



Fair  
Trading

Regulatory Impact Statement  
Conveyancers Licensing Regulation  
2015

June 2015





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## Executive Summary

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The purpose of this document is to seek public comment on a draft of the Conveyancers Licensing Regulation 2015, which will replace the existing Conveyancers Licensing Regulation 2006. The *Subordinate Legislation Act 1989* provides for the automatic repeal of statutory rules (regulations) after they have been in force for five years. The Conveyancers Licensing Regulation 2006 was due for automatic repeal on 1 September 2011, however the repeal, and the re-make of the Regulation, was postponed until the resolution of the National Occupational Licensing System and the effects of national e-Conveyancing were fully understood.

The Conveyancers Licensing Regulation 2006 is now due for repeal on 1 September 2015 and will lapse if not re-made. It is proposed that the Regulation be re-made with some minor amendments.

The draft Conveyancers Licensing Regulation 2015 has been prepared for consultation purposes. Following consideration of comments made in submissions, further amendments may be made to the draft Regulation before it comes into effect.

The Subordinate Legislation Act aims to reduce unnecessary regulation by Government. The Act requires that a Regulatory Impact Statement (the Statement) be prepared and public consultation be undertaken for all proposed regulations dealing with substantive matters. The purpose of the Statement is to assess the need for the Regulation and to explore whether there are any other non-regulatory options that could supplant the need for Government intervention.

The Statement must assess the economic and social costs and benefits of a proposed regulation and consider all possible options to meet its objectives. Before the Regulation can be made it must be demonstrated that it is the option which produces the greatest net public benefit.

The Regulatory Impact Statement process aims to ensure that:

- the Regulation is the most efficient and effective way of achieving the policy objective; and
- the Regulation results in minimum cost to the community or produces an outcome where the expected benefits resulting from it outweigh the expected costs to the community.

The Regulatory Impact Statement must include:



- a statement of the objectives of the proposed Regulation and the reason for them;
- an identification of the alternative options by which those objectives can be achieved, either in whole or in part;
- an assessment of the costs and benefits of each alternative to the making of the regulation, including the costs and benefits relating to resource allocation, administration and compliance – this assessment must consider the alternative of not taking any action;
- an assessment as to which of the options will bring about the greatest net benefit or the least net cost to the community; and
- a statement of the consultation program to be undertaken

The impact of a proposed regulation is generally expressed in terms of:

- ‘cost-benefit’ analysis of the options, where the costs and benefits flowing from the proposal can be measured in monetary terms, or
- ‘cost-effectiveness’ analysis, where the benefits of the regulation do not lend themselves to monetary quantification.

Qualitative costs and benefits may also be important in conducting both cost-benefit and cost-effectiveness analysis. Qualitative costs and benefits may involve consideration of matters affecting, for example, comparative quality of life, environmental pollution and visual amenity.



## The Consultation Process

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### **Making a submission**

Interested organisations and individuals are invited to provide a submission on any matter relevant to the effective operation and good management of the conveyancers licensing industry in NSW, whether or not it is addressed in this Regulatory Impact Statement or the Draft Regulation.

We would prefer to receive submissions by email and request that any documents provided to us are produced in an 'accessible' format. Accessibility is all about making documents more easily available to those members of the public who have some form of impairment (visual, physical, cognitive). Further information on how you can make your submission accessible is contained at <http://webaim.org/techniques/word/>.

### **The closing date for submissions is 24 July 2015**

Email submissions to [policy@finance.nsw.gov.au](mailto:policy@finance.nsw.gov.au)

Postal submissions to:

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

Additional copies of this Regulatory Impact Statement and the proposed Regulation can be downloaded from [www.fairtrading.nsw.gov.au](http://www.fairtrading.nsw.gov.au)

Printed copies can be requested from NSW Fair Trading by phone on (02) 9895 0791.



### **Confidentiality of Submissions**

The consultation process is public and open. Submissions will be published on the NSW Fair Trading website. If you do not want your personal details or any part of your submission published, please indicate this clearly in your submission. Automatically generated confidentiality statements in emails are not sufficient.

However, please be aware that even if you state that you do not wish certain information to be published, there may be circumstances in which the Government is required by law to release that information, for example, in accordance with the requirements of the *Government Information (Public Access) Act 2009*. It is also a statutory requirement that all submissions are provided to the Legislation Review Committee of Parliament.

### **Identified Stakeholders**

The Regulatory Impact Statement has been provided directly to some stakeholder organisations. A list of these stakeholders is provided at Appendix 5.

### **Evaluation of Submissions**

All submissions will be considered and assessed in accordance with the criteria stated in the *Subordinate Legislation Act 1989*. If required, further targeted consultation may be undertaken. The Minister for Innovation and Better Regulation will then determine the final Regulation.

### **Commencement of the Regulation**

After the Minister for Innovation and Better Regulation has finalised the Regulation, it will be submitted to the Governor for approval. Once approved by the Governor, the Regulation will be published on the NSW Legislation website at [www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au).

It is proposed that the Regulation will commence on 1 September 2015, when the existing Regulation is due to be repealed.



## Objective and Rationale of the Regulation

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### Objective

The primary objective of the Regulation is to provide the legislative support and administrative detail for the operation of the *Conveyancers Licensing Act 2003*, enabling it to operate effectively and meet its intent in providing protection for consumers of conveyancing services.

The Regulation will provide for:

- The fees payable by conveyancers or corporations for the issue of a licence;
- The rules of conduct to be observed by licence holders in the exercise of their functions;
- Requirements of licensees in the retention, banking and payment of trust monies, as well as record keeping and accounting and the furnishing of statements of account; and
- Procedures for the hearing of costs disputes in the NSW Civil and Administrative Tribunal.

### Rationale

It is necessary to re-make the Regulation at this time because:

- The current Regulation has been in place since 2006 and will be automatically repealed on 1 September 2015 if it is not re-made, because of sunset provisions contained in the *Subordinate Legislation Act 1989*.
- If the Regulation is not re-made, and therefore repealed, much of the *Conveyancers Licensing Act* would become unenforceable as licensing functions, fees, requirements for the keeping of trust accounts and rules of conduct for practitioners rely on the detail contained in the Regulations.





## Options for achieving objectives

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The primary objective of the Regulation is to provide the legislative support and administrative detail for the operation of the *Conveyancers Licensing Act 2003*.

The options for achieving the objectives of the Regulation are:

### **Option 1**

Maintain the status quo – Do not make the proposed Regulation, and instead re-make the Regulation to be identical to the existing Regulation.

### **Option 2**

No action – Allow the existing Regulation to lapse under the sunset provisions of the Subordinate Legislation Act, and do not make any replacement Regulation.

### **Option 3**

Make the proposed Regulation – The provisions of the Regulation would provide the legislative support and administrative detail for the Conveyancers Licensing Act.



## Impact Assessment of Options

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### Assessment of Option 1

Maintain the status quo.

#### **Option 1 – Costs**

This option would result in no additional direct costs for consumers, individual conveyancers, conveyancing business or the Government because the Regulation would be remade without any changes. However, there would be a loss of opportunity cost of not updating certain provisions to bring them into line with modern means of communication and business practices.

Specifically, consumers would not benefit from being able to use email to request from a conveyancer an itemised account of the conveyancing transaction in which they are involved. Similarly, conveyancers would not benefit from being able use email to provide their clients with itemised accounts. In this regard, consumers and conveyancers alike would not benefit from the increased speed and efficiency of communication that email affords. If the period for which conveyancers are required to keep records is not increased from six to seven years, the Regulation would continue to be inconsistent with other conveyancing legislation and a key business practice of the conveyancing industry would be out of step with that of most other industries.

There would also be a highly significant loss of opportunity cost for those conveyancers who wish to maintain their licence even though they are not currently undertaking conveyancing work.

There would be no significant additional costs for the Government arising from this option. Overall the estimated cost of this option for industry, particularly for a certain segment of the industry is medium.

#### **Option 1 – Benefits**

The primary benefit of this option is that neither consumers nor conveyancers would need to adapt in response to new legislative requirements. However, this benefit is estimated to be low as the Regulation is outdated and does not provide the same benefits to consumers, conveyancers and the conveyancing industry compared with the new proposed Regulation.



### ***Option 1 – Conclusion***

While there are no additional direct costs imposed by this option, there would also not be any significant additional benefits. Importantly there would be direct and in-direct loss of opportunity costs, particularly in regard to the current costs associated with maintaining a license when a licensee is not currently undertaking conveyancing work.

### **Assessment of Option 2**

No action.

### ***Option 2 – Costs***

This option would result in the current Regulation being repealed without a replacement Regulation being made. Although the Act would remain, its objectives would not be met because many of its provisions would be rendered unworkable. It would not be possible to give effect to the intention of the Act without further action by the Government such as amending the Act. Without a Regulation the Government's capacity to quickly amend requirements, in response to problems that arise for consumers and/or changes in industry practice, would be restricted.

More specifically, there would be no means by which to calculate the fees that in part enable Fair Trading to carry out its functions as regulator of the conveyancing industry. While licenced conveyancers would still be required under the Act to be covered by a policy of profession indemnity insurance, there would be no guidance as to how this licence condition may be met or assurance that the policy is appropriate insofar as it is approved by the Minister. Consumers would be exposed to further potential risks arising from a lack of accountability in the conduct of conveyancing businesses. Resolving costs disputes would potentially be more expensive and onerous, restricting access to NCAT.

The safety of monies held in trust by conveyancers would be threatened since consumers would be at greater risk of defalcation and/or the misappropriation of funds. An absence of guidance as to how trust accounts are to be managed could lead to increased costs for conveyancing businesses. Consumers would lose the confidence of dealing with conveyancers required to follow legislative procedures. Conveyancers would lose the benefit of certainty that they are complying with legislation by following prescribed record keeping requirements, and the period for which conveyancers are required to keep records under the Regulation would be inconsistent with other conveyancing-related legislation and the business practices of other industries.



If no particular information was prescribed to be included in Fair Trading's register of licenced conveyancers, the risk of consumers dealing with unlicensed conveyancers would increase which in turn could lead to potential increases in complaint handling and investigation costs for the government and risk to consumers' funds, as well as increased cost to consumer on checking whether a conveyancer is licenced. Suspended conveyancers would not continue to be accountable to their clients or Fair Trading for their actions prior to their suspension.

The administrative benefits and cost savings of penalty notices would be lost because without prescribed penalty notice offences, all offences would need to be the subject of disciplinary proceedings, and the level of industry compliance would be reduced because little or no action would be taken for minor offences. Furthermore, while the Government's role in regulating the conveyancing industry would continue under that Act, in the absence of a Regulation it would generally be made more difficult and time-consuming because of the lack of appropriate and consistent guidelines for the management of trust accounts and controlled money the keeping of records.

There would not necessarily be a reduction in the Government's role in regulating the conveyancing industry. That role would continue under the Act but in absence of a Regulation would likely more onerous and therefore more costly.

### ***Option 2 – Benefits***

This option affords very few benefits to consumers or the Government. There would be a significant reduction in the administrative and compliance obligations of conveyancers and therefore a reduction in the operating costs of a conveyancing business. This could conceivably lead to cheaper conveyancing services for consumers, but only if conveyancers passed on those business costs savings to consumers.

### ***Option 2 – Conclusion***

Allowing the Regulation to lapse would result in high costs for consumers and the Government with little to no benefits. There would be benefits to conveyancers in reduced business costs from complying with regulatory requirements. However, overall, the high cost to consumers and Government of significantly reduced consumer protection, high dispute resolution costs and the removal of the capacity to collect fees while maintaining the need to enforce and administer the legislation outweigh the potential benefits of reduced business costs and the benefits to industry of those reduced business costs.



### **Assessment of Option 3**

Make the proposed Regulation.

#### ***Option 3 - Costs***

There are little to no additional costs to consumers, conveyancers or the Government arising from this option. Adjustment to the new provisions would be minor or inconsequential. Most, if not all consumers and conveyancers, will already use or have access to email. Maintaining records for an extra year is highly unlikely to incur any additional costs for individual conveyancers or conveyancing businesses.

There will be some costs to Government in having to provide new licensing forms.

#### ***Option 3 - Benefits***

There will be highly significant benefits through cost savings to those conveyancers who wish to maintain their licence even though they are not currently carrying out conveyancing work. The Regulation will do this by specifically requiring that a conveyancer must only be covered by a policy of professional indemnity insurance when carrying out conveyancing work. There are also benefits arising for Government by providing that an insurance policy can be one approved by the Commissioner for Fair Trading.

Consumers will benefit from being able to use email to request an itemised account of the conveyancing transactions in which they are involved, as will conveyancers when providing a client with an itemised account when requested. This change will bring a key part of conducting the business of conveyancing into line with modern means of communication and provides for greater efficiency.

Conveyancers and the conveyancing industry generally will benefit from the requirement that records are kept for a period of seven instead of six years because as this requirement will be consistent with other conveyancing-related legislation and the practices of other industries. This consistency is also beneficial to the Government.

#### ***Option 3 – Conclusion***

The costs of adjusting to the new Regulation would be low as conveyancers are already required to keep and maintain records for six years and requiring the records to be kept for an additional year would not impose significant costs. The benefits however are high, particularly for those conveyancers who wish to continue to maintain their licence even though they are currently not carrying out conveyancing work. There are also demonstrated benefits for consumers and industry from the increased efficiency arising from the use of email.



### Summary of Costs and Benefits for each option

Option	Likely Costs	Likely Benefits	Overall Benefit
Option 1	Medium	Low-medium	Medium
Option 2	High	Medium	Low-medium
Option 3	Low	High	High

### Preferred Option

**Option 3, making the proposed Regulation, is the preferred option.**

This is the option which provides the greatest benefit and the least cost to industry, consumers and the Government.



## Regulation- Making Powers

**Table 1: Regulation making powers of the Act and scope of the proposed Regulation**

Regulation making power provided by the Act	Section in the Act	Scope of the Regulation	Clause in the draft Regulation
<b>Part 1 Preliminary</b>			
To prescribe additional legal work which is considered to be conveyancing work.	4(2)(c)	None prescribed.	
To prescribe any work that does not constitute conveyancing work.	4(3)	None prescribed.	
<b>Part 2 Licences</b>			
To prescribe a breach of any provision of the Act or the regulations as a ‘disqualifying breach’.	10(1)(r)	None prescribed.	
To prescribe matters concerning a licence relevant to the operation of Part 2 of the <i>Licensing and Registration (Uniform Procedures) Act 2002</i>	11(5)	None prescribed.	
To prescribe the application fee for a licence.	12(1)	Prescribe fees for the granting, renewal, restoration and replacement of a conveyancer licence.	5 Schedule 2
To prescribe a requirement that a licence holder is be insured under a policy of professional indemnity insurance.	15(1)	To specify that the holder of a conveyancing licence must be insured under a policy of professional insurance approved by the Secretary by an order published on the NSW legislation website.	6
To prescribe that a professional indemnity insurance policy be a certain type of policy approved by Ministerial Order published in the Gazette	15(2)	See above.	6
<b>Part 3 General conduct of licences</b>			
To prescribe matters to be taken into account by the Commissioner when considering whether granting an exemption from: <ul style="list-style-type: none"> <li>▪ The requirement for a separate licence to be in charge of each place of business</li> </ul>	20(4) & (5)	Prescribes the following matters: <ul style="list-style-type: none"> <li>▪ reasons why the exemption is needed</li> <li>▪ the licensee’s previous experience as licensee-in-charge</li> <li>▪ the licensee’s capacity to comply with guidelines issued by the secretary</li> </ul>	7



Regulation making power provided by the Act	Section in the Act	Scope of the Regulation	Clause in the draft Regulation
<ul style="list-style-type: none"> <li>▪ The prohibition on a licensee exercising the functions on behalf of more than one licensee at a place of business</li> </ul>		<ul style="list-style-type: none"> <li>▪ the licensee's record of compliance with the conditions of a licence as well as the provisions of the Act and Legal Professions Act 1997 and 2004.</li> <li>▪ employer references in relation to a licensee's experience as a licensee in charge</li> </ul>	
To prescribe rules of conduct to be observed for carrying in a conveyancing business. The regulations may adopt, with or without modification, rules made by the Law Society in respect of solicitors. The regulation may make provision for matters to be disclosed to the principal including any conflict of interest or beneficial interest in relation to the sale of property.	22(1), (2) & (3)	Prescribes rule do be observed in the in the course of the conduct of a conveyancing business or exercise of the functions under a licence.	8 Schedule 3
To prescribe restrictions on the sharing of receipts of a conveyancing business with a person who is not a licensee.	26(4)	None prescribed.	
To prescribe restrictions on the classes of persons (other than licensees) with whom a licensee may be in partnership.	27(4)	None prescribed.	
To prohibit a licensee who conducts a conveyancing business from being employed in or conducting any other business.	28(1)	Prohibits a licenced conveyancer from conducting, or being employed in the conduct of, the business of an agent under the <i>Property, Stock and Business Agents Act 2002</i> .	9
To prescribe for advertising by licensees. Section 35 deals with such matters as details to be included in advertisements and misrepresentation.	34	None prescribed.	
To prescribe the kind of conflict of interest or beneficial interest that must be disclosed together with the basis for costs.	36(1) & (2)(f)	None prescribed.	
To prescribe any additional matters that must be disclosed to the client.	36(2)(f)	Prescribes the disclosure of non-conveyancing work to be carried out.	10
To prescribe the information to be disclosed to clients and when it would not be reasonable to require disclosure.	40	None prescribed.	





Regulation making power provided by the Act	Section in the Act	Scope of the Regulation	Clause in the draft Regulation
<b>Part 4 Resolution of costs disputes</b>			
To prescribe for notification of a costs dispute to the NSW Civil and Administrative Tribunal (NCAT).	43(1)	Prescribes notification in writing and in accordance with the requirements of the <i>Civil and Administrative Tribunal Act 2013</i> , made within 60 days after the licensee provides their client with a bill or account for costs.	12
To prescribe the fee that must accompany the notification of a costs dispute to NCAT.	43(2)	None prescribed.	
To prescribe payment of a costs assessment by the parties to a costs dispute.	45	Prescribes payment in the manner ordered by the Tribunal.	13
To prescribe for applications to NCAT for the determination of a costs dispute	47	None prescribed.	
To prescribe the transfer of proceedings to or from other courts to NCAT.	50(2)	Prescribes transfer by order of the court hearing the costs dispute, the Registrar of the court giving notice to the principal registrar of the Tribunal and transferring all documents relating to the proceedings, and serving on all parties a notice fixing a date for a hearing or a directions hearing.	14
<b>Part 5 Trust money and controlled money</b>			
To prescribe the period of time controlled money is to be held under the direct or indirect control of the licensee.	53(1)(ii)	None prescribed.	
To prescribe the procedure for a licensee to withdraw or receive money due for costs from trust or controlled money.	53(3)(a)	Prescribes that the licensee must: <ul style="list-style-type: none"> <li>▪ have disclosed the costs and other matters required to be disclosed to the person from whom the licensee has received trust money, or</li> <li>▪ be able to claim that the disclosure was not required because it was not reasonable to require it.</li> <li>▪ deliver the bill or account of the costs together with a written notice that the licensee intends to withdraw the money and apply it towards payment of the bill or account 30 days after its delivery.</li> </ul>	20
To exempt money or a class of money held in trust by a former licensee or the representative of a deceased licensee from being	63(6)	None prescribed.	



<b>Regulation making power provided by the Act</b>	<b>Section in the Act</b>	<b>Scope of the Regulation</b>	<b>Clause in the draft Regulation</b>
required to be included in statements to the Commissioner.			
To prescribe the manner in which an itemised account of a transaction must be rendered to any person directly concerned in a transaction by or with a licensee.	67	Provides that a request must be served by personal delivery, post or email. The itemised account may be provided by personal delivery, post or email.	11
<b>Part 6 Records</b>			
To prescribe records and documents, accounts and transactions required to be kept by a licensee.	69(2)(a)	Prescribes that the following records must be kept originals or copies of: <ul style="list-style-type: none"> <li>▪ all documents evidencing the transactions concerned and all associated documents</li> <li>▪ all other documents and records maintained, issued or received by the licensee or the licensee's employees</li> </ul>	31
To prescribe the manner and form in which licensees' records are kept	69(2)(b)	Prescribes that records must be: <ul style="list-style-type: none"> <li>▪ kept for a period of 7 years unless transferred to another licensee or solicitor</li> <li>▪ in English</li> </ul>	32 and 33
<b>Part 8 Management and receivership</b>			
To prescribe NSW Fair Trading account as the Operating Account for the purposes of the Management and Receivership provision of the Act.	90	Prescribes the Compensation Fund as the Operating Account.	4
To prescribe a person or class of persons as an associate of a licensee.	91(1)(f)	None prescribed.	
To prescribe a relationship as a prescribed relationship for the purposes of Part 8.	91(2)(d)	None prescribed.	
To prescribe the accounts to be kept relating to the income accrued and expenses incurred in connection with a licensee's business and the purpose for which money in such accounts may be expended.	102(a)	None prescribed.	
To prescribe the purpose for which money may be expended in accounts kept for income accrued and expenses incurred in connection with a licensee's business.	102(b)	None prescribed.	



Regulation making power provided by the Act	Section in the Act	Scope of the Regulation	Clause in the draft Regulation
<b>Part 9 Complaints and disciplinary action</b>			
To prescribe additional grounds for the taking of disciplinary action.	132(1)(1)	None prescribed.	
To prescribe provisions of the Acts and the Regulation remain applicable to a suspended licence.	133(3)	Prescribes the following: <ul style="list-style-type: none"> <li>▪ s66 – Secretary may require information</li> <li>▪ s72 – power to require production of licensee’s records</li> <li>▪ s75 – requirement for audit</li> <li>▪ s77 – statutory declaration required where no money held or received on behalf of another person</li> <li>▪ s88 – claims can be made against Compensation Fund</li> <li>▪ s95 – powers of a manager</li> <li>▪ s152 – fraudulent conversion and false accounts of money received by licensee</li> <li>▪ s153 – fraudulent accounts for expenses, fees and other charges</li> </ul>	35
<b>Part 11 Offences and proceedings</b>			
To prescribes alternative maximum monetary penalty imposable by Local Court.	157(3)	None prescribed.	
To prescribe penalty notice offences; amount payable for offence dealt with by penalty notice; and different amounts of penalties for different offences or classes of offence.	158(6)	Prescribes penalty notice offences and associated penalty amounts for breaches of the Act and Regulation.	38 Schedule 4
<b>Part 12 Administration</b>			
To authorise disclosure of information obtained in administration of Act.	161(1)(f)	None prescribed.	
To prescribe the particulars to be included in the register of licences.	162	Prescribes that the Register is to contain the following particulars: <ul style="list-style-type: none"> <li>▪ the name and business address of the licensee, partners or directors</li> <li>▪ the licence number</li> <li>▪ date of issue and expiry</li> <li>▪ licence cancellation or suspension (including under the <i>Fair Trading Act 1987</i>)</li> <li>▪ licence conditions</li> <li>▪ disciplinary action</li> <li>▪ convictions</li> <li>▪ undertakings</li> </ul>	34



Regulation making power provided by the Act	Section in the Act	Scope of the Regulation	Clause in the draft Regulation
		<ul style="list-style-type: none"> <li>▪ appointment of a manager or receiver</li> <li>▪ payments made from the Compensation Fund</li> </ul>	
To prescribe persons other than NSW Fair Trading officers to whom the Commissioner may delegate functions under the Act.	164(b)	None prescribed.	
<b>Part 13 Miscellaneous</b>			
<p>Provides a general regulation making power which enables the Governor to make regulations:</p> <ol style="list-style-type: none"> <li>1) As necessary or convenient for carrying out or giving effect to the Act;</li> <li>2) With respect to:                             <ol style="list-style-type: none"> <li>a) Application procedures;</li> <li>b) Fix maximum remuneration for services provided by a licensee;</li> <li>c) Require display of remuneration and prescribe penalties;</li> <li>d) Prescribe accounts and records to be kept and manner of keeping;</li> <li>e) Prescribe method of service of notices, documents etc.</li> <li>f) Prescribe exemptions from all part of Act.</li> </ol> </li> </ol>	172(1) & (2)	None prescribed.	
To create an offence punishable by penalty of not more than 40 penalty units for a corporation or 20 units in any other case.	172(3)	None prescribed.	
<b>Schedule 1</b>			
To prescribe savings or transitional provisions.	2	Prescribes that any act, matter or thing that had effect under the Conveyancers Licensing Regulation 2006 continues to have effect under this Regulation.	48



## Discussion of the Proposed Regulation

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Submissions are welcome on the proposed Regulation as a whole, on specific provisions of the draft Regulation or on other matters relevant to the Regulation. The following points are provided to give some context to the provisions of the Regulations.

### **Part 1 Preliminary (clauses 1 to 4)**

This Part cites the title of the proposed Regulation (clause 1), specifies its commencement date (clause 2) and defines certain terms and phrases used (clauses 3 and 4). These provisions are of a machinery nature only.

### **Part 2 Licensing (clauses 5 and 6)**

NSW Fair Trading imposes fees for conveyancer licences in order to recoup a proportion of the costs of regulating the conveyancing industry. These costs include those incurred in processing licence applications, developing requirement for qualification and continuing professional development and maintaining a register of all licenced conveyancers. NSW Fair Trading is also responsible for handling complaint against licenced conveyancers and taking disciplinary action.

The fees NSW Fair Trading charges for conveyancing licence comprise an application fee and a processing fees, as well as a contribution to the Property Service Compensation Fund prescribed by the Property Stock and Business Agents Regulation 2003. Applications may be lodged online and this is encouraged by the offer of a discount or 'rebate'. NSW Fair Trading is able to retain the processing fee when an application is refused. The proposed clause 5 provides for the calculation of the fees as set out in Schedule 2. There is a slight increase in the fees proposed to account for an increase in the consumer price index.

Section 15 of the Act requires licenced conveyancers to be insured under a policy of professional indemnity for which the Regulation may provide. This is a consumer protection measure aimed at ensuring that any professional negligence on the part of a licenced conveyancer does result in financial loss for their client.



### Proposed amendment to 2006 Regulation

The current Regulation requires licenced conveyancers to be insured under a policy, or a policy of a kind, approved by the Minister. However, the proposed clause 6 provides that approval may be granted by the Commissioner for Fair Trading. This change is made possible by the general regulation power of section 15(1) of the Act.

The proposed clause 6(1) is different to the current clause 6(1) as it specifies that a licensee must have professional indemnity insurance “when carrying out conveyancing work”. This is intended to provide flexibility in terms of when conveyancers are required to be covered by professional indemnity insurance for the purposes of meeting this condition of their licence. In particular it will reduce costs for conveyancers who wish to maintain their licence even though they may not be currently carrying out conveyancing work.

### **Part 3 Conduct of conveyancing business (clauses 7 to 11)**

This Part aims to ensure that conveyancing businesses are properly supervised, promotes ethical and accountable conduct for licensees and transparency in the provision of conveyancing services. It also removes the potential for a conflict of interest where a licensee also has an interest in a real estate business and protects consumers by providing access to appropriately detailed information about fees and expenses charged by a licensee.

Under section 20 of the Act, licenced conveyancers who carry on business at more than one place must employ a separate licensee to be in charge of each place of business. Except where licensees are in a partnership, a licensee-in-charge is also prohibited from acting for more than one licensee at a single place of business. These requirements reflect the view that qualified supervision is paramount when dealing with complex conveyancing transactions. However because these requirements may prove onerous in certain circumstances, exemptions may be granted where there is demonstrable need and only to licensees who have already demonstrated their capacity to properly supervise multiple businesses and maintain accountability. The proposed clause 7 specifies the factors the Commissioner for Fair Trading must take into account when considering whether to grant an exemption.

The proposed Regulation also provides for rules of conduct which are detailed in Schedule 3 (clause 8), prohibits licensees from undertaking both conveyancing work and



that of a real estate agent (clause 9) and requires a licensee who undertakes both conveyancing and non-conveyancing work to disclose as much to their clients (clause 10).

Furthermore, the proposed clause 11 outlines the manner in which a client of a licenced conveyancer may serve a request for an itemised account for the conveyancing transactions they are directly involved in, as well as the manner in which a licenced conveyancer may provide the itemised account requested.

### Proposed amendment to 2006 Regulation

In addition to personal delivery and post, an itemised account may now also be requested and provided by email. This change reflects the use of modern communication technology.

### **Part 4 Resolution of cost disputes**

This Part provides for the particulars and applicable fees for the notification and application for determination of a costs dispute to the NSW Civil and Administrative Tribunal (NCAT), as well as the period of time within which a notification must be made (clause 12). This includes the parties bearing the costs of an independent assessment of a costs dispute when referred by NCAT (clause 13) as well as the manner in which proceedings in costs disputes are transferred to NCAT by order of another court hearing the dispute (clause 14). The prescription of the same notification and application process will ensure matters are dealt with in an efficient and consistent manner. The fees applying to costs disputes are minimal and in line with fees which apply for other matters dealt with by NCAT. The proposed Regulation will reflect the updating of the *Civil and Administrative Tribunal Act 2013* since the current Regulation was introduced.

### **Part 5 Trust money (clauses 15 – 30)**

This Part contains various requirements that ensure licenced conveyancers are accountable for their handling of money held in trust for and on behalf of their clients. It sets out general recordkeeping requirements for trust accounts (clause 16) and the particular trust account records licenced conveyancers must keep (clause 17). It also specifies requirements and procedures for keeping trust account records by computer (clause 18), issuing separate statements of account for each ledger account maintained for a client (clause 19), receiving and withdrawing payment for costs from trust money (clause 20), the banking of and issuing receipts for trust money (clauses 21 and 22), the



payment of money from and depositing money into trust money (clause 23 and 24), maintaining cash books for trust account transactions (clause 25), maintaining a journal of all transfers between accounts in a trust account ledger that are not electronic transfers (clause 26), maintaining a separate ledger account for trust money received on behalf of or paid to each client (clause 27), preparing a monthly trial balance statement of all current ledger accounts (clause 28), signing cheques or effecting electronic funds transfers from trust accounts (clause 29) and maintaining in the trust account ledger an account in the licenced conveyancer's own name (clause 30).

These requirements and procedures facilitate close regulation of licenced conveyancers' management of trust accounts and controlled money. They provide for the inspection of trust accounts and ensure a clear audit trail to reduce the possibility of misappropriation of funds.

### **National Electronic Conveyancing and PEXA**

The Regulatory Impact Statement does not propose to amend the Regulation to address licensees' requirements in relation to National Electronic Conveyancing.

Stakeholders will no doubt be aware of the operation of *Property Exchange Australia* (PEXA). PEXA was formed in 2010 to deliver a national electronic conveyancing solution to the Australian property industry. Commencing in November 2014, PEXA now facilitates the exchange of property by allowing land registries, financial institutions and practitioners (lawyers and licensed conveyancers), in a number of jurisdictions, to transact together, online. The system allows for the electronic settlement of all financial transactions at a nominated date including settlement monies, taxes and any disbursements.

To enable this, PEXA "links" to practitioners' trust accounts. Where practitioners do not operate a trust account, clients or practitioners are able to place funds in a Registered Source Account created by PEXA.

Those practitioners operating a trust account under the Act, can have their trust account approved by PEXA for use in its system. The PEXA platform then enables source funds for a conveyancing transaction to be provided from the trust account registered by the practitioner.

PEXA also offers all practitioners the use of the PEXA Registered Source Account to source funds required for a PEXA property transaction. This enables practitioners such as licensed conveyancers who do not operate trust accounts to conduct transactions. The account is managed by PEXA; funds can be deposited by a client direct to the





account, and PEXA can debit funds from the account at the time of financial settlement in accordance with instructions given by the practitioner.

A significant number of licensed conveyancers in NSW do not operate trust accounts in their businesses. Rather, they direct their clients, when required, to remit monies direct to other agencies or persons when required in their transaction; or are employed by legal practitioners in their conveyancing practice, who use their own trust accounts. The new PEXA system therefore provides an opportunity for these licensed conveyancers to make use of PEXA's alternate Registered Source Account. However, PEXA has advised that they will encourage licensed conveyancers to operate their own trust account for the purposes of the electronic system, rather than use the Registered Source Account.

### **Fair Trading's reasoning regarding the use of the Registered Source Account**

Licensed conveyancers would comply with section 53(1) of the *Conveyancers Licensing Act 2003*, regarding the PEXA Registered Source Account provided any funds were deposited into the account by the client and not the conveyancer. If the client provided the funds directly to the licensed conveyancer for that purpose, then the Act would require conveyancers to deposit the funds into the conveyancer's trust account before remittance to PEXA. Section 53(3) (b) of the Act allows licensed conveyancers to directly receive cheques or other negotiable instruments made payable to a third party (in this case PEXA) and deposit them into the account without having to put them through their trust account if the licensee does so on behalf of a client and in accordance with directions given by the client. However PEXA encourages only transferring funds electronically.

### **Why aren't the Regulations being amended to accommodate PEXA requirements?**

In the case of a solicitor, money paid into the PEXA Source Account would be "trust money" as defined in s. 243 of *the Legal Profession Act 2004*, in respect of which the solicitor must maintain appropriate records, as required by cl. 85 of the *Legal Profession Regulation 2005*.

Section 243(1)(d) of the *Legal Profession Act* expressly refers to money which may be dealt with subject to a "power" (power money), which is equivalent to money kept in an account such as the PEXA Source Account, over which a solicitor has a "power" to operate. The *Conveyancers Licensing Act* does not make reference to this type of trust money, nor is it recognised in the Regulations. The Regulations to the *LPA 2004* have full requirements in relation to solicitors' handling of this type of trust money.



In the case of a conveyancer, there is uncertainty about whether money paid into the PEXA Source Account is “trust money” for the purposes of the Conveyancers Licencing Act. Fair Trading has received advice that, in order to comply, the PEXA Source Account would have to, among other requirements:

- be at an authorised deposit-taking institution approved by the Commissioner for Fair Trading for the purposes of the Act;
- be in the name of the licensee who conducts the conveyancing business; and
- contain the words, “Trust Account”.

A conveyancer using a PEXA Source Account would not be able to fully comply with the requirements of the Act and Regulations with respect to the opening, naming, operation and closing of a trust account.

However, a licensee would still be required to comply with requirements relating to statements of account, and receipts for trust money.

For completeness and to avoid dispute, the Conveyancers Licensing Act would therefore have to be amended in the following ways:

- recognition of money subject to a “power” as a form of trust money;
- specifying when power money is “received”;
- amending the Act so that power money is not required to be deposited in a “trust account” as defined by the Act;
- requiring power money to be dealt with only in accordance with the relevant power; and
- requiring a conveyancer to account for power money in the prescribed manner.

Following those amendments appropriate record keeping amendments with respect to “power money” and the PEXA Source Account, could be made to the Regulations.

### **Are client’s moneys placed in a PEXA Source Account safeguarded?**

Fair Trading has received advice that a person suffering loss because of a conveyancer’s defalcation of money from the PEXA Source Account may generally make a claim against the Property Services Compensation Fund.

As there appears to be no risks to consumers it is not proposed to make the changes to the Conveyancers Licensing Act at this time. However, the changes can be made when the Act is next reviewed or where they can be included in an appropriate Bill.



### **Part 6 Records (clauses 31 - 33)**

To ensure that licenced conveyancers are accountable for the records and documents they hold on behalf of their clients, the proposed Regulation specifies the manner and form in which records of conveyancing transactions must be kept (clause 31). The aim is to ensure that all relevant records are kept on file for each client and an audit trail established to facilitate inspections and compliance action by NSW Fair Trading.

#### Proposed amendment to 2006 Regulation

The current regulation requires records to be kept for at least six years. The proposed clause 32 extends this to seven years for the purposes of bring it into line with other conveyancing-related legislation [*Conveyancing Act 1919* and that *Conveyancing and Law of Property Act 1898*] and good business practice generally. Furthermore, all written records are required to be produced for auditing purposes must be in the English language (clause 33).

### **Part 7 General (clauses 34 – 39)**

NSW Fair Trading maintains a register of all licenced conveyancers in accordance with section 162 of the Act. The intended purpose of the register, which may be accessed by a member of the public for a fee, is to assist consumers to make informed choices when selecting a licenced conveyancer. The proposed clause 34 specifies the details to be included in the register. These include the details of disciplinary action taken against a licensee, cancelled and suspended licences and applications for a licence that have been refused on the ground that the applicant is not a fit and proper person.

The Act introduces a disciplinary regime that has no effect after a licence is suspended. Under section 133(3) of the Act, certain provisions of the Act and Regulation continue to apply to a suspended licence. The proposed clause 35 specifies which provisions continue to apply. The aim is to ensure that conveyancers whose licence has been suspended remain accountable.

The license restoration provision of the *Licensing and Registration (Uniform Procedures) Act 2002* does not apply to conveyancer licences cancelled under Part 9 of the Act (clause 36).

If a licenced conveyancer has neither received from nor held any money for a client during a particular audit period, section 77 of the Act requires that they provide NSW Fair Trading with a statutory declaration to this effect. The proposed Regulation specifies that when the licensee is a corporation, the director (or any two directors if there is more than one) must provide the required statutory declaration (clause 37).



Section 158 of the Act permits NSW Fair Trading to issue penalty notices for offences under the Act or Regulation. The object of the penalty notice scheme is to encourage changes in conveyancer conduct to achieve compliance with the law. Penalty notices are used by NSW Fair Trading for offences of a minor or technical nature. The proposed clause 38 provides that the offences specified in Schedule 4 are offences for which penalty notices may be issued. Schedule 4 also prescribes the penalty amounts for each offence.

The proposed clause 39 provides for the continuation or 'saving' of matters that had effect under the current Regulation.



# APPENDICES



## Appendix 1 - About the Regulation

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The Conveyancer Licensing Regulation 2015 (the Regulation) will be made under the *Conveyancer Licensing Act 2003* (the Act). The Minister responsible for the Regulation is the Minister for Innovation and Better Regulation.

The Regulation is currently in draft form and this Regulatory Impact Statement provides details of the objectives for proposing the Regulation. The main purpose of the Regulation will be to provide legislative support for the operation of the Act.

The Regulatory Impact Statement has been prepared to assess the costs and benefits of the proposed regulation and assist conveyancers, consumers of conveyancing services, and other parties in commenting on the draft Regulation. If necessary, amendments will be made to the Regulation to address issues identified during the consultation process. The final Regulation will be published on the NSW Legislation website at [www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au).



## Appendix 2 - Background Information

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### **Role of a licensed conveyancer**

A conveyancing transaction involves the preparation and giving of advice on the many and varied documents in relation to the transaction. Most commonly, a person buys a property such as land, a house, a home unit or an office building and instructs a conveyancer to complete the transaction. To effectively perform this scope of work, a conveyancer must be knowledgeable about sale of property contracts, land division, survey, property development, property management, strata administration, insurance, taxation and business analysis.

Unrestricted licence holders may, in addition to residential work, carry out a broad range of commercial property transfers, ranging from the sale or purchase of factories or shops in a shopping centre to the entire shopping centre itself. They can also undertake transactions for small businesses, including the transfer of 'goodwill' and 'stock-in-trade' and act on the sale of farms and other rural property, regardless of whether the property is zoned or used wholly or partly as commercial or residential.

### **Conveyancers licensing legislation**

Conveyancers have been practising as an independent industry outside the legal profession since the commencement of the Conveyancers Licensing Act 1992, which recognised a need to increase consumer competition in the provision of conveyancing services by allowing qualified professionals other than solicitors to undertake conveyancing work, and established a licensing and regulatory regime by which this could be achieved.

The 1992 Act limited licensed conveyancers to conveyancing of residential properties less than 10 hectares only, and it was found this restriction did not sufficiently break down the monopoly solicitors had over conveyancing. As a result, only partially improved consumer choice and cost variability was evidenced. Introduction of the Conveyancers Licensing Act 1995 was intended to further increase competition by expanding the scope of transactions and work allowed to be carried out by a licensed conveyancer. This was broadened to include personal property and commercial and rural property transactions, in addition to residential conveyance.

A formal review of the Conveyancers Licensing Act 1995 was conducted in 2002 under a National Competition Principles Agreement. The National Competition Policy Review



concluded that continued regulation of the industry was justified given the risks faced by consumers in their dealings with conveyancers, particularly regarding conveyancers' levels of competence and the safety of money held in trust. The review also found that objectives of the *Conveyancer Licensing Act 1995* – to increase competition and protect consumers – could be further met by modification, and in some cases tightening, of the existing laws.

The Conveyancers Licensing Act 2003 repealed the Conveyancers Licensing Act 1995 and replaced it with a new Act for the purposes of improving consumer protection, allowing conveyancers to incorporate, introduce 'rules of conduct', clarify and update pre-existing legislation and reform the disciplinary system.

Regulatory responsibilities and oversight for the conveyancers licensing regime were previously the responsibility of the Law Society of NSW, however it was acknowledged there would be greater benefit to industry if regulatory functions were transferred to a body independent of both the legal and conveyancing professions. NSW Fair Trading is currently responsible for administering the Conveyancers Licensing Act 2003 and for licensing qualified conveyancers.

### **Profile of the conveyancing industry in NSW**

Since the introduction of legislation governing conveyancing and prescribing occupational licensing in 1992, there has been significant growth in the industry.

The conveyancing industry has grown considerably in the last 20 years. When the Conveyancers Licensing Act 1995 was introduced there were 43 licenced conveyancers. Now, as at April 2015, there are a total of 1,194 licensed conveyancers. Of these, 1,062 are individual licences and 132 are corporate licences.

It is noted that while most conveyancing businesses and solicitors offices employing conveyancers undertake a broad range of different types of conveyancing work, the main proportion of work carried out relates to residential transactions.

One of the most important aspects of the role is the fiduciary duty a conveyancer has to a client. This duty arises from a relationship of trust where the conveyancer is able to exercise discretion or power in undertaking the management of certain work for a client where specific conduct and rules may not be clearly set out. The relationship of trust may include holding money on behalf of the client.





## Appendix 3 - Summary of the Regulation

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**Clauses 1 and 2** include the name of the Regulation and date of commencement.

**Clause 3** notes the meaning of 'the Act' and references to a Form.

**Clause 4** notes the meaning of "Operating Account".

**Clause 5** provides for the calculation of fees for a conveyancer licence as set out in Schedule 2.

**Clause 6** provides that licenced conveyancers must be covered by a policy of professional indemnity insurance when conducting conveyancing work, and that this policy must be of a type approved by the Commissioner for Fair Trading.

**Clause 7** specifies the factors the Commissioner for Fair Trading must take into account when considering whether to grant an exemption from the licensee-in-charge requirements of section 20 of the Act.

**Clause 8** provides for the rules of conduct for licenced conveyancers set out in Schedule 3 for purposes of section 22 of the Act.

**Clause 9** prohibits licenced conveyancers from conducting or being employed in the business of a real estate agent for purposes of section 26 of the Act.

**Clause 10** requires licenced conveyancers to disclose to their clients the conveyancing and non-conveyancing work they will carry out for them.

**Clause 11** specifies the means by which an itemised account of conveyancing transactions may be requested and provided.

**Clause 12** specifies how, and in what timeframe, notifications of costs disputes must be made to the NSW Civil and Administrative Tribunal for the purposes of section 43 of the Act.

**Clause 13** specifies that the parties must bear the costs of an assessment of a costs dispute for the purposes of section 45 of the Act.

**Clause 14** specifies how proceedings in costs disputes are to be transferred to or from other courts for the purposes of section 50 of the Act.

**Clause 15** defines terms used in Part 5.

**Clause 16** sets out the general record keeping obligations of licenced conveyancers for the purposes of section 172.



**Clause 17** specifies the particular records licenced conveyancers are required to keep.

**Clause 18** sets out what is required of licenced conveyancers who keep records by computer and the procedures they must follow.

**Clause 19** requires licenced conveyancers to provide statements of account to clients for whom they hold money and specifies the timeframe in which statements of account are to be provided and the information they must include.

**Clause 20** specifies the circumstances in which a licenced conveyancer may receive or withdraw trust money and the procedure that must follow.

**Clause 21** requires licenced conveyancers to deposit trust money into their trust account on the next banking day after they receive if practicable, or the following day if not.

**Clause 22** requires a receipt to be prepared when licensed conveyancers receive money on behalf of any person and specifies the particulars to be included.

**Clause 23** provides that money may only be drawn from licensed conveyancers' trust accounts by cheque or electronic transfer in accordance with specified accountability requirements.

**Clause 24** specifies what licenced conveyancers are required to do when depositing money into their trust account and the particulars that must be entered in the deposit book or record.

**Clause 25** requires licensed conveyancers to maintain a cash book that records all payments into and out of their trust account and specifies what must be recorded.

**Clause 26** requires licenced conveyancers to maintain a journal recording all transfers between accounts in the trust account ledger and specifies the particulars to be included.

**Clause 27** requires licenced conveyancers to maintain a separate ledger account for trust money received on behalf of or paid to each principal and specifies the particulars to be included.

**Clause 28** requires licenced conveyancers to prepare a monthly trial balance statement for all current ledger accounts and specifies what must be included.

**Clause 29** stipulates who may sign cheques and effect electronic funds transfers for trust account transactions and sets out the requirements for the delegation of those responsibilities.

**Clause 30** enables licenced conveyancers to maintain an account in their own name in their trust account ledger.



**Clause 31** specifies the records licenced conveyancers must keep.

**Clause 32** specifies the licenced conveyancers must keep records for at least 7 years.

**Clause 33** stipulates that the records licenced conveyancers are require to keep must be English.

**Clause 34** requires NSW Fair Trading to maintain a register of licenced conveyancers and specifies the information to be included.

**Clause 35** specifies the provisions of the Act that continue to apply to a suspended conveyancer license.

**Clause 36** disallows applications for the restoration of conveyancer licenses cancelled for disciplinary reasons.

**Clause 37** provides that directors of corporations that are licensees may lodge statutory declarations as required of licensees generally when they neither receive nor hold money for client during an audit period.

**Clause 38** provides for the penalty notice offences created in Schedule 4

**Clause 39** provides for the continuing effect of the provisions of the previous Regulation.

**Schedule 1** is the form to be used by clients of licenced conveyancers who choose to waive their entitlement to a periodical statement of account under section 19 of the Act.

**Schedule 2** is the list of fees for conveyancer license applications.

**Schedule 3** sets out the rules of conduct that apply to licensed conveyancers.

**Schedule 4** is the list of penalty notice offences and their accompanying penalties.



## Appendix 4 – List of Stakeholders

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### Key Stakeholders

The following organisations have been provided with a copy of this Regulatory Impact Statement:

- The Australia Institute of Conveyancers NSW Division Ltd
- The NSW Law Society
- The Real Estate Institute of NSW
- TAFE NSW
- Macquarie Law School (Macquarie University)
- NSW Small Business Commissioner
- Land and Property Information (LPI)
- Estate Agents Cooperative



## Appendix 5 – Proposed Fee Amendments

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The Conveyancers Licensing Regulation prescribes fees for licences issued under the Act. In 2000, Fair Trading introduced an annual review of all prescribed fees to adjust for inflation. Fee changes come into effect on 1 July each year. The inflation rate is calculated as the change in the Consumer Price Index (CPI) for Sydney for the preceding calendar year. The CPI is publicly available information. It is published quarterly on the Australian Bureau of Statistics website.