



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: JC:lb:1297093
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NECS in NSW Industry Consultation Feedback
Land and Property Management Authority
DX 17 SYDNEY

Dear Sir,

Client Authorisation for use in NECS

I am writing to you at the request of the Law Society's Property Law Committee (Committee).

The Committee appreciates the opportunity to comment on the issues raised in the Consultation Paper: *Client Authorisation for use in NECS* as part of the stakeholder consultation for the "NECS in NSW" program.

If you wish to discuss the Committee's responses in the attached submission, please contact Ms Liza Booth, Executive Member, Property Law Committee by telephone 9926 0202 or by email to liza.booth@lawsociety.com.au.

Yours faithfully,

for **Joseph Catanzariti**
President

Property Law Committee Submission

NECS in NSW Consultation Papers - Client Authorisation for use in NECS

Preliminary

A Client Authorisation is effected by the Subscriber and the Client executing a Client Authorisation Agreement (C A Agreement) in prescribed form. The Subscriber is first required to verify the identity of the Client through a Client Identity Verification (CIV). The integrity of that process is crucial to and underpins the CA Agreement. The Committee's comments are predicated on its agreement to the CIV that is ultimately prescribed.

The Committee noted that Chris White from LPMA had indicated that the Forum to be held on 11 September 2009 would be focussing on the following issues from the section of the Paper titled "Specific Questions for Stakeholders" commencing on page 22- Issues: 1, 2, 3, 6, 10, 11, and 12. The Committee's responses will also focus on these issues.

National Project Team (NPT) Position

The NPT considered the draft template form CA Agreement attached to the Consultation Paper and accepted the concept of the draft form, subject to final review and the following:

- NPT consider it critical that the Client Authorisation process be able to be completed without face- to- face contact between Subscriber and Client;
- There was a clear preference for the Client Authorisation to have statutory backing;
- The process should not attempt to disrupt proportionate liability arrangements in the event of fraud.

The Committee endorses the NPT position.

Specific Questions for Stakeholders

Issue 1 – Loss events and claims (Section 6.1)

1.1 Should the Client Authorisation or NECS Participation Rules make specific provision for cases where loss is suffered in a transaction where the Client Authorisation agreement;

- cannot be located;
- was not created;
- is found to have been defective or invalid; or
- was cancelled or revoked,

or should the common law apply?

1.2 What are the key considerations or criteria supporting either preference?

Committee comments

The Committee notes that the common law currently deals with these issues adequately under the existing regime. The implementation of the NECS should not alter the legal liability of transacting parties.

The Committee also notes that there will be instances where the client identification process fails through no fault on the part of the person conducting it.

It is considered critical that legal practitioners should only be liable in the event of fraud to which they are a party or if they are clearly negligent.

Issue 2 – Content of a Client Authorisation (Section 6.4)

- 2.1 Is the authorisation wording (see Section 6.3) sufficient, or is there a case for additional or varied wording?
- 2.2 Should any additional matters be included in the effect of the Client Authorisation? If so, what, and for what reason?
- 2.3 What level of transaction detail should be specified in a Client Authorisation agreement, and why?
- 2.4 Do the terms of the draft Client Authorisation agreement achieve:
 - the risk management objectives desired by all participating parties;
 - the desired level of confidence of parties using or relying on the NECS;or are additional or varied terms required, and for what reasons?

Committee comments

The Committee queried whether the timing of the termination of the authorisation needed to be made explicit. It may be necessary for the authorised practitioner to carry out steps after settlement – e.g. signing and answering requisitions or to make corrections.

The Committee also discussed whether an authorisation should be “property specific” (except in relation to large scale property developments).

The Committee questioned the wording of clause 5 in relation to what is authorised. Clause 5 of the draft CA Agreement reads, in part:

“5. What is authorised

“You authorise Us to act as your agent in NECS” to:

- (c) authorise any financial settlement involved in the Transaction to be effected, **unless** you instruct us otherwise; and **(emphasis added)**.

It is considered that the form should nominate whether a practitioner is authorised to act in relation to a financial settlement. Not every NECS transaction will involve a financial settlement. Committee members suggested that a box or section of the form could nominate whether a financial settlement was included in the authorisation with, for example, the default position being “yes”.

The Committee discussed the class of person who could act as an agent in relation to the Client Authorisation process (in the event that it is completed without face-to-face contact between the Subscriber and Client).

The Committee considers that the class of person who should act as an agent should be fairly wide; if possible, i.e. it could be a Certifier or a class of persons capable of being a Certifier.

In the event that the Client Authorisation process is completed overseas, it could be conducted by a Notary Public or Consular official, or, for example, a person authorised to take an oath.

The Committee notes that the matters illustrated in section 6.4 of the Discussion Paper:

- b) Specification of any person representing a Transacting Party and verification of their authority to represent, and
- c) Specification of the transaction(s) to which the Client Authorisation applies will cause practical difficulties for large organisations.

It was queried whether in relation to the draft CA agreement template that the fourth box (subscriber details, certification and signing) should specify "Certifier" rather than "Subscriber".

It was noted that in order to be user friendly, the CA Agreement should be able to be completed locally online from the template form.

The Committee endorsed the view that agents completing the authorisation process on behalf of a Subscriber conducting a client identification interview, if completed within Australia, should be a Certifier or a local person capable of being a Certifier. In the event that this interview is conducted overseas, the class of persons prescribed as capable of conducting the interview on the Subscriber's behalf should be a class of person capable of taking an oath.

Issue 3 – Identity Verification and Client Authorisation (section 6.4)

- 3.1 Must the identity verification and the Client Authorisation be undertaken at the same time, and if not, why not?
- 3.2 What are the consequences if they are not undertaken at the same time?

It was noted that logically the client identification must be taken as a first step, but that how and when the second process is undertaken is a risk management decision for the Subscriber. There is no logical reason why the two steps need to be undertaken at the same time.

Issue 4 – Exceptional Circumstances (section 6.4)

- 4.1 Should the Client Authorisation and CIV procedure requirements be the same when undertaken by a Subscriber's agent, and if not, why not?
- 4.2 Should a Subscriber be permitted to act for a Transacting Party when nobody has met the Transacting Party or Transacting Party representative face- to- face? What liabilities should accrue to a Subscriber who has not arranged a face-to-

face CIV for a Client who is subsequently revealed to be a fraudulent identity and why?

- 4.3 On what basis should other affected parties be able to rely on the establishment of identity and authorisation of the Transacting Party?

The Committee noted that this was not one of the issues highlighted by Chris White for focus at the Stakeholders' Forum on 11 September 2009. The Committee, however, considered that it raised very important issues.

Committee comments in relation to the numbered points:

- 4.1 The Committee considered that the CIV procedure should be the same, whether carried out by principal or agent.
- 4.2 If, as principal, a legal practitioner having not met a new Client then allowed his or her agent to undertake the CIV process without a face-to-face meeting with the Client, then there should be consequences.
- 4.3 Other parties should be able to rely on the establishment of identity and authorisation of a Transacting Party.

It is suggested that provided the identification process is prescribed and the legal practitioner follows the prescribed procedure then the practitioner should not be held liable if the identity is fraudulent. The NECS system should not impose additional liability on legal practitioners – a solicitor should only be liable in the event of fraud to which they are a party or negligence.

- 4.4 See the comments in relation to 4.2 above.

Issue 6 – Common law contract or Statutory Effect (section 7.3)

- 6.1 Should the Client Authorisation take effect as a common law contract, and for what reasons?
- 6.2 Does the Client Authorisation require any statutory support, and why?

The Committee considers that it may be too confusing to deem the authorisation to take effect as a power of attorney. It was noted that so long as dealings are regarded as deeds, the effect of the Client Authorisation will need to be dealt with by way of amendment to the current legislation.

It is considered that the Client Authorisation should take effect as a common law contract and if this required some amendment to the existing legislation to be given effect, the legislation should be amended to give effect to this.

Issue 9 – Types of Client Authorisations (section 10.3)

- 9.1 Do the three types of Client Authorisations (specific, standing and batch) adequately cover the types of instructions given by Clients to Subscribers?

The Committee response: Broadly, "yes".

9.2 If not, what other scenarios need to be provided for, and why?

Not applicable.

9.3 Does the risk of a Subscriber holding a Standing Authority acting without the Client's actual instructions need to be addressed in NECS, and if so how would the risk best be managed?

The Committee considered "No" – the common law and professional regulation of Subscribers would deal adequately with this risk.

Issue 10 – Expiration, Revocation and other Termination of the Client Authorisation (Section 11.6)

10.1 What rules on expiration, revocation and other termination of a Client Authorisation are required, and for what reasons?

10.2 Is the draft Client Authorisation Agreement a suitable template, and if not, why not?

10.3 Should a Client Authorisation of any type have a mandatory outer limit expiration period, and if so what should it be and why?

10.4 Should a Client Authorisation Agreement provide that it terminates on the "completion" or "termination of the "Transactions" it authorises? If not, why not?

10.5 Should a Client Authorisation Agreement describe a "Transaction" in more detail than simply sale, purchase, mortgage or discharge in relation to identified land, and if so, why?

10.6 Are the proposed NECS arrangements regarding substitution of Subscribers in a NECS transaction when one Subscriber's Client Authorisation is revoked adequate, and for what reasons?

The Committee agreed that rules are required, and that under the current system a practitioner's authorisation would normally expire when the title issues rather than on settlement.

Comments on specific points:

10.2 Yes, subject to the comments made by the Committee.

10.3 No

10.4 The Committee notes that this issue needs some thinking through – there may still be some issues that need to be "tidied up" after settlement;

10.5 The CA Agreement should highlight whether or not the Transaction involves a financial settlement ;

10.6 The Committee considers that further information is required before a determination could be made in relation to this issue

Issue 11 – Execution (section 12.4)

11.1 What actions should be mandatory for the Subscriber in terms of validating the legal authority of the party executing a Client Authorisation, and why?

- 11.2 Are the certifications from the Transacting Party and Subscriber in the proposed form of Client Authorisation appropriate and adequate to protect the interests of all interested parties, and why?

Committee comments

The Committee members consider this a critical risk issue for legal practitioners completing the form. The fourth box currently states:

"I CERTIFY" that:

- (a) the identity and authority of the person(s) whose signature(s) appear(s) below have been verified in accordance with the Prescribed Requirements;.....

It is noted that unless the legislation contains a complete code in relation to the prescribed requirements for verifying the authority of parties purporting to act for example for organisations or companies, then the certification in relation to authority need to be deleted from the form.

The Committee also discussed record keeping requirements in relation to the CA Agreements. It was considered that it may be necessary to utilise permanent deposit provisions of the legislation to prevent record keeping requirements becoming too onerous for legal practitioners.

Issue 12 – Reliance on Client Authorisation agreement certifications (section 15)

- 12.1 Who should be able to rely on the certifications in the Client Authorisation agreement, and for what reasons?

The Committee again reiterated that NECS should not impose a change in the liability position of the Transacting Parties which is already subject to long settled general law and legislation.

The Committee considers that the model to be endorsed is effectively an electronic version of the current environment. There is a body of law in relation to the sharing of risks for property transactions that should not be varied by adopting the NECS system