



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: JC:lb:1301138
Direct Line: 9926 0202

23 December 2009

NECS in NSW Industry Consultation Feedback
Land and Property Management Authority
DX 17 SYDNEY

Dear Sir,


Instrument Certification

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: Instrument Certification 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,


Joseph Catanzariti
President

Encl

NECS in NSW Consultation Papers – Instrument Certification

Preliminary

The move to digital instruments signed by authorised Certifiers, rather than hard copy instruments signed directly by transacting parties, is a significant one.

A Subscriber will be bound by legislation and NECS Participation Rule provisions to review and retain supporting evidence for a transaction, and to provide to the other participants in a case and to the Land Registry for registration, signed digital instruments containing certifications as to the correctness and compliance of those instruments and supporting evidence.

Instrument Certification is a process of:

- verifying compliance with the scope of prescribed requirements in a certification statement.
- affirming the relevant certification statement as true.
- signing to bind the certifier to the certification that the prescribed requirements in the certification statement have been complied with, for the registry instrument.

National Project Team (NPT) Position

The NPT considered the Land Registry's proposals in February 2009 and resolved in support of the proposed certifications and implementation arrangements subject to review of the final wording of each certification statement.

The Land Registries proposed that:

- the two certifications concerning correctness of information and compliance with legal requirements could be considered general certifications, and be effected through the NECS Participation Rules; and
- the three other document specific certifications be effected through inclusion in registry instrument templates, in respect of compliance with Client Authorisation, Client identity Verification, and supporting evidence requirements.

The Committee also resolved in favour the proposals subject to the review of the final wording of each certification statement and provided that those who are entitled to conduct NECS transactions and sign Instruments on behalf of others are subject to no less rigorous requirements than apply in paper conveyancing.

Specific questions for stakeholders

Issue 1 – Policy Principles

- 1.1 Are these the right policy principles to achieve transaction assurance, community confidence, and to maintain the integrity of the Torrens Title Register?
- 1.2 If not, what changes to the principles should be considered, and why?

The ten policy principles identified to guide implementation of registry Instrument Certification (IC) in NECS are set out on pages 27 to 28 of the paper. These principles are as follows:

1. IC is not contained in the jurisdiction-specific characteristics;
2. IC does not contain any instrument-specific characteristics;
3. The use of IC is to be enforced by reference to a consistent statutory power to set requirements in each jurisdiction;
4. IC is to be provided as part of the instrument to which they refer;
5. IC to be completed by the Certifier immediately prior to instrument signing;
6. IC to be provided by a Certifier contracted to the Subscriber being or representing the transacting party;
7. IC to confirm that the identity of the Client has been verified;
8. IC is to confirm that a properly completed and signed CA has been obtained;
9. IC is to certify that all prescribed evidence necessary to support the instrument has been obtained, perused, found to be in proper order and securely retained; and
10. IC is to certify that, to the best of the Certifier's knowledge at the time, the instrument complies with all prescribed requirements.

Committee's comments

The Committee agreed that these appear to be the right policy principles to achieve these objectives.

Issue 2 – Certification content

- 2.1 Are the 5 proposed subject categories for certifications sufficient to provide assurance in relation to signed instruments?
- 2.2 Is the proposed wording of the certifications appropriate?
- 2.3 If not, why not and what changes are necessary?
- 2.4 Should there be an additional certification which affirms that the instrument reflects the intentions of the client?

Committee's comments:

- 2.1 The Committee considered that there should be an additional express certification that the Certifier has authority to certify on behalf of the Subscriber.
- 2.2 The Committee does not have any issues with the proposed wording of the certifications.

- 2.3 The Committee does not consider this proposed additional certification to be necessary.

Issue 3 – Loss events and claims (section 6.1)

- 3.1 Should there be specific provision for loss suffered in a transaction where instrument certification (s) are:

- incorrectly provided
- not supported by required evidence

or should the existing remedies apply?

Committee's comments:

The Committee considers that existing remedies should apply. The existing mandatory professional indemnity insurance carried by **Industry Certifiers** (see the definition on page 38) is adequate to cover these risks.

The Committee wishes to emphasise its view that the work of certification on behalf of another (a client) in the electronic environment as contemplated in the paper is "legal work". It is the view of the Committee that, in this circumstance, the giving of the certificate of correctness required under section 117 (1) (a) of the *Real Property Act 1900* on behalf of another is legal work and as such is subject to regulation under the *Legal Profession Act 2004*. Such work is only permitted to be carried out in this jurisdiction by an Australian legal practitioner, or for present purposes, by a licensed conveyancer.

The Committee notes that the NPT resolved on 25 August 2009 that regulated legal and conveyancing practices using NECS are to be able to use unregulated employees as Certifiers.

The Committee strongly endorses the proposition that only industry-regulated practitioners (or Industry Certifiers) should be permitted to act as Certifiers. It is the view of the Committee that this reflects the way the current paper environment operates. The Committee supports the performance objectives for the NECS Legal Framework set out in the Third Consultation Package:

"Ensure that those who are entitled to conduct NECS transactions and sign instruments on behalf of others are subject to no less rigorous requirements than apply in paper conveyancing".

The Committee strongly supports this objective and others noted in the same paper such as objective 2.1 requiring, for example, "expertise in conducting the transactions". This cannot be ensured if legal and conveyancing practices use unregulated staff such as "paralegals" – an undefined terms encompassing employees of varying experience and expertise to carry out these important functions.

The Committee notes that the risk assessment in relation to the NECS Legal Framework appears to have been carried out on the basis that all Certifiers will be regulated industry practitioners.

Industry Certifiers are subject to strict controls which include compulsory fee disclosure, mandatory levels of continuing professional education, trust account regulation, strict

professional conduct and ethical standards (at least in the case of solicitors) and, most importantly, mandatory professional indemnity insurance. The stated purpose of the prohibition of unqualified persons from engaging in legal practice is the protection of the public interest and to protect clients of law practices and licensed conveyancers. The same consumer protection measures are equally applicable to the ability to participate as a Certifier in NECS.

Issue 4 – Certifications embedded in Participation Rules

- 4.1 Is it appropriate that certifications about correctness and compliance are implied in instruments by the NECS Participation Rules?
- 4.2 Alternatively, should all relevant certifications be expressly provided in each instrument and why?

Committee's comments:

The Committee considers that all relevant certifications should be expressly provided in each instrument. The express certifications emphasise for the Certifier carrying out this important function that a certification as to correctness and compliance comprises legal work and the ramifications that flow from the nature of the act.

Issue 5 – Certifications in Instruments

- 5.1 Should the certifications expressly provided in each instrument be:
 - individually acknowledged on the instrument?
 - acknowledged as a group?
 - implied by signing the instrument without a specific affirmation?

Committee's comments:

The Committee considers that the certifications expressly provided in each instrument should be individually acknowledged on the instrument for the reasons previously canvassed.

Who makes the Certification and for whom?

The Committee notes the statement in the paper:

"the Certifier certifies, on behalf of the Subscriber, that an instrument submitted for lodgement is, to the Certifier's knowledge and diligent inquiry correct in the context of the transaction and compliant with all relevant legislation and Land Registry requirements..."

The Committee emphasises once again, that the certification referred to is legal work. If a Certifier is a contractor of a Subscriber (rather than an employee), that contractor must be an industry regulated practitioner in order to carry out this work.

Issue 6 – Effective Time of an Instrument Certification

- 6.1 Are there any reasons why certifications should not be considered to be effective at the time the registry instrument is signed?
- 6.2 Should there be a specific obligation in the Participation Rules on the Subscriber to ensure that matters covered by the certifications remain true at the time of settlement and/or lodgement? If so why, and if not why not?

Committee's comments:

- 6.1 The Committee considers that this is a difficult issue.

A certification is a representation made at the time a registry instrument is signed that the statement is correct at the time that it is signed and remains correct until "unsigned".

- 6.3 It is suggested that the Participation Rules should provide that any certification at the time a registry instrument is signed, is an assertion that the instrument is compliant and correct at that time and that the certification is repeated at settlement unless it is "unsigned" beforehand.

The Committee notes that in addition, two later certifications are made later once registry instruments are signed, namely:

- the parties wish to proceed to settlement; and
- a direction as to how the proceeds are to be disbursed.

Issue 7 – Statutory Penalty for a False or Negligent Certification

- 7.1 Should a penalty regime (e.g. section 117 (2) and (3) of the NSW *Real Property Act 1900*) apply to instrument certifications for NECS transactions where the instrument is lodged in NSW?
- 7.2 Is the quantum of penalty in section 117 a sufficient and effective deterrent? If not, what should the penalty be and why?

Committee's comments:

- 7.1 Yes a penalty regime should apply to instrument certifications for NECS transactions.
- 7.2 No, one penalty unit is clearly an inadequate penalty and not an effective deterrent. The appropriate penalty is a matter for government policy.

Issue 8 – Other Consequences for a False or negligent Certification

- 8.1 Should legislation and/or the participation rules clarify the potential civil liability of a Subscriber (or Certifier) in respect of a false or negligent certification?
- 8.2 Should false or negligent certifications be grounds for suspension or termination of a registered practitioner's or conveyancer's practising certificate?

Committee's comments:

- 8.1 The Committee considers that the current law provides a sufficient regime to determine the civil liability of the parties.
- 8.2 This is not a matter for NECS or LPMA but a matter for the Regulator of the regulated Subscriber or Certifier. There should be an obligation for the Registrar to inform the Regulator of an incorrect certification. The consequence of an incorrect certification should be that the NECS issues a "show cause" notice rather than the automatic suspension of the Subscriber (or Certifier) from NECS (with a copy also served on the Regulator).

The Committee considered the example of a certification of identity based on forged documents. Although the person defrauded may establish that they did not authorise the transaction, the party certifying relying on the forged documents may have complied with any prescribed requirements for CIV and CA. Solicitors and licensed conveyancers who act as Subscribers and Certifiers are not, and cannot be expected to be expert in the detection of forged identity documents. No identity verification system will detect or eliminate all fraud and the design principles governing the implementation of NECS must recognise and deal with this risk rather than transferring it solely on to Subscribers or Certifiers.

If the Regulator, on the other hand, suspends or cancels a practising certificate, the subcommittee considered that this information must be shared with the NECS in addition to the proposed mechanism by which NECS will make real-time checks of the continued licensed status of Industry Certifiers.

Issue 9 – Reliance on document certifications

- 9.1 Should legislation and/or the participation rules clarify who is able to rely on the certifications in a signed registry instrument prior to lodgement, and if so from what time and for what reasons?
- 9.2 Prior to lodgement should a registry instrument certification be treated as a general affirmation to the world, or as a limited affirmation only to other Subscribers in the same transaction workspace, the NECS Operator and the Land Registry?

The Committee considers that prior to lodgement the representations made by certification in a signed registry instrument are representations to the parties, NECS and the Registry only (and not to the world) until they are either unsigned or registered following settlement.