



The Law
Society
OF TASMANIA

Our ref:F2.1

Notice to: All Practitioners

Date: 13 December 2006

Subject: Undertakings by Licensed Conveyancers

The Law Society considers it prudent to alert practitioners to an issue which may affect certain dealings with licensed conveyancers. In particular the Society is concerned about undertakings or arrangements proposed by conveyancers to address either the completion of a transaction or the discharge of obligations of either party associated with that transaction.

Typically, conveyancer undertakings might involve arrangements for settlement, such as the payment of purchase monies, loan funds or the discharge of one obligation and, in return, the accounting to the other party for documents in return. At its most basic, the issue will arise with the offering and acceptance of undertakings as to the payment of rates, land tax, water charges or other financial obligations of the party imposed by contract or by subsequent agreement.

The *Conveyancing Act 2004* and the *Conveyancing Regulations 2005* amend the provisions of the *Legal Profession Act 1993* and authorise the conduct of the practice of conveyancing by persons who are licensed but who are not legal practitioners.

The *Regulations* address how licensed conveyancers must conduct their practice, in particular *Regulation 11* imposes a duty upon licensed conveyancers to comply with the rules of conduct which are set out in Part 5 of the *Regulations*.

Regulations 13(e) and *16(4)* address the giving of undertakings or agreements with, respectively, another conveyancer or a legal practitioner or a third party. Both provisions are in similar form, that is, the conveyancer must not give an undertaking to, or enter into an agreement with another conveyancer or a legal practitioner that he or she is unable to carry out.

There are other obligations which impose duties to act with honesty, fairness, courtesy and professionalism, the use of reasonable care, the maintenance of regular and effective communication as would be expected in the orderly administration of conveyancing transactions.

Regulation 17 also obliges a conveyancer to maintain “acceptable professional standards” and in conducting his or her business a conveyancer must take all possible steps to protect the integrity of the profession and avoid any activity that may bring him or her or the profession into disrepute.

Whilst *Regulations 13* and *16* impose obligations on conveyancers to not enter into undertakings or agreements that cannot be carried out, and a breach of the regulations and *Act* amounts to an offence, this does not have the effect of imposing on conveyancers, the strict obligations arising out of a solicitor’s undertaking.

An undertaking by a solicitor is subject to supervision by the Court, the breach of which may amount to professional misconduct, and which is enforceable before the Court upon exercise of the Court's inherent jurisdiction to supervise practitioners.

A useful outline of the general principles with respect to the giving of an undertaking and the enforceability of an undertaking is set out in Gino Dalpont's Lawyers Professional Responsibility in Australia and New Zealand (Second Edition) page 561:

“A person to whom a lawyer has given a personal undertaking may enforce that undertaking via a civil claim for breach of contract if the requirements for the existence of a contract are fulfilled. In the alternative, that person may have recourse to the inherent jurisdiction of the Court to enforce a lawyer's undertaking”.

There may be questions arising as to whether an arrangement amounts to an undertaking or not; see *The Hobart Savings Bank v Wong* 16/1989, where it was held that a particular document signed by a legal practitioner was not “... in clear terms an undertaking in the sense of a promise, pledge, guarantee or unequivocal declaration of intention. On the face of the document he did no more than ‘agree’.” Conversely see *National Australia Bank Limited v Jennings Elliot* A5/1994 where an agreement to comply with the terms of a particular authority was held to amount to an undertaking for the purposes of (then) Order 47 rule 8.

Whilst the Law Society would expect a personal undertaking to be constructed strictly against the giver:

“[o]nce a lawyer gives a personal undertaking it must be honoured irrespective of subsequent developments, whether specifically or via compensation. It is no defence that the undertaking requires a third party to do an act, or that the lawyer may have a defence to an action at law”, (*Dalpont page 565*),

However, there can be no corresponding opprobrium, sanction or consequence with respect to the alleged breach of an undertaking by a conveyancer.

Whilst it is clear that in certain circumstances an “undertaking” or arrangement between a conveyancer and another or a legal practitioner could amount to a contract and might thereby be enforceable as such, care must be taken not to assume that an undertaking given by a conveyancer is enforceable against the conveyancer personally as it would be against a legal practitioner.

The Law Society has sought an amendment to the *Conveyancing Act* to provide for an undertaking by a licensed conveyancer to be enforceable by the Court in the same manner as a solicitor's undertaking.