THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Prop:EEgl1694038

2 May 2019

Conveyancing Rules version 5 review
Office of the Registrar General
McKell Building
2-24 Rawson Place
SYDNEY NSW 2000

By email: org-econveyancing@finance.nsw.gov.au

Dear Sir/Madam,

Consultation on the draft Conveyancing Rules Version 5 ("Conveyancing Rules")

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

1. Effective date

We understand that version 5 of the Conveyancing Rules is to be effective from 1 July 2019. Pages 1, 3 and Rule 2 of the Conveyancing Rules require updating to reflect this.

2. Rule 8.2

We suggest that for consistency and clarity, the word "dated" in the heading for Rule 8.2 should read "signed". This is consistent with the references to "signed" in Rule 8.2.1 and 8.2.2 and the approach adopted generally.

We suggest that the opening words of Rule 8.2.3 should be amended to read "Where the relevant instrument is signed between 1 July 2018 and 30 June 2019,". The meaning of the current reference to "on or after 1 July 2018 and 30 June 2019" is unclear.

Rule 8.2.4 has not been amended from version 4 of the Conveyancing Rules. However, with the likely commencement of other Electronic Lodgment Networks ("ELNs") in NSW this year, we suggest that the reference in Rule 8.2.4 to "an ELN is not available and has not been available for one clear Business Day" needs to be reconsidered. For example, in a multiple ELN environment, must all ELN's be unavailable for Rule 8.2.4 to apply?

The concept of one ELN being unavailable also recurs in Rule 8.5.2, 8.6.2, 8.7.2 and 8.8.2. We are also concerned that if this concept is altered to mean all ELNs being unavailable, this indirectly appears to require that practitioners must subscribe to all ELNs, which we do not support.

3. Rule 8.5

For consistency, we suggest that the heading of Rule 8.5 should be amended to read "Lodgment of transfers signed between 1 July 2018 and 30 June 2019." The headings of Rules 8.6 and 8.7 should be similarly amended to refer to "signed between" the relevant dates.

4. Mainstream Dealings and transmission applications

We note a new definition, Mainstream Dealings, has been added to the definitions in Rule 3.1. We particularly note the inclusion of a withdrawal of caveat and a transmission application as Mainstream Documents. Under Rule 8.7 it will therefore be mandatory to lodge transmission applications and withdrawals of caveat electronically. As this is a very late addition to the documents caught by the 1 July 2019 milestone, we believe it will be critical in the communication materials prepared by the Office of the Registrar General ("ORG") to highlight the changes to what has been communicated to industry over the past two years.

We have recently brought to your attention in liaison meetings with ORG and NSW Land Registry Services ("NSW LRS"), an inconsistency between the Registrar General's Guidelines and the practice of NSW LRS in relation to lodgment of an electronic transmission application. The Registrar General's Guidelines in relation to an electronic Transmission Application state that:

> The consent is not necessary where an applicant is also the executor. Where there are several executors, administrators or trustees, each must join in the application either by consenting to it or as an applicant.

As mentioned, we understand that the document specifications from NSW LRS require evidence of consent in such circumstances, even though this is unnecessary under the Registrar General's Guidelines. If this discrepancy has not yet been resolved, we request that this issue be resolved well before 1 July 2019.

5. Rule 8.7

For clarity, we suggest that the words "all of which are" should be added to line one of Rule 8.7.1 so that it reads "Any Mainstream Dealing or combination of Mainstream Dealings all of which are signed between...". Without this clarification there may be ambiguity where not all the documents have been signed between the relevant dates.

6. Rule 8.8

The Law Society has strong concerns in relation to the practical application of Rule 8.8.1. Linking the mandating of electronic lodgment for a particular type of dealing to the point-in-time that it is published on the ORG "Schedule of eDealings" is problematic. In our view, there must be a lead time between the time a document is eligible to be lodged electronically and the time it must be lodged electronically. For example, where a sale contract involves an unusual type of transfer not currently able to be lodged electronically, the parties will prepare the transaction to settle in the paper environment. While the contract is on foot, must the parties continually monitor the

ORG website to check if the transfer has become eligible to be lodged electronically and if so, reorganise the transaction for an electronic settlement?

In our view, the transition to electronic conveyancing to date has been reasonably smooth because practitioners have been given appropriate lead times. The tail end of the transition should not be treated any differently, especially as we start to transition less common dealing types. We suggest there must be a lead time for each document as it becomes able to be lodged electronically. In our view, an appropriate lead time would be not less than 90 days, reflecting the time running from a party giving initial instructions to prepare a sale contract to the end of the average settlement period.

Accordingly, it is our view that as a general rule, documents should not be required to be lodged electronically as soon as they become available to be lodged electronically. There must be a period of at least 90 days to:

- allow extensive communications to alert industry to the change, especially while there are variable and changing exceptions to the ability to lodge a particular dealing type electronically and variations in the document scope of ELNs;

- allow practitioners to effectively manage work in progress;

- allow for detection and rectification of any issues with the eDealing; and

- ensure that NSW LRS and any operating ELNs are all applying the same rules and all training materials are consistent.

The Schedule of eDealings is a new document on the ORG website, the existence of which is referred to in ORG's Circular 2019/01 "Consultation on the Conveyancing Rules Version 5". Given the importance this Schedule is to play in the residual document strategy, we suggest further communications about the Schedule will be necessary in due course. It would also be helpful if the Schedule was more user friendly, for example, by using subheadings between the two sections of "available" and "not available" to be lodged electronically. It would also be useful if the Schedule was more printer friendly.

In a multi ELN environment, the concept of "eligible to be lodged electronically" may require further consideration. For example, if a document can be lodged electronically through one ELN, but not all ELNs operating at the time, is that sufficient for the document to be considered to be eligible to be lodged electronically? As mentioned above, this approach could have the presumably unintended consequence of compelling practitioners to subscribe to all ELNs, if individual ELNs had different document suites available. It could also have the effect of entrenching the dominant position of the ELN with the most comprehensive suite of available documents.

We are also concerned about the general approach to the residual document strategy and mandate of 1 July 2020 from the perspective of requisitions. Currently, business rules applied to electronic dealings minimise the incidence of requisitions in eConveyancing, though they do occur. As new documents are added to the scope of electronic dealings, in particular documents with additions that are unstructured data, i.e., added via the document hub, the likelihood of requisitions increases. At present, the current ELNO does not have a mechanism for relodging an eDocument with changes made to satisfy a requisition and the only alternative is to reconstitute the dealing and lodge it in paper. It is also unlikely that any new ELN will have "relodging" functionality for some time.

We understand that documents lodged via the residual document strategy are likely to have an eDealing as a covering sheet and may attach a scanned copy of the paper dealing attached via the document hub. These dealings are likely to have a higher incidence of error and likelihood that the dealing itself will require amendment and have to be "relodged".

The way in which the paper concepts of "uplifting " dealings and the consequences for the priority of dealings also needs to be carefully considered. This is particularly the case with respect to caveats which maintain priority, even if requiring a material alteration, until they are either uplifted to correct the defect or they are rejected at the expiry of the requisition period.

7. Rule 11

In line one of Rule 11.1.2, the words "under the" have been duplicated.

In relation to the Notes that appear with Rule 11, we suggest that the first note should be amended to read:

> With respect to paper documents, a Client Authorisation is only allowed to be used for a representative acting for the mortgagee using the National Mortgage Form.

8. Waivers

As the bulk of transactions move to mandatory electronic lodgment, in our view consideration should be given to a waiver for interdependent transactions that involve matters or aspects outside the NSW land register. For example, the simultaneous settlement of the sale of a company title unit and the purchase of a Torrens title property will likely always need to be conducted in paper. We would be happy to work with you to consider this issue further.

Any questions in relation to this submission should be directed to Gabrielle Lea, Policy Lawyer on 9926 0375 or email: gabrielle.lea@lawsociety.com.au.

Yours faithfully,

Elizabeth Espinosa

Elizabeth Espinosa
President