



THE LAW SOCIETY
OF NEW SOUTH WALES

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Dear Ms Nicoll

National Electronic Conveyancing: Certificate of Title Solutions

I am writing to you at the request of the Law Society's Property Law Committee ("Committee"). The Committee is pleased to provide preliminary comments on the proposed Certificate of Title Solution ("CT Solution") in the National Electronic Conveyancing System ("NECS"), in response to a Memorandum dated 17 February 2012 from the National E-Conveyancing Working Group of the Law Council seeking such preliminary views from constituent bodies.

Importance of the September 2011 report

The Committee regards the New South Wales Land Registry paper "NSW Land Registry - Certificate of Title Solution for Concurrent Electronic & Paper-based Conveyancing - Stage 2.3: Identification of the CT Solution" dated 22 September 2011 ("Paper"), as providing a detailed assessment of the relevant and important considerations which need to be taken into account in determining whether paper Certificates of Titles should issue in NECS, and of the arguments for and against, having regard to the nine Performance Objectives identified in the Stage 2.2 report.

The Committee is grateful for the opportunity to comment on the Paper.

General observations

The position of the Committee may be summarised as follows:

The Committee agrees that general retention of the paper Certificate of Title (CT) is the most suitable CT Solution for the following reasons:

- to mitigate the risk of fraud;
- satisfying the need for consent of the person with control of the right to deal ("CoRD holder") to dealings which would not be permissible in the present paper environment;

- the suitability of the process for use nationally; and
- the importance of the CT as a “token” of ownership.

The Committee agrees that there should be an “opt-out” option. Whether this should be limited solely to certain classes of parties to land transactions is something that requires further consideration of the risks and how this would affect the operation of NECS.

The Committee agrees that the most secure present system of paper Certificates of Title (the use of a Certificate Authentication Code (“CAC”)) should be adopted if this is feasible on a national basis (noting that jurisdictions other than New South Wales do not have a CAC). The Committee notes that, over time, advances in technology will probably provide a more secure system than the CAC.

Subscribers and certifiers in NECS and the CT solutions

The Committee’s position has, for the reasons previously enumerated at some length, consistently been that both representative subscribers and certifiers in NECS should be regulated professionals. The Law Council Working Group has now also adopted this as its formal position.

The New Zealand model in which Certificates of Title were abolished in 2002 (which mandates verification in electronic conveyancing only by regulated professionals) provides evidence that risk is minimised by the use of regulated professionals. In commenting on the scheme in practice, Robb Mundie the NZ Registrar General of Land has said:

*“To ensure adequate controls are in place around the use of the system, the ability to certify electronic instruments is restricted to qualified conveyancers, principally lawyers. **This reflects the role that lawyers have always played as trusted professionals in the conveyancing process**” [bold emphasis added].*

Mr Mundie also said

“It is interesting to note that in the paper-based system lawyers were required to certify transactions correct for the purposes of the Land Transfer Act 1952. While this was often seen as a mere formality, case law on these matters indicates that a person making such a certification is in fact providing assurance that the transaction is genuine and legally compliant. The certification regime now in place for e-dealings can therefore be seen as a logical application of the obligations that have always been placed on conveyancers in New Zealand (E-Conveyancing in New Zealand: Progress to Date and Future Developments August 2007)”.

This reflects the present legal position in New South Wales and should be maintained in any NECS system.

The Committee maintains its position that the use of only regulated professionals as representative certifiers and subscribers in NECS is essential to minimise risk in each aspect of an e-conveyancing system. The search for a minimum-risk CT solution provides another reason to adopt this as a fundamental principle in NECS.

Universal “opt-out” option

The Committee considers that a universal “opt-out” option should be further investigated. If such an option were permitted in NECS, the risk management and practicality concerns raised by the Paper may well be, in the view of the Committee, addressed by ensuring adoption of the current proposal as to who may participate in NECS (that is, following the New Zealand model). This would address most of the risk concerns when aligned with a legislative regime as to which party has the right to deal.

Limited “opt-out” option

The Paper’s limited “opt-out” option has the appeal of involving a significant proportion of land transactions, limiting transactions to those where the consent of the person entitled to notice gives that consent whilst (by keeping paper CTs for other transacting parties) removing any need for the maintenance of an additional electronic register of the CoRD (or other mechanism with the same purpose).

The Committee considers however that there are classes of persons involved in property transactions who would benefit if given the right to decide not to require the issue of a paper CT. The most obvious class is those groups who have a significant volume of land transactions where the title is unencumbered: property trusts, superannuation funds, developers and the like. By way of example, a property developer selling in a recently subdivided strata plan or land subdivision with many (possibly hundreds) of lots may prefer that no paper CTs issue for the property on registration. Some simple and effective process could be developed that significantly satisfies the performance objectives to cover this option. From a risk management viewpoint, it seems that the paper-based system with a security CT is likely to have a greater risk profile than any of the proposed No CT solutions in the electronic environment. This leaves only the issue of suitability for use of the agreed solution on a national basis outstanding.

As this is a request for a preliminary view only, the Committee considers that the opportunity exists for a further examination of this option (which is, essentially, Solution 6 in the CT Solutions noted in the Paper).

Further consideration

The Committee would welcome the opportunity for further consultation as the development of NECS continues.

Yours sincerely



Justin Dowd
President