THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Property:REgl863245

4 July 2014

National Electronic Conveyancing Program
Land and Property Information
GPO Box 15
Sydney NSW 2001

By email: econveyancingnsw@lpi.nsw.gov.au

Dear Sir/Madam,

Conveyancing Reform – Concurrent Electronic and Paper Conveyancing Consultation Paper

The Law Society appreciates the opportunity to comment on the NEC in NSW Consultation Paper "Conveyancing Reform – Concurrent Electronic and Paper" ("Consultation Paper"), which has been reviewed by the Property Law Committee ("Committee").

The Committee makes some general comments below and has provided responses to the questions set out in the Consultation Paper and noted issues for further consideration in the attached table.

1. General Comments

The Committee supports the proposal to align paper and electronic conveyancing requirements. In the Committee's view this will assist solicitors and conveyancers in moving to electronic conveyancing and provide a single approach to client engagement in conveyancing which should result in efficiencies. The Committee agrees that in the introductory phase of electronic conveyancing it is quite plausible that a transaction might begin in the paper environment and then move to the electronic environment or vice versa. Harmony between electronic and paper environment will certainly assist solicitors and conveyancers move between the environments as necessary and limit the inconvenience to practitioners and their clients.

The Committee also commends the objective of seeking uniformity with the other jurisdictions in procedural requirements. The Committee notes that similar papers to the Consultation Paper have issued in Victoria and South Australia. The Committee understands that the Registrar-General intends to work with his counterparts in the other jurisdictions in seeking uniformity in alignment of paper and electronic requirements where possible. It is noted that uniformity must be coupled with considerations of best practice and fraud mitigation to ensure not only uniformity but the integrity of the Torrens system in New South Wales.

The Consultation Paper acknowledges that a proportion of transactions will continue in the paper environment for some time and that implementation of the reforms outlined in the Consultation Paper is likely to be staged. The timeframe for implementation, together with appropriate communication and education will be critical to a smooth transition.

The Committee broadly supports most of the reforms outlined in the Consultation Paper. However Committee members have significant concerns in relation to several of the options contained in part seven of the Consultation Paper, relating to mortgagee consent to registration of a subsequent dealing.

2. Consents by Mortgagees to Conveyancing Transactions

Clearly with the phasing out of certificates of title, the practice of the mortgagee producing the certificate of title to allow the registration of a dealing during the currency of the mortgage warrants review.

However in the Committee's view, Options 2(a) and 2(b) unduly focus on the processes connected with the registration of a subsequent interest, and the way those processes themselves affect the Registrar-General, the registered proprietor, the first interest holder and the holder of the proposed subsequent interest. The impact on first interest holders and on others proposing to deal with land that becomes subject to such a subsequent interest has the potential to complicate processes significantly. Simplicity of process at the point of registration appears to be very much outweighed by the resultant complexity and uncertainty.

In the Committee's view, the removal of the requirement for mortgagees to consent prior to the registration of subsequent dealings does not adequately protect a mortgagee. For example:

(a) The effect a disadvantageous lease (or the variation of a lease previously consented to) might have on the value of the subject land, or on the mortgagor's covenants to its mortgagee regarding rental incomes.

(b) The effect a subsequent mortgage might have on the ability of the mortgagor to honour its first mortgage obligations, or the often finely-balanced relationships between senior, mezzanine and junior financiers in a complex project.

Reliance on the fact that first mortgagees are afforded priority and protection against subsequent interests by legislation appears to ignore the potentially significant economic effects of the creation of subsequent interests.

It is recognised that sub-section 53(4) of the *Real Property Act 1900* already covers the theoretical possibility that a lease might be registered without the mortgagee having given consent:

> A lease of land which is subject to a mortgage, charge or covenant charge is **not valid or binding on the mortgagee, chargee or covenant chargee** unless the mortgagee, chargee or covenant chargee has consented to the lease before it is registered.

A first mortgagee might, as a matter of contract, be able to insist on a mortgagor obtaining consent to a subsequent dealing and, as a matter of Torrens title law, put both the mortgagor and the subsequent interest holder at risk that the first mortgagee could ignore the subsequent interest. The proposal still represents a significant watering-down of the concept of the control of the right to deal. In the Committee's view, the importance to the State's economy of an orderly and reliable property

sector militates against the proposal. The Committee strongly opposes Options 2(a) and (b) and supports Option 1, where an electronic CoRD consent replaces the current consent and production of the certificate of title by the mortgagee.

In the Committee's view, Option 1 is in keeping with the interpretation of "authorised dealing" in s 96(2) of the *Conveyancing Act 1919* in *Hypec Electronics Pty Ltd (In Liq) v Registrar-General* [2005] NSWSC 1213, held to mean a dealing authorised by the mortgagee rather than a dealing authorised by the mortgagor or the *Real Property Act 1900.*

The December 2013 amendments to the *Real Property Act 1900* for the first time explicitly articulated the concept of the control of the right to deal in Torrens land. Dealings in Torrens land are made by registered instrument. For so long as all folios had a paper duplicate certificate of title held by the first mortgagee, possession and production of that token embodied control of the right to deal.

Control of the right to deal is rendered illusory if a first mortgagee cannot, before registration, exercise its right to refuse consent to the registration of a dealing and be bound by an interest to which it has not consented and not received notice.

At present, a party proposing to deal with land that is the subject of multiple interests noted in the second schedule of the folio of the Register can usually assume that only those interests, and all of those interests, validly encumber or benefit the fee simple or other interest against which they are recorded.

While it is recognised that there are classes of interest not apparent from examination of the Register, such as:

(a) over-riding statutory rights such as those arising under s 59A of the *Local Government Act 1993* (which may be discoverable on making relevant enquiries),

(b) unfulfilled consent conditions saved by *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* [2004] HCA 59 (which likewise may be discoverable on making other appropriate enquiries),

(c) omitted easements saved by s 42 of the *Real Property Act* (which are not necessarily amenable to discovery on making routine enquiries),

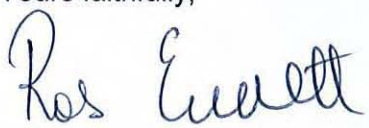
the existence of such exceptions does not, in the Committee's view, justify an erosion of the control of the right to deal as proposed.

It is antithetical to the principle of title by registration that a party examining the Register would not be able to conclude that something appearing on the Register was validly created and enforceable. Otherwise, a party proposing to deal in land would be put to making enquiry regarding the granting of the prior mortgagee's consent to each subsequent dealing.

Bearing in mind the observations of Gageler J in *Castle Constructions Pty Limited v Sahab Holdings Pty Limited* [2013] HCA 11, at 53, the proposed change would undermine the finality of the Register in our system of title by registration. That consequence should be avoided.

The Committee would welcome further opportunities to discuss its comments. Should you have queries about this letter, please contact Gabrielle Lea, Policy Lawyer for the Committee on (02) 9926 0375 or by email to gabrielle.lea@lawsociety.com.au.

Yours faithfully,



Ros Everett
President

NEC in NSW Consultation Papers
No 6 - Conveyancing Reform – Concurrent Electronic and Paper Conveyancing

Submission by the Law Society of NSW Property Law Committee ("Committee") – 4 July 2014

No.	Questions	Comments
1.	**Overview**	
2.	**Client Authorisation**	
2.1	Is the introduction of Client Authorisation requirements appropriate for paper conveyancing transactions? If not, why not?	Yes, the Committee supports the proposal and notes that it will promote a single approach to client engagement in conveyancing transactions.
2.2	Is it appropriate to introduce Client Authorisation forms for all instruments which currently require execution and witnessing? For which of these instruments (if any) should Client Authorisation forms not be introduced?	• Generally yes, but the Committee has not considered in detail each instrument which currently requires execution and witnessing. • The Committee does not believe the reform should only be limited to instruments currently in scope for electronic conveyancing but it does have some concerns with potential use in relation to execution of leases or mortgages given the prevalence of covenants in these documents and the significant duration of the legal relationship established by these instruments.
2.3	Where the use of a Client Authorisation is available for a class of instrument, should its use be made mandatory? If so: □ what transition arrangements will be necessary; and □ what period, if any, would be appropriate for optional use before use of a Client Authorisation becomes mandatory.	• The Committee assumes that the reference to "mandatory" means mandatory where the client is represented by a solicitor or conveyancer so that it would not be mandatory in the context of a self-represented party (the position of self-represented parties is dealt with at part 10 of the Consultation Paper). • The Committee supports the use of a Client Authorisation where available to be mandatory provided a sufficient lead or transition time is given and that this is supported by appropriate communication and education. • The Committee considers that by way of introduction it would be appropriate to first mandate the use of the Client Authorisation for the execution of transfers, provided a sufficient lead time is given. • If the use of a Client Authorisation was mandated for transfers, the Committee considered whether a special case should apply for off the plan purchases, given

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		the likely time lapse between the taking of initial instructions and the execution of the transfer once the unregistered plan has been registered. However, the Committee determined that it would be preferable to provide a much longer lead time or transition time of approximately three years for all transfers which would likely catch the majority of any off the plan contracts exchanged prior to the introduction of the reform. • The lengthy transition period should also be accompanied by confirmation of the acceptance for registration of the current form of transfer.
3.	**Verification of Identity Requirements**	
3.1	Is it reasonable to introduce VOI requirements for paper conveyancing transactions? If not, why not?	• Yes, the Committee regards it as reasonable to introduce VOI requirements for paper conveyancing on the basis that it already applies to a degree and that it will be consistent with electronic conveyancing. • The Committee suggests further consideration should be given as to whether a solicitor is able to verify the identity of another solicitor within the same firm, or whether a greater degree of independence should be required, similar to the constraints in the context of giving a s 66W certificate under the *Conveyancing Act 1919.* • The Committee also notes that in the paper environment there appears to be no equivalent prerequisite steps akin to registering with an electronic lodgement network operator or in relation to the issuing of a digital certificate.
3.2	Is the proposed list of Verifiers appropriate? Are there any other categories of persons who should have the authority to verify identity?	The Committee regards the proposed list of Verifiers as appropriate and does not think there are any other categories of persons who should be added to the list of potential Verifiers.
3.3	Are there any other situations where VOI should be required?	The Committee has no further suggestions for consideration in relation to other situations where VOI should be required.
3.4	Is the proposed seven year period for retention of documents appropriate? If not why not, and what would be an appropriate period?	• The Committee regards the seven year period for retention as appropriate, meaning seven years from the lodgement date. However as a practical issue, the party performing the VOI will not necessarily be aware of the actual date of lodgement.

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		• The Committee seeks clarification that retention of the documents electronically will satisfy the retention obligation.
4.	**Certifications**	
4.1	Do you believe it is reasonable to broaden the Certifications required for paper transactions to align with those required for electronic transactions? If not, why not?	Yes, the Committee supports the alignment of certifications in the paper and electronic environment.
4.2	Are the proposed persons who can give Certifications appropriate? Are there any other categories of persons who should have the authority to give Certifications?	Yes, the Committee regards the proposed persons who can give certifications as appropriate and has no further suggestions for consideration.
5.	**Priority Notices**	
5.1	Should Priority Notices be optional? If not, why not?	• The Committee has been a long standing supporter of the introduction of Priority Notices, particularly since the case of *Black v Garnock* [2007] HCA 31 ("*Black v Garnock*"). • In the Committee's view, Priority Notices should be optional and should be available for all paper transactions not just those transactions where a party is self-represented.
5.2	Should Priority Notices extend to all dealing types or only to transfers and mortgages?	• The Committee anticipates that the use of Priority Notices will largely be in the context of a transfer and mortgage, but advocates that Priority Notices should be available for all dealings (though it is anticipated there would be limited use for other dealings). • The Committee suggests that a specific form of Priority Notice could be developed for the common transfer and mortgage context which would likely assist in promoting the use of a Priority Notice and ease compliance with requirements. • Representatives should be able to lodge a paper Priority Notice as well as being able to lodge electronically.

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5.3	Is the list of dealings that are not affected by a Priority Notice outlined above appropriate? If not, what should be added to or removed from the list?	• The Committee has concerns with the proposal that a Priority Notice will not prevent the recording of a writ, particularly in a *Black v Garnock* type context and strongly advocates writs be excluded from the list of dealings not affected by a Priority Notice. The inclusion of writs in this list seems to be contrary to the rationale of *Black v Garnock.* • If, despite the Committee's suggestion, writs are retained in the list of dealings not affected by a Priority Notice, the Committee strongly suggests that ss 105A-D of the *Real Property Act 1900* may need to be reviewed and possibly amended to ensure the proposed interplay between Priority Notices and writs operates as intended.
5.4	Is 60 days the appropriate period of time for a Priority Notice? If not, what should that period be?	• In the Committee's view 60 days appears reasonable and fits satisfactorily with the standard 42 day completion period for a land sale transaction. • The Committee believes there may be an argument for a longer period, given that often the delay in the paper environment can occur between completion of the transaction and physical lodgment of the documents for registration.
5.5	Should Priority Notices be able to be extended? If so: □ For how long? □ Should the extension give priority over a dealing lodged prior to the extension?	• The Committee supports the proposal that Priority Notices be able to be extended once and that the extension should preserve the original priority. • The Committee regards 30 days as a suitable period for the extension.
6.	**Phasing out Certificates of Title**	
6.1	Do the proposed safeguards outlined in this consultation paper adequately replace the role of the Certificate of Title?	In the Committee's view the proposed safeguards outlined assist in replacing several roles of the Certificate of Title. The Committee strongly suggests that these other safeguards be fully implemented and widely adopted before the commencement of any further phasing out of a paper Certificate of Title.
6.2	Are there any other options that should be considered?	The Committee does not believe there are other options that should be considered.
6.3	What safeguards need to be in place prior to	The Committee suggests that the other safeguards referred to in its response to question 6.1 should be given sufficient time to have proved their effectiveness before

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	discontinuing the issue of Certificates of Title?	further steps are taken in discontinuing the use of Certificates of Title. Transition periods will need to be generous to ensure that solicitors and conveyancers have adapted their processes and are fully complying with the additional safeguards before any timeframe for further phasing out commences.
6.4	Should Certificates of Title of some sort continue to be issued to registered proprietors but have a purely commemorative role, that is, no legal standing in the conveyancing process?	The Committee has no comment regarding the issue of commemorative Certificates of Title.
7.	**Consents by Mortgagees to Conveyancing Transactions**	
7.1	Does removal of the practice of producing the Certificate of Title, without any additional form of consent from a prior interest holder, simplify existing processes?	• Yes, as a matter of process the removal of that practice would simplify the process however simplification of process should not be the primary objective. • Please see the covering letter for more detailed comments in relation to the Committee's objections to this proposal. In short, the Committee views the proposal as effectively diluting the concept of right to deal and it has serious concerns that it may lead to a the lack of confidence in the Torrens system.
7.2	Will mortgagees continue to be adequately protected? If not, why not?	• In the Committee's view, mortgagees will not continue to be adequately protected. Examples include a disadvantageous lease entered into without consent of the mortgagee or the grant of a second mortgage where there is insufficient equity to support it. • It is not just the protection of the mortgagee that is in issue, it is the wider paramountcy of the Register that may be compromised. The Register should be conclusive without a further need to inquire whether or not mortgagee consent was actually obtained. • The proposal also has the potential to create uncertainty where a less sophisticated party to a lease transaction might not be aware of the need to obtain mortgagee consent.

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7.3	Do you believe that the proposed changes simplify existing processes relating to consents? If not, why not?	The proposal initially appears to simplify existing processes but the consequences of not obtaining consent are far from simple. For example, if the mortgagee's consent to a lease was not obtained prior to its registration, is that consent able to be obtained post-registration to cure the earlier absence of consent? If consent was not obtained, does the mortgagee have the ability to have the lease expunged from the Register, resulting in perhaps at most an equitable lease? A simplification of mere process may in fact lead to complicated legal consequences.
8.	**Common Mortgage form**	
8.1	Do you believe that it is a good idea to remove the Mortgagor's signature from the Mortgage form presented for registration? If not, why not?	• The Committee regards it as appropriate to remove the mortgagor's signature from the mortgage form, although the actual signature on the document is of course useful as evidence. • Clearly, financial institutions will need to hold excellent records to ensure that the wet signature duplicate is properly held for safe keeping .
8.2	Should the option to lodge a Mortgage without the Mortgagor's signature but with a certification by the Mortgagee that it holds a valid Mortgage from the Mortgagor, on the same terms as the Mortgage presented for registration be available to any Mortgagee?	The Committee supports this proposal.
8.3	If not, what is an appropriate limitation, for example, limit the option to APRA regulated mortgagees?	The Committee believes it is appropriate to limit the option to APRA regulated mortgagees and authorised deposit taking institutions (excluding entities such as Paypal).
9.	**Mortgagee provisions**	
10.	**Self-represented Parties**	
10.1	Are the proposed requirements for self-represented parties reasonable? If not, why not?	The Committee believes either of the two options outlined in the Consultation Paper would be reasonable where the dealing is to be lodged by the self-represented party without the involvement of any other party (which would typically be the case in relation

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		to Notices of Death, caveats and withdrawals of caveats). The Committee has concerns about how the VOI process would operate in circumstances where the self-represented party is not the lodging party. For example: • A purchaser may act for itself but have a financial institution as an incoming mortgagee. Land and Property Information ("LPI") will typically not be aware that the purchaser is not represented by a lawyer or conveyancer (unless the reforms made it mandatory that a transfer can never be signed by a represented purchaser, but only by the purchaser's representative). Will the VOI undertaken by the incoming mortgagee suffice for LPI's purposes? • Where a vendor is acting for itself, is it envisaged that the vendor will be required by LPI to have their identity verified? If so, how would this operate in practice?
10.2	Will the proposed requirements for self-represented parties assist conveyancers and solicitors in dealing with self-represented parties? If not, why not?	Subject to the qualifications noted above, the Committee believes VOI of self-represented parties would assist conveyancers and solicitors in dealing with self-represented parties.
10.3	Which of the two options do you prefer? Why?	The Committee supports Option 2. It appears simpler administratively and minimises issues about handling, receipt and storage of supporting evidence.
10.4	Are there any other requirements that should be placed on self-represented parties? If so, what?	The Committee could not identify any at this stage.
10.5	Who should be authorised verifiers for the purpose of verifying the identity of self-represented parties?	For simplicity, the range of authorised verifiers available to self-represented parties should align with the list of verifiers for paper transactions generally – see the answer to question 3.2 above.
11.	**Powers of Attorney to Effect Transactions with Land**	• Although there are no specific questions in part 11, the Committee advocates for the removal of the requirement to register a Power of Attorney prior to effecting a transaction with land. Given many of the measures already introduced and many proposed measures focus on the prevention of fraud, the Committee believes it is inappropriate to publicly register a document which will contain a specimen

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		signature of a registered proprietor (and often of an attorney) and in many cases the actual address of the subject property. If the requirement for registration of the Power of Attorney is removed that eliminates any need for VOI to be performed prior to registration of the Power of Attorney instrument. • If despite the Committee's suggestion, VOI is introduced for Powers of Attorney as a prerequisite to registration, the Society's Elder Law and Succession Committee has several concerns with the practical operation of such a requirement: o the principal of the Power of Attorney may not have the requisite identity documents, such as a current drivers licence; o commonly the attorney organises for the registration of the Power of Attorney, not the principal; and o a loss of capacity by the principal may make it more difficult to perform VOI in relation to an enduring Power of Attorney. • Members of the Elder Law and Succession Committee based in rural and regional areas also noted that the proposed definition of "person being identified" seems to include: o Sydney agents who act on the solicitor's behalf in a settlement or are lodging a Power of Attorney with LPI on the solicitor's behalf; o non subscriber solicitors if they are attending a settlement and acting for the purchaser; o unrepresented purchasers; and o any solicitors or clients who ask for the documents to be sent to them. The rural and regional solicitors noted that identifying these people would involve a face to face verification, which they would not be able to do in most circumstances.