AUSTRALIAN INSTITUTE OF CONVEYANCERS NSW DIVISION LTD

16th September 2020

The NSW Productivity Commissioner
NSW Productivity Commission
ProductivityFeedback@treasury.nsw.gov.au

Dear Commissioner

Re: Green Paper Continuing the Productivity Conversation.

The Australian Institute of Conveyancers NSW Division Limited (AICNSW) is pleased to provide feedback in relation to the Green Paper, Continuing the Productivity Conversation.

AICNSW is the peak body for NSW Licensed Conveyancers. There are approx. 1,500 licensed conveyancers in NSW and approx. 500 conveyancing businesses which undertake a significant proportion of conveyancing services on behalf of NSW citizens. Conveyancing businesses are small businesses who are integral to property transactions.

We wish to comment on two Draft Recommendations as detailed in the Green Paper.

1. **Draft recommendation 4.3:**
   Recognise outside occupational licenses from other jurisdictions.

In relation to this recommendation we advise that we have commenced dialogue with a range of NSW Government Ministers as we were aware that The Council on Federal Financial Relations (CFFR) has been tasked with developing a uniform scheme to support widespread occupational mobility via automatic recognition, with ambition to take effect from 1 January 2021.

We understand the objective of such a scheme is similar to those detailed in your green paper being a framework for the automatic recognition of occupation licenses across jurisdictions, allowing trades, as well as a raft of licensed occupations, easier access to business across state and territory borders.

Whilst, we do not in principal oppose this objective the framing of any legislation or regulation needs to take into consideration the fact that just because some occupations in different jurisdictions share the same name or title it does not necessarily follow that they are the same occupation.

In this instance there a substantive difference between what are called “conveyancers” or “settlement agents” in the different jurisdictions of the Commonwealth.

Most importantly, this distinction is found in the fact that conveyancers in NSW and Victoria are **"qualified entities"** within the meaning of the *Legal Professions Uniform Law (NSW) 2015.*
In that respect only **"qualified entities"** are entitled to **"engage in legal practice".** That is, they are legislatively authorised to provide legal work *in this case as provided by,* ***s4 Conveyancers Licensing Act NSW 2003****)* to the public, whereas if a person is not a "qualified entity" within the meaning of the LPUL they are not (with some legislative exceptions) authorised or permitted to "engage in legal Practice".

Consequently judicial determinations have affirmed that conveyancers in NSW are required by the courts and the public, and have interpreted the Conveyancing Licensing Act 2003 (CLA) and conveyancers licensed thereunder, to be at the same competence, standard and duty of care as that of a solicitor in the area of law in which they practice.

Therefore, whilst NSW and Victorian conveyancers are entitled to "engage in legal practice", conveyancers or settlement agents in other jurisdictions', are either prohibited from engaging in legal practice and giving legal advice, or are not authorised or qualified to do so, and it follows thus they are not of the same occupation.

The consequences of automatic recognition would, for example, result in a settlement agent (conveyancer) in Western Australia being automatically recognised as a conveyancer in NSW, the effect of which would be to "qualify" a licensee of WA, whose license, educational qualifications, skills and experience, permits them to perform only certain prescriptive functions in the conveyancing process and who is prohibited from giving legal advice, to automatically qualify that person as a "qualified "entity" in NSW or Victoria, within the LPUL. Thereby, authorising that person to provide to the public, "legal advice" and draw 'unrestricted' documents that create, vary or modify or effect the legal and equitable rights between parties in both real and personal property.

Clearly, whilst one is providing a 'conveyancer type service' limited to such prescriptions as set out in their relevant jurisdictional licensing legislation, prohibiting what is legal work or an authority to engage in legal work, and that of the other being a "qualified entity" within the meaning of the LPUL, must be an essential consideration in the determining of "Automatic" Recognition of Occupations across the Commonwealth.

This view would appear to be supported by the NSW Crown Solicitor.

AICNSW in a review of the Conveyancers Licensing Act 2003 has recently obtained a legal opinion and analysis from [redacted] solicitor on NSW conveyancers and the application of the Legal Professions Uniform Law (NSW). A part of that report deals with "**CONVEYANCERS, SETTLEMENT AGENTS, ETC – EQUIVALENT OCCUPATIONS?** The Report refers to a discussion paper from NSW Fair Trading which in turn refers to advice from the NSW Crown Solicitor on equivalency of "conveyancer type" occupations with a NSW conveyancer. Under the heading Background, the NSW Crown Solicitor advises;

"*The NSW Crown Solicitor has advised that the conveyancer-type occupations in other jurisdictions (namely, South Australia, Western Australia and Northern Territory) are not equivalent to the occupation of conveyancer in NSW, whether as defined under the Conveyancers Licensing Act 1992 or of 1995.*" (now 2003).

In relation to any formal interpretation of the Licensing Acts the Crown Solicitor advises;

"***Formal interpretation of licensing Acts***": This measure "*would involve a statement from the licensing authority*" in the relevant State or Territory to the effect that the "conveyancer-type"

person may undertake "conveyancing work" in New South Wales, including "*giving consequential legal advice*". The Paper comments (at p.2):
"*However, a statement* [from the licensing authority] *to this effect would not function correctly at law if it declared permission to do something which was still actually prohibited by legislation in that jurisdiction*."

In order to assist your review and for a detailed analysis of this matter we include pages 37-40 of that report relative to equivalency of a conveyancer in NSW (Victoria) and "conveyancer type" occupations in other jurisdictions.

2. **Draft recommendation 4.4:**
   Reform mandatory CPD

We believe that mandatory CPD is an important element of a licencing schemes for achieving quality assurance, maintaining professional standard and ultimately enhancing consumer protection. We firmly believe that CPD is an essential criterion for a profession which conveyancing clearly is, and we would welcome a review particularly around reporting and compliance. Given the rate of change that has been imposed on conveyancing over the last 5 years it is imperative that practitioners must stay "current" and maintain their professional skills both technical and non-technical.

We look forward to further dialogue and stakeholder consultation in relation to the above.

Yours faithfully

[redacted]

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Extract from Report by [redacted]. Page 37-40

12. CONVEYANCERS, SETTLEMENT AGENTS, ETC – EQUIVALENT OCCUPATIONS?

12.1 It is demonstrated under heading 11 above that the Courts are of the view that the law and the community are entitled to expect the same standards of professionalism and competence from Licensed NSW Conveyancers doing "conveyancing work" as solicitors doing the same work. Is the same true of conveyancers, settlement agents, land brokers and other "conveyancer-type" persons practicing in other jurisdictions?

12.2 In May 1997, the Acting Director-General of Fair Trading issued a Discussion Paper titled "Mutual Recognition of Conveyancers" (the "Paper"), the purpose of which was to examine "three measures by which the mutual recognition of conveyancers may be achieved". The Paper was "based on advice from the NSW Crown Solicitor on the question of equivalence Australian conveyancer-type occupations". The three measures referred to are the following:

(1) "Formal interpretation of licensing Acts": This measure "would involve a statement from the licensing authority" in the relevant State or Territory to the effect that the "conveyancer-type" person may undertake "conveyancing work" in New South Wales, including "giving consequential legal advice". The Paper comments (at p.2):

> "However, a statement [from the licensing authority] to this effect would not function correctly at law if it declared permission to do something which was still actually prohibited by legislation in that jurisdiction."

In other words, calling a frog a prince does not turn the frog into a prince, and this is clearly not a viable solution.

(2) "Amend licensing Acts" in order to adopt the New South Wales definition of "conveyancing work". This of course would be a sure route to equivalence, but none of the jurisdictions referred to have taken this step 3.

(3) "Adopt uniform minimum competency standards": This measure considers the possibility of bridging the gap by means of the imposition of conditions requiring certain educational qualifications and practical experience. At the time of issue of the Paper, specific proposals were evidently not in existence, although the Paper states that "The development of national competency standards is expected to simplify the process for considering equivalence". The significance of this measure is discussed in paragraph 12.9 below.

12.3 Nevertheless, in the "Background" section the Paper states (p.1) that "The NSW Crown Solicitor has advised that the conveyancer-type occupations in other jurisdictions (namely, South Australia, Western Australia and Northern Territory) are not equivalent to the occupation of conveyancer in NSW, whether as defined under the Conveyancers Licensing Act 1992 or of 1995." The respective "conveyancer-type" persons in Western Australia and Northern Territory are described as settlement agents, similar to law stationers in New South Wales. The WA settlement agent is not permitted to undertake "conveyancing work" and "is not an occupation equivalent to that of NSW conveyancer" (p.5). With respect to the NT conveyancing agent, "The two occupations are fundamentally different. The conveyancing

agent seems to be an agent, not a principal in the meaning of the work done by a NSW conveyancer" (p.6)4.

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3 Those jurisdictions are South Australia, Western Australia and the Northern Territory. At the time of issue of the Paper, none of Victoria, Tasmania and the Australian Capital Territory had legislation for a conveyancing or "conveyancer-type" occupation.

4 It is to be noted that the Paper was issued when the Legal Practitioners Ordinance 1974 (NT) was in force, repealed by the Legal Profession Act 2006 (NT), discussed in paragraph 8.6 of Part 5 of this Report. Be that as it may, and although the differences are significant, as will be apparent from the extracts from the Agents Licensing Act 1979 (NT) set out in paragraphs 8.2 and 8.3 of Part 5 that the work of a NT conveyancing agent includes what would in NSW be considered as "legal work". Further, both the Legal Practitioners Ordinance and the Legal Profession Act excluded and exclude (respectively) the authorised functions of a conveyancing agent from the prohibition of a person who is not a legal practitioner engaging in legal practice.

12.4 The same section of the Paper, immediately after the extract on page 1 quoted above, states that "Only the SA conveyancer activities may be considered as being similar and may be made equivalent by the imposition of conditions" (suggesting a limited range of conveyancing work and a prohibition on the giving of legal advice as a condition on a license). However, it is not long before the Paper indicates an insuperable obstacle to achieving equivalence in the case of a South Australian land broker; namely, that, even if the Conveyancers Act 1994 (SA) could be interpreted as authorising the doing of "legal work" involving the preparation of legal documents, the Legal Practitioners Act (SA) would clearly prohibit the giving of legal advice which, the Paper admits with wry understatement, "can be considered to be a matter of substance".

12.5 Then, under the heading (p.7) "Why it is unlikely that equivalence can be achieved with (restrictive) conditions", there is a discussion, applicable also to the South Australian situation, of the case of Sande v Registrar, Supreme Court of Queensland, which concerned an application by a South Australian land broker for registration as a conveyancer in Queensland5 . The Paper (at pp. 7-8) quotes from the judgement as follows:

> "[The Mutual Recognition Act 1992] does not attempt to provide for the mutual recognition of legislatively controlled services or activities, but only for the mutual recognition of regulatory standards relating to occupations….
>
> A [South Australian] land broker may not practice the profession of the law, an expression which includes preparing any will or other testamentary instrument, preparing an instrument affecting personal property and preparing an instrument affecting any right, power or liability at law or in equity. A conveyancer admitted under s.42 of the Supreme Court Act Queensland 1867 may ordinarily do these things" (emphasis added).

12.6 Further, in Sande (No. 2) (1995) (quoted on page 9 of the Paper), Thomas J stated that, although the Mutual Recognition Act expresses an intention that, pending registration in the jurisdiction where recognition is sought, one ought to be able to carry out their "equivalent occupation":

> "There is in this case a serious question concerning whether becoming a solicitor, even with limitations, can be regarded as an 'equivalent occupation' with that which he practices in South Australia."

12.7 This brings us back to the matter of the giving of legal advice which, as noted in paragraph 12.4 above, "can be considered to be a matter of substance". Under heading 9 of Part 2 of this Report, we discuss the giving of legal advice as an indicium of engaging in legal practice. Indeed, in paragraph 9.1, we refer to the definition of "conveyancing work" in section 4 of the Conveyancers licensing Act 2003 as including "legal work (such as the giving of advice …", and, referring to New South Wales, "if the adviser gives advice in an area which is normally the preserve of a qualified legal practitioner, or which involves matters of legal

rights or obligations, and the adviser does not make clear his or her lack of qualifications, then the issue of unlawful legal practice is engaged".

5 At this time, there was in Queensland a conveyancing profession, operating under the subsequently- repealed section 42 of the Supreme Court Act 1867 (Qld), under which conveyancers were authorised in terms very similar to sections 13 and 14 of the Attorneys Bills and Conveyancing Act of 1847 (NSW) (see heading 2 in Annexure A,) to do conveyancing work.

12.8 In relation to legal advice the Paper attaches a "matrix" or table, comparing "conveyancer-type" activities in each of the jurisdictions discussed. Only New South Wales is indicated as being authorised to give legal advice. In the case of the other three jurisdictions, authority to give legal advice is expressly disclaimed. Under the "SA Conveyancer" column, the words "Does not include giving legal advice", underlined, appear. It is difficult to see how the imposition of conditions – short of the successful completion of a legal qualification – could qualify a person who is not authorised to provide legal advice in South Australia as a person who is authorised to provide legal advice in New South Wales. In other words, we submit, the "conveyancer-type" occupation of land broker is not equivalent to the professional occupation of a Licensed NSW Conveyancer.

12.9 We referred in paragraph 12.2(3) above to the third option discussed in the Paper for achieving equivalence; namely, the development of national competency standards. It is clearly the Paper (or the perception within Fair Trading which is expressed in the Paper) that gave rise to the regulatory model enshrined in the Conveyancers Licensing Act 2003. In the Second Reading speech introducing the Bill (see paragraph 4.1 of Part 3 of this Report), Ms Reba Meagher referred to "overlapping responsibilities of different agencies [which] have resulted in an inefficient administrative structure with gaps in the regulatory framework", and proposing (among other things) "competency standards … as part of the qualification criteria [providing] the opportunity for a general review of current guidelines for educational and practical experience".

12.10 In other words, the regulatory approach taken in the 2003 Act sought to make the scheme of regulation of Licensed NSW Conveyancers consistent with the type of regulation applicable to "conveyancer-type" persons in other jurisdictions6 which were (in some cases) not authorised to prepare legal documents, or a full range of legal documents in the conveyancing sphere, and, in every case, not authorised to give legal advice. In other words, the occupation of a Licensed NSW Conveyancer is not "equivalent" to that of the other jurisdictions referred to, and, we submit, should not be regulated as if it were.

However, because of that regulatory approach, the scheme of regulation under the 2003 Act is defective because it envisages or assumes standards which are not applicable to a person qualified to do "legal work" or to "engage in legal practice". Conversely, and as argued in this Report, the appropriate scheme of regulation for Licensed NSW Conveyancers is that which is applicable to other "qualified entities"; namely, that provided for under the Uniform Law.