



THE LAW SOCIETY
OF NEW SOUTH WALES

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26 February 2019

Certificates of title: the next evolution
Office of the Registrar General
McKell Building
2-24 Rawson Place
SYDNEY NSW 2000

By email: ORG-admin@finance.nsw.gov.au

Dear Sir/Madam,

Certificates of title: the next evolution ("Discussion Paper")

The Law Society of NSW appreciates the opportunity to comment on the Discussion Paper. The Law Society's Property Law Committee has contributed to this submission.

Our responses to the questions raised in the Discussion Paper are set out in the attached table.

We would be pleased to meet with you to further discuss the matters raised in this submission. Any questions should be directed to Gabrielle Lea, Policy Lawyer on 9926 0375 or email: gabrielle.lea@lawsociety.com.au.

Yours faithfully,

Elizabeth Espinosa
President

Certificates of title: the next evolution – Discussion Paper

Submission by the Law Society of NSW – February 2019

NO.	QUESTIONS	COMMENTS
Model 1 – The current mixed eCT and paper CT environment		
Q.1.	What features, if any, of the existing CT environment should be retained in NSW?	Consideration could be given to a reworking of the Certificate Authentication Code (“CAC”) system for unencumbered titles in Model 2. However, we acknowledge that the security benefits of the CAC system could be eroded where access to the code is shared.
Q.2.	Are there any issues arising in the existing environment which have not been considered in this discussion paper?	<ul style="list-style-type: none"> • No. • We note that practitioners are increasingly aware of the concept of Control of the Right to Deal (“CoRD”) in the existing environment. The process of obtaining and lodging CoRD Holder consents is becoming part of daily conveyancing practice.
Model 2 – eCTs and CoRD Holder Consents		
Q.3.	In a scenario where all paper CTs are converted to eCTs with a system of CoRD Holder Consents, are there any practices that should be changed or any new features that should be introduced?	<ul style="list-style-type: none"> • Consideration should be given to a variation of Model 2 which eliminates the need for Transacting Party Consents. Where the CoRD Holder is a party to the transaction, that party’s consent should be assumed from their participation in the transaction and not required separately. CoRD Holder consents should only be required in Third Party Consent situations which importantly would retain a mechanism for a mortgagee’s consent to subsequent dealings. • If the requirement remains for a mortgagee to sign a Plan, the CoRD Consent could also be dispensed with as the mortgagee is effectively consenting by signing the plan. However, on balance our view is that the mortgagee should be separately required to provide its consent in addition to signing the Plan. This continues the current approach to mortgagee consent to Plans but simply alters

NO.	QUESTIONS	COMMENTS
		<p>the instrument of consent. Requiring a separate additional consent is warranted in our view, given the significance of registering a Plan in relation to the protection of the mortgagee's asset.</p>
Q.4.	<p>Are there any issues arising in a 100% eCT and CoRD Holder Consent environment that have not been considered in this discussion paper?</p>	<ul style="list-style-type: none"> • Assuming Model 2 is adopted, consistent guidance needs to be provided as to what steps practitioners should take in relation to paper certificates of title ("paper CTs") which are the subject of a conveyancing transaction. The current inconsistency between the NSW Participation Rules and the Registrar General's Guidelines as to whether the paper CTs should be securely destroyed or retained as evidence must be addressed. Guidance will also need to be provided in relation to paper CTs held for safekeeping by legal practices. • The discussion paper does not mention whether the electronic certificate of title ("eCT") will contain the usual statement as to which party has control of the right to deal ("CoRD") where the title is unencumbered. We understand that the Office of the Registrar General is considering this issue. In our view it is not necessary to separately state on the eCT for an unencumbered title that the registered proprietor has the CoRD as the right to deal is the inherent right of the registered proprietor. However, we consider that it would be useful to retain the statement that "No certificate of title has issued for the current edition of this folio". An Historical Search could include the words "No CT issued", instead of "CoRD issued" underneath the new edition number. If it is decided to retain a notation that the registered proprietor holds CoRD in unencumbered titles, then the current notation could be utilised. • The discussion paper briefly notes the impact on solicitor's liens and equitable mortgages once a paper CT is replaced with an eCT. These are significant changes for both practitioners and members of the public and require closer examination. • The impact on solicitors' liens and equitable mortgages also highlights the importance of adequate prior communication of the changes. We would be

NO.	QUESTIONS	COMMENTS
		<p>pleased to work with the Office of the Registrar General to communicate these important changes to our members.</p> <ul style="list-style-type: none"> • We understand that the Office of the Registrar General is also considering whether the certificate of title for the common property of a strata plan should be converted to an eCT. While there is merit to maximising the number of titles included in the conversion to eCTs, we acknowledge that it may be appropriate to retain a paper CT for the common property of a strata plan. If the CT for the common property of a strata plan became an eCT, there is then the question of evidencing the owners corporation's consent. Although the owners corporation could properly be viewed as a transacting party to the registration of a new by-law, in our view the consent of the owners corporation as CoRD Holder should be separately required for certainty. We would be pleased to discuss the approach to be taken in relation to the certificate of title for the common property with the Office of the Registrar General. • The discussion paper does not flag transitional issues such as whether the conversion will take place on one day, or will be staggered as it was for the bulk conversion in 2018, for certificates of title where an ADI was registered as first mortgagee. We understand that the Office of the Registrar General is considering the manner in which the conversion will take place in consultation with NSW Land Registry Services and industry generally. • Consideration will also need to be given to the treatment of titles that are the subject of inflight transactions, that is, titles that are the subject of a current transaction as at 1 July 2019. • Clarity will also need to be provided as to any class of paper CTs which are outside the scope of the conversion to eCTs.

NO.	QUESTIONS	COMMENTS
Model 3 – No eCTs and no CoRD Holder Consents		
Q.5.	In the event there are no eCTs/CoRD Holder Consents, are there any practices that should be changed or any new features that should be introduced?	<ul style="list-style-type: none"> • The Law Society does not support Model 3. • In our view, the discussion paper does not sufficiently address the issue of mortgagee’s consent under such a model, other than to note that it would be assumed that required consents have been obtained. • We note that the mortgagee’s right to consent to subsequent dealings which was recognised and protected in NSW in <i>Hypac Electronics Pty Ltd (In Liq) v Registrar-General</i> [2005] NSWSC 1213 has been statutorily removed in some States. We do not support a departure from the principles articulated in that case. • If Model 3 were adopted, we suggest that legislative amendment would be required to remove a mortgagee’s power to consent, or deny consent, to the registration of subsequent dealings in order to protect their security. (For example, see s 127A <i>Transfer of Land Act 1893</i> (WA), in relation to subsequent mortgages.) We do not support any legislative amendment mirroring the Western Australian position.
Q.6.	Are there any issues arising from a no eCT/no CoRD Holder Consent environment which have not been considered in this discussion paper?	See our response to question 5.
Q.7.	What are the risks of removing transacting party Consents only?	<ul style="list-style-type: none"> • We support a variation on Model 2 which eliminates the need for Transacting Party Consents and as a general principle are more comfortable with removal of Transacting Party Consents than the removal of Third Party Consents.

NO.	QUESTIONS	COMMENTS
		<ul style="list-style-type: none"> Either a mortgagee's consent is safeguarded by an effective mechanism for the provision of consent, such as the retention of Third Party Consents, or legislative amendment will be required to remove the requirement for a mortgagee's consent. If this issue is not adequately addressed, there is likely to be an increase in litigation where dealings are registered without the mortgagee's consent, which in most cases is contractually a default under the terms of the mortgage.
General		
Q.8.	Are there any other issues that should be considered in comparing the potential options for unencumbered titles beyond 1 July 2019, which have not been considered in this discussion paper?	No.
Q.9.	Do you have a preference for a particular model and why?	<ul style="list-style-type: none"> As referred to in our response to question 3, we support a variation of Model 2 which eliminates the need for Transacting Party Consents. In our view this strikes the right balance by eliminating redundant consent mechanisms for parties directly involved in transactions, while preserving a mechanism for third party consents, particularly the preservation of a system for a mortgagee's consent to subsequent dealings.