners of the licensee if such persons were able to own a conveyancing business.

These conflicts are largely recognised in South Australia in the *Conveyancers Act (1994)* where a review in 2004 of these provisions in the Act led to the insertion of prohibitions in relation to real estate agents, financial institutions and mortgage brokers. Section 7¹⁷

¹⁷ 7—Entitlement to be registered

- (1) *(Not applicable - applies to non-incorporated conveyancers).*
 - (2) Subject to subsection (3), a company is entitled to be registered as a conveyancer if—
 - (a) the company—
 - (i) is not suspended or disqualified from practising or carrying on an occupation, trade or business under a law of this State, the Commonwealth, another State or a Territory of the Commonwealth; and
 - (ii) is not being wound up and is not under official management or in receivership; and
 - (ab) no director of the company is a prescribed person; and
 - (b) no director of the company—
 - (i) has—
 - (A) been convicted of an indictable offence of dishonesty; or
 - (B) during the period of 10 years preceding the application for registration, been convicted of a summary offence of dishonesty; or
 - (ii) is suspended or disqualified from practising or carrying on an occupation, trade or business under a law of this State, the Commonwealth, another State or a Territory of the Commonwealth; or
 - (iii) has, during the period of five years preceding the application for registration, been a director of a body corporate wound up for the benefit of creditors—
 - (A) when the body was being so wound up; or
 - (B) within the period of six months preceding the commencement of the winding up; and
 - (c) each director of the company is a fit and proper person to be the director of a company that is registered as a conveyancer.
 - (3) A company is not entitled to be registered as a conveyancer unless the constitution of the company contains stipulations so that—
 - (a) the sole object of the company must be to carry on business as a conveyancer; and
 - (b) the majority of the directors of the company must be natural persons who are registered conveyancers (but where there are only 2 directors 1 may be a registered conveyancer and the other may be a person who is not a registered conveyancer and nothing in this paragraph prevents a constitution providing that all directors of a company must be registered conveyancers); and
 - (c) no director of the company may be a prescribed person; and
 - (d) the majority of voting rights exercisable at a meeting of the members of the company must be held by registered conveyancers who are directors or employees of the company (but nothing in this paragraph prevents a constitution providing that all such rights must be held by registered conveyancers); and
 - (e) no share in the capital of the company, and no rights to participate in distribution of profits of the company, may be owned beneficially by a prescribed person.
 - (4) For the purposes of this section, a person is a **prescribed person** if the person is—
 - (a) a land agent; or
 - (b) a financier; or
 - (c) a close associate of a land agent or financier,
other than where the land agent, financier or close associate is also—
-

provides that –

- no director may be a real estate agent or “financier” (defined as a person who carries on a business that consists of or involves mortgage financing or lending money for the purchase of land) or a close associate unless he or she is also a registered conveyancer;
- no real estate agent or financier (or a close associate) may own a share in an incorporated conveyancer or be able to participate in the distribution of its profits;
- the majority of the directors must be registered conveyancers; and
- the majority of exercisable votes in general meeting must be exercisable by registered conveyancers.

It is the Institute’s view that the Law must include provisions prohibiting a real estate agent, financial institution, mortgage broker and legal practitioner (or an associate of any of such person) from –

- being a director,
- holding any shares or
- being entitled to participate in the profits of the conveyancer

unless he or she is also licensed as a conveyancer.

(d) a registered conveyancer; or

(e) a prescribed relative of a registered conveyancer who is a director of the particular company seeking registration under this section.

(5) In this section—

financier means a person who carries on a business that consists of or involves—

- (a) mortgage financing; or
- (b) lending money for the purchase of land;

land agent means an agent or a sales representative within the meaning of the *Land Agents Act 1994*.

3 COMMENTS ON PARTICULAR PROVISIONS OF THE DRAFT BILL

In addition to the comments above, the Institute has comments in relation to particular provisions in the draft Bill.

3.1 Clause 4 – Definitions

See the discussion in relation to *Jurisdictional Issues* in *General Comments* above.

3.2 Clause 9 – Regulations about licensing of persons carrying out licensed occupations

Clause 9 provides for regulations in relation to the licensing of persons carrying out licensed occupations. Clause 9(3) excludes the need for regulations for an occupation that is not licensed in the participating jurisdiction. However, the clause does not address the situation where the work is within the wider scope of work that is undertaken by an occupation that is outside the proposed Law. The draft Bill enables a jurisdiction to opt out of licensing that occupation: for example, it means that Queensland can avoid making regulations in relation to licensed conveyancers because conveyancing work is undertaken as part of legal work which is governed by legislation regulating legal practice by legal practitioners.

Clause 9 should be amended to provide that –

- where the work carried out by a licensed occupation in some participating jurisdictions is carried out in another jurisdiction by a separate profession or occupation that is already regulated and that separate profession or occupation is not initially brought within the Law owing to other legislation of that jurisdiction, the regulations under the Law shall apply automatically from the third anniversary of the proclamation of the Law in that jurisdiction unless it has promulgated alternative regulations in relation to the licensed occupation; and
- any regulations promulgated by a jurisdiction in relation to competencies and qualifications and restrictions and limitations on practice must be reasonable having regard to the scope and nature of the work as well as the processes involved.

3.3 Clause 12 – Injunction stopping person from engaging in conduct in contravention of Law or regulations

To avoid the need for registration of orders, the jurisdiction for hearing and granting injunctions should include the Federal Court (see *Discipline and Enforcement* in *General Comments* above).

It is suggested that a definition of “Court” (to mean the Supreme Court or Federal Court) should be included in clause 3 and the word “Court” be substituted for “Supreme Court” in clause 12 and elsewhere.

3.4 Clause 13 – Licensee must not lend or otherwise allow use of licence by another person

Clause 13 provides that a licensee must not “*lend the licensee’s licence*” or allow another person to use the licence. The basis for the prohibition is the absence of adequate supervision and control of the business of an occupationally licensed person. There is no definition of “*lend the licensee’s licence*”.

Surprisingly, the clause does not provide that the person using the licence is guilty of an offence: a penalty should also be imposed on the person benefitting from the lending of the licence.

Coupled with this prohibition should be a positive obligation upon a licensee to exercise significant control over the operation and management of the licensee’s business. This obligation should not prevent a person conducting a business from more than one premises so long as the business (or each part of the business) is adequately supervised and managed on a daily basis by the licensee or another suitably licensed person. Without such provisions, a licensee could not take six months’ holiday without the need to notify the Licensing Authority about the change in circumstances.

Provisions should be added to the Law to the effect that –

- a person to whom the licence is lent is guilty of an offence with the same maximum penalty as for the licensee; and
- a licensee will be deemed to lend his or her licence where the licensee –
 - permits the licensed occupation to be carried out but neither the licensee nor any other person holding the same occupational licence is exercising significant control on a daily basis over the operation or management of the licensee’s business, or
 - permits a person who does not hold that occupational licence to exercise significant control over the operation and management of the licensee’s business.

Similar provisions need to be included in relation to a nominee of a body corporate.

3.5 Clause 16 – Eligibility for licence

Clause 15(2)(a) provides that an applicant must declare the jurisdiction in which he or she proposes to primarily carry out the licensed occupation. However, neither clause 16 nor any other provision in the draft Bill makes it a requirement that the jurisdiction in which the applicant primarily proposes to carry out the licensed occupation is the jurisdiction in which either the application is made or the applicant intends to reside.

3.6 Clause 17 – Personal probity

Clause 17(1)(b) enables the regulations to specify “*the personal probity requirements of*

the body corporate's nominee or another relevant person". Whilst "or" may be interpreted as 'and', the replacement of "*or another relevant person*" with "*and any other relevant person*" would eliminate the possibility for argument that might have to be dealt with initially by a non-legal person in the regulator's office.

3.7 Clause 18 – Financial probity

Under the present wording of clause 18, a person who failed the financial probity requirements in clause 18 could apply for a licence on behalf of a body corporate and be its nominee and could even apply on behalf of a succession of bodies corporate and be their nominees.

It is suggested that clause 18 be amended to provide that a body corporate is not eligible if its nominee or a relevant person fails the financial probity requirements.

3.8 Clause 19 – Excluded person

Clause 19 prevents an excluded person from obtaining the same occupational licence that he or she was previously excluded from. However, many occupational licences are similar and, even where dissimilar, the transgression often has wider ramifications than the actual licence.

It is suggested that Clause 19 should be amended –

- to catch a person who has been made an excluded person in relation to any licensed occupation under the Law (requiring several changes); and
- to enable the regulations, the Licensing Authority or a Court (on appeal from a decision of the Licensing Authority) to provide or find that the conduct upon which the person was declared an excluded person was not relevant to the eligibility for the licence for which the application has been made.

3.9 Clause 22 – Period of licence

The nature of the business carried out by some occupational licences (notably conveyancers and real estate agents) requires annual reporting of a small number of matters including ongoing professional development (for reasons set out *Scope of Work, Competencies and Educational Qualifications* in *General Comments* above) and trust account audit. For other licensed occupations, the need for ongoing professional development may not be as pressing but, owing to constant legislative and technological change, will still be required to protect the consumer and avoid allegations that the government is asleep at the regulatory wheel.

The Institute believes that a licence period should not extend beyond five years and, for occupational licences that require annual reporting (such as conveyancers and real estate agents), a period of licence of more than one year should not be contemplated unless a robust regime is incorporated in which the licence is automatically suspended if –

- the annual return is not lodged, or
-

- within one month of being served with a notice requiring compliance with the annual requirements, the licensee fails establish to the reasonable satisfaction of the regulator that he or she has complied with those requirements.

3.10 Clause 24 – Change in details or circumstances

The need for much greater detail in the meaning of “*primary jurisdiction*” has been identified under *Jurisdictional Issues* in *General Comments* above. However, there are two additional circumstances in which notification should occur.

Where there has been a change in the circumstances upon which the licensee was eligible for a licence (for example, where there has been a change in the circumstances affecting financial probity or personal probity), it is critical that the licensee is required to inform the Licensing Authority promptly so that the Licensing Authority can determine whether or not the licensee should continue to carry out work under the licence.

The Licensing Authority also needs to be promptly informed where the nominee of a body corporate ceases to be employed by the body corporate or ceases to exercise significant control over the operation and management of the licensee’s business, so that it can ensure that a suitable replacement is appointed promptly.

3.11 Clause 35 – Grounds for disciplinary action

The issue of contravention of legislation (particularly provisions creating offences) is usually reserved to a court or tribunal vested with the power to make that determination. To remove doubt about determinations by a non-judicial officer under this clause, it is suggested that “*contravened*” is replaced by “*contravened, or appears to have contravened*”.

Clause 35(2) appears confusing and unnecessary. There will be circumstances where the Licensing Authority is unsure if the licensee’s licence has been automatically suspended or cancelled. However, under clause 35(2) the Licensing Authority breaches the Law if it takes disciplinary proceedings under clause 35 where the suspension or cancellation has been automatic. Obviously, the licensee will argue that there has been no automatic suspension or cancellation and that disciplinary proceedings are required to effect any suspension or cancellation. It is suggested that “*may not*” be replaced with “*need not*”.

3.12 Clause 36 – Grounds for immediate suspension

The Institute supports immediate suspension of a licence in specific circumstances. In addition to those already set out in the draft Bill, the Institute believes that there are three other circumstances in which it should occur.

Annual reporting of various matters (in particular in relation to dealings with trust moneys and related audit) by conveyancers and real estate agents is critical. Failure to lodge those reports or lodging them when not properly completed should result in immediate suspension. Hence, immediate suspension of a licence should occur where the licensee has not lodged with the Licensing Authority within two months of the latest date for

lodgement¹⁸ any return or report (including all required particulars and documents) required by the regulations to be lodged.

A person who is found to be mentally incompetent to look after their own affairs should not be able to look after the affairs of some-one else and presents a danger to consumers. In addition, a person in South Australia pleaded mental incompetence in criminal proceedings against her for misappropriation of moneys in the course of her employment as a registered conveyancer. The trial was delayed for more than a year by the preparation of various psychiatric reports and the prevarications of her legal team. During that period, she continued to act as a registered conveyancer because the existing legislation prevented the suspension of her licence in the absence of a conviction. Hence, it is suggested that immediate suspension of a licence should occur where the licensee has been declared mentally incompetent or pleaded mental incompetence before any court or tribunal.

The third situation in which immediate suspension of a licence should occur is where a nominee of a body corporate has ceased to exercise significant control over the operation and management of the licensee's business (eg through change employment) but a replacement nominee has not commenced employment in that role within 14 days. If a notice of immediate suspension under this ground is served but the nominee commences employment in that role, it should be up to the licensee to establish to the reasonable satisfaction of the Licensing Authority that it has complied. To deal with the consequences of clause 37(3), any work carried out from the date of that employment should be deemed to have been carried out pursuant to the licence.

The comments made in relation to the possible need for judicial determination under clause 35 apply to clause 36.

3.13 Clause 37 – Immediate suspension of licence

Clause 37(3)(b) specifies events that end a suspension. An additional event should be included in clause 37(3)(b), namely where a nominee commences employment in the role of the nominee after a notice related to the failure of the body corporate to have a nominee has been served on the licensee (see also comments in relation to clause 36 above).

3.14 Clause 38 – Show cause notice

The Institute strongly supports this process. See *Discipline and Enforcement* in the *General Comments* above.

3.15 Clause 39 – Representations about show cause notice

Clause 39 enables the Licensing Authority to consider written representations from the licensee. However, the Licensing Authority should also be able to consider relevant written representations from other persons.

¹⁸ Of course, the Licensing Authority should be able administratively to extend the latest date upon request in appropriate circumstances.

3.16 Clause 62 – Access to seized things

It is common for a licensee to be required by statute to maintain certain records. Some records are maintained for the benefit of the client of the licensee – for example, trust account records of a conveyancer or a real estate agent. In those circumstances, the seizure of the records would prevent the licensee from being able to carry out work for the client. In many cases, the inability to carry out the work would have serious ramifications for the client. In a conveyancing transaction, it may deprive a client of money to which the client is entitled or prevent a transaction occurring, thereby placing the client in default of his or her contractual obligations and potentially resulting in the client being liable for default interest for the period that the transaction is delayed.

Hence, clause 62 should be amended to provide that, where records have been seized, the authorised officer may be required to provide a copy of all seized records. The authorised officer should be obliged to provide a copy of the records within one working day (or such longer period as may be reasonable in consideration of the quantity and format of the seized records¹⁹) after receipt of a written request from the licensee or any client of the licensee to whom those records relate.

It is not appropriate to provide that the owner of the records is entitled to the copy because ownership of records can be a contentious issue. Both the licensee and the client to whom those records relate should be able to obtain a copy.

3.17 Clause 66 – Impersonation of authorised officers

Does clause 66 catch persons who pretend to be authorised officers in television skit or a play? Perhaps the context in which the person pretends to be an authorised person should be particularised or the expression “*holds out*” be used.

3.18 Clause 79 – Delegations

The move to the national single agency model may require alternative delegations. A subclause should be added to clause 79 to enable the Licensing Authority to make delegations under that model.

3.19 Clause 85 – Vacancies to be advertised

Subclause (2) appears to be inconsistent with subclause (1) in relation to the need for advertising a vacancy on the Licensing Board before it is filled.

3.20 Clause 111 – Membership and procedures of Advisory Committee

The Australian Institute of Conveyancers comprises State and Territory-based Divisions whose sectional interests are tossed into the mix to produce national policy. Hence, the Australian Institute of Conveyancers is the peak body for licensed conveyancers in Australia and represents the national views of conveyancers. It is keen to provide a

¹⁹ There have been instances where an authorised officer has seized hundreds of files. It would not be practical for a copy to be provided within one working day.

nominee or nominees to the Occupational Licensing Advisory Committee in relation to licensed occupation of conveyancers.

3.21 Clauses 118-20 – Payments into Authority Fund

The National Occupational Licensing Authority Fund is constituted to meet the costs and expenses of administering and enforcing the Law. It is not an indemnity/fidelity fund. The sources of income are specified in clause 119. It is unclear whether the fines for breaches of the Law will be paid into the Authority Fund. It is important to note that fines are specified as a source of income for several indemnity/fidelity funds under existing occupational licensing legislation in relation to conveyancers and real estate agents.

3.22 Clause 128 – Limitation on time for starting proceedings

Clause 128 provides that proceedings for an offence against the Law or the regulations must start within 3 years after the commission of the offence. The Institute believes that this is too restrictive. Clause 22 provides for a licence to be granted for up to 5 years. In that case, a licensee could fail to advise a change in circumstances (as required by clause 24) and, so long as there was no other obligation to disclose the change in the following 3 years, it would be impossible to then take proceedings against the licensee.

It is the Institute's view that where the offence requires a notification of a change in circumstances, the proceedings must be started within 3 years after notification of the change by the licensee. See also the comments in relation to clause 24 above.

3.23 Clause 134 – National regulations

There are numerous other regulatory powers that should be specified in clause 134. These include the following:

- matters relating to professional indemnity insurance for licensees including the conditions and requirements for such insurance and the minimum level of cover;
- the establishment, operation and audit of trust accounts and the handling of trust moneys and trust property; and
- matters relating to the establishment and operation of an indemnity fund including the purpose of the fund, the handling of claims, the rights of subrogation and audit of the fund.

3.24 Clause 135 – Inclusion of new occupations in regulations

See *The Proposed Model in General Comments* above.

4 CONCLUSION

4.1 Outline

The need to protect consumers (who, in the context of conveyancing work, are usually quite unsophisticated, trusting and vulnerable) through appropriate standards of competency, knowledge and conduct is at the core of regulation and at the core of this Response.

The Institute is generally supportive of the proposed legislation but is concerned that the proposed model, the delegated agency model, will not achieve the objectives specified in the Intergovernmental Agreement and the proposed Law and will make little progress towards a seamless economy: indeed, in some respects it will inhibit a move towards a seamless economy and facilitate entrenched anti-competitive practices.

Hence, whilst the initial adoption of the delegated agency model is appropriate, the Law needs to clearly provide for the move to the national single agency model within 5-9 years from the commencement of the Law. Participating jurisdictions should not be able to exclude the operation of the Law in relation to particular licensed occupations (in particular, conveyancers).

It is also acknowledged that regulators should be able to impose conditions on licensees carrying out work within their respective jurisdictions in the short term. However, ultimately there must be nationally consistent qualifications and nationally consistent courses that teach the processes for carrying out work in all jurisdictions. Eventually licensed conveyancers should, like legal practitioners, have no jurisdictional conditions on the practice of their profession. Ongoing professional development must be a requirement for renewal of a licence.

The nature of the work of conveyancers (being legal work that may be delivered remotely and involves the handling of trust moneys) creates special issues (including trust accounting, professional indemnity insurance and indemnity/fidelity funds) that must be addressed in the Law and in the regulations relating to conveyancers.

Incorporated licensees also involve unique problems that need to be carefully addressed.

The Institute supports the simple procedure associated with the 'show cause' notice and substantial penalties for breaches of the Law.

There are many issues that need to be changed or included in the proposed legislation that are detailed in the *General Comments* and *Comments on particular provisions on the draft Bill*.

4.2 Contact details

For further information or discussion upon the comments in this Response or any other matters relating to national licensing, please contact:

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