Three's a crowd

Susanna Heley wonders how many regulators it takes to change a lightbulb

THE RELATIONSHIPS BETWEEN regulators can be an odd mix of tension and cooperation. Recently there was a power tussle between the Legal Services Board and the Solicitors Regulation Authority over the constitution of the SRA board. On the other hand there has been unprecedented cooperation between the Land Registry and the Law Society in generating a joint practice note on property and registration fraud.

Throw into the mix the new rules concerning disclosure of information by the SRA and the Legal Ombudsman to other regulators, as well as the proposed use of memoranda of understanding to address problems posed by alternative business structures, and you are left with the inescapable conclusion that regulatory overlap is an increasing problem.

I was not surprised to read that research commissioned by the SRA identified a lack of consumer awareness about the regulation of different legal services providers. Far from simplifying the 'regulatory maze', the post-Clementi world seems harder to navigate than ever.

Tough call

In some ways, solicitors are fortunate – the SRA largely fulfils the regulatory requirements of several bodies, including the Financial Services Authority (depending on the nature and extent of services provided) and the Office of Fair Trading.

However, solicitors are not immune from the activities of other regulators; for example, many solicitors will be asking Santa for telephone call recording systems this year, thanks to the FSA. As of 25 December 2010 solicitors acting for lender clients in connection with the recovery of mortgage arrears will be obliged to record telephone calls with the borrower and maintain the recording for three years under new FSA requirements.

The requirement to record calls is not absolute; it affects calls which discuss the amount due, repayment terms and forbearance options. It also seems that only calls with the borrower himself are caught by the requirement – not calls with a solicitor or third party acting on his behalf. Solicitors may wish to decide whether to record all calls in case these matters are discussed. It is possible for firms to apply for a waiver if the requirement is unduly burdensome (or would not achieve its purpose) and they can show that borrowers will not be put at risk.

Solicitors acting for lenders are facing difficult choices following this and other changes introduced by the FSA. Lenders' obligations towards consumers in repayment difficulties have been significantly altered with a prohibition on additional default charges where consumers are meeting instalment plans; various reasonable time requirements and restrictions on the circumstances in which a lender can repossess a property. It remains to be seen how far solicitors will have to police these requirements; according to the SRA solicitors will certainly be required to check that the lender or third-party administrator for whom they are acting is authorised to administer a regulated mortgage contract.

All of the changes, combined with our general duty to the court, are likely to mean that solicitors will need to have systems in place to ensure lenders are entitled to bring proceedings based on arrears. This is largely going to be a question of judgment for both lender and lawyer but I strongly recommend solicitors review the FSA's policy statement 10/9.

The requirements raise serious questions for lawyers as to how call recording is to be handled; the maintenance of records, privacy implications, data protection and regulations concerning call monitoring. I can see this being something of a legal and logistical quagmire.

Poor response

Leaving aside the detail of these particular changes, I was dismayed to see that the Law Society was not listed as having responded to the consultation paper which led to these changes. In the list of respondents, it seemed that only the Housing Law Practitioners Association had any direct connection to the practice of law. I suspect this may be because the rules relate to lenders. Solicitors are merely caught in the crossfire.

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I have largely given up expecting the vast majority of the profession to respond to consultations; one of my bugbears is that the SRA received only 34 responses to the consultation which led to the introduction of the publicity policy – and that level of response is not unusual, even for major changes affecting the entire profession. Maybe solicitors are apathetic to such matters, but I prefer to believe that busy professionals struggle to find the time to read and respond to consultations.

Returning to the regulatory maze, there is an ever-increasing circle of regulators prepared to make demands of lawyers in the run up to the launch of alternative business structures and outcomes focused regulation – and it is unlikely that the situation will improve. Solicitors should therefore be paying close attention to regulatory proposals which will no doubt emerge over the next six months or so.

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