

Incorporated Conveyancing Practices

The following is a brief guide on what is required to operate a conveyancing business under a corporate structure and the responsibilities of directors of companies generally. The following is not to be taken as legal advice and is not intended to include everything that should be considered when incorporating a conveyancing practice. Anyone intending to open a conveyancing business or to operate that business under a corporate structure is advised to seek their own independent legal and financial advice.

There are very good reasons why it may be a good business decision to incorporate your practice, however, this will not suit everyone's situation and you should seek legal and other professional advice about your particular circumstances.

Conveyancing Corporations owned by unlicensed persons:

Since conveyancing businesses were permitted to operate under a corporate structure (Conveyancers Licensing Act 2003) there has been a temptation for unlicensed persons to set up a company and employ a licensee as a director. To some licensees becoming an employed director may appear to be an attractive way of becoming involved in a conveyancing business. However before considering a proposal such as this there are other important considerations to take into account.

Corporation Licence:

To operate a conveyancing practice under a corporate structure the corporation must hold a 'corporation licence' (see Section 8 Conveyancers Licensing Act).

To be granted a licence the Commissioner for Fair Trading must be satisfied that:

- The corporation is a fit and proper person to hold a licence, and
- each director of the corporation is a fit and proper person to hold a licence, and
- *no director or executive officer (within the meaning of the Corporations Act) of the corporation is a disqualified person, and
- the corporation is not a disqualified person, and
- at least one of the directors holds a licence that a natural person is required to hold to carry on a conveyancing business.

*Section 10 of the Conveyancers Licensing Act sets out the full definition of

a disqualified person. However, a disqualified person includes, amongst others;

- an Australian legal practitioner, incorporated legal practice or solicitor corporation,
- the holder of a licence or certificate of registration under the Property, Stock and Business Agents Act,
- Any person disqualified from being employed in a law practice or disqualified under the Property, Stock and Business Agents Act.

Licensee in charge:

There must be a 'licensee in charge' at each place of business. The licensee director can be the licensee in charge at one place of business but must employ a 'licensee in charge' at all other places of business (see section 20 Conveyancers Licensing Act).

The Licensee in charge must properly supervise the conveyancing business carried on by the licensee or the corporation (see section 21 Conveyancers Licensing Act). This includes:

- Supervision of employees
- Establishment of procedures to ensure compliance with the CLA and other laws
- Monitoring the conduct of the business to ensure procedures are complied with
- Compliance with any guidelines that may be issued by OFT as to what constitutes proper supervision of the business. Failure to comply with any such guidelines constitutes a failure to properly supervise the business

Directors' responsibilities:

Being a director or officeholder of a company comes with legal obligations and these obligations need to be seriously considered before becoming involved in a corporate set up.

As a director of a company, whether as a shareholder or an employed director, you are expected by law, amongst other matters, to:

- be honest and careful in your dealings
- know what your company is doing
- make sure the company can pay its debts on time
- see the company keeps proper financial records

Only be a company director if you are willing, able and have enough time to put in the effort.

By law directors must prevent a company from incurring debts when it is insolvent or about to become so. To not do so may involve criminal prosecution, substantial fines or lead to action by a liquidator. Your personal assets – not just those of the company- may be at risk.

As a director or officeholder you are responsible for the company's compliance with the Corporation Act. You cannot rely on other directors to do this for you.

Sharing receipts of a conveyancing business or corporation:

A licensee must not share receipts with another person unless that person is a licensee or the sharing of receipts is approved by the Commissioner for Fair Trading (see Section 26 Conveyancers Licensing Act). This includes the sharing of receipts with other directors or with another business or company.

To set up some form of elaborate corporate or business structure so that receipts can be distributed or disbursed can be a breach of provisions of the Conveyancers licensing act.

Who is a director?

A director is not just a person appointed to the role. Under the Corporations Act a person may also be a director if they are not formally appointed but act in that role, or if the directors of the company act in accordance with that person's instructions or wishes.

This warning is taken from the ASIC web site:

Avoid any company where someone offers to make you a director or secretary on the promise that 'you won't have to do anything' and 'just sign here'. You could be exposing yourself to many legal liabilities.

The manner in which a conveyancing business is setup, especially under a corporate structure, is something the OFT pursues quite aggressively. Aside from loss of licence and penalties for non compliance with the licensing legislation, there can also be personal liability (and prosecution!) as company director for the debts of the company, including income tax, staff entitlements, unpaid superannuation etc. Members considering a proposal from unlicensed people to be employed as a licensee director of a company, or under some other arrangement, should be aware of their responsibilities and liabilities