THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: JC:lb:1296877
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21 September 2009

The Hon. Tony Kelly, MLC
Minister for Lands
Governor Macquarie Tower
Level 34
1 Farrer Place
SYDNEY NSW 2000

Dear Minister,

Real Property Amendment (Land Transactions) Bill 2009

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

The Committee has the responsibility of considering and dealing with any matters relating to property law and advising the Council of the Law Society on all issues relevant to that area of practice. The members of the Committee are senior property law practitioners and experts. Many of them advise clients, both property owners and lenders, of their rights and obligations under relevant legislation including the *Real Property Act 1900*.

Generally

The Committee welcomes the introduction of a facility to enable the electronic lodgement of a notice of sale (the eNOS system). The Committee also appreciates the opportunity to have been involved in the consultation process, not only during the regular liaison meetings with the Land and Property Management Authority (LPMA) but also through the sessions conducted by LPMA during the software development phase.

The Committee had understood from earlier discussions that legislative amendments to the *Real Property Act* to implement eNOS were to have been accompanied with consequential amendments to those statutes which presently require notification to rating authorities of a change of owner (for example, under s604 of the *Local Government Act*, or section 81 of the *Rural Lands Protection Act*).

The contents of the draft Bill

Clauses 1 and 2

The Committee has no difficulty with the drafting of clauses 1 and 2 of the Bill. However, the Committee notes that to ensure a smooth introduction of the system the proclaimed commencement date should allow sufficient time for users of eNOS to familiarise themselves (and undertake any necessary training in) the new system. It occurs to the Committee that (especially in the light of the changes to mandatory CPD which took effect on 1 April 2009 for the 2009-2010 CLE year) training sessions on the operation of eNOS by officers of LPMA would be welcomed by the profession, particularly if they could be scheduled for the first quarter of 2010.

Schedule 1 Item [1]

Similarly, Schedule 1 item [1] causes no difficulties, subject only to allowing time for education of the profession once details of the "approved form" and "approved manner" become publicly available.

Schedule 1 items [2] to [5]

The Committee has some concern about the proposal to require a notice of sale (whether electronic or manual) to be accompanied by or to bear a certificate of correctness. The Committee appreciates the importance of maintaining the integrity of the Torrens Register, and were the information in a NOS or an eNOS to form part of the Register these proposed amendments would be entirely appropriate. The Committee noted that during the pilot phase discussions it recommended to LPMA that the lodgement of an eNOS be recorded in some fashion on the Register against the title of the relevant property (primarily as a means of providing notice that a purchaser has exchanged contracts, and thereby largely resolving the difficult issues raised by the High Court decision in *Black v Garnock* (2007) 230 CLR 438). LPMA was not inclined to adopt that approach, and maintained that the eNOS information was to be kept "off-Register". The proposal to bring a notice of sale within the ambit of section 117 appears inconsistent with that view.

One of the benefits of the eNOS system as demonstrated during the pilot phase was the ease of updating information contained in the data space as circumstances changed. As the Committee understood the demonstrations at pilot phase, it would be open to anyone holding the two passkeys (view-only and edit) to edit and update the eNOS data at any time prior to the eNOS being "locked" (which was expected to occur at the time of the lodgement of the relevant Torrens dealing such as a transfer). The Committee welcomed this flexibility as allowing for information about, to take two examples, the date of settlement and the address for service of notices on the purchaser (that is, at the rated property or elsewhere) to be updated as circumstances during the transaction changed, thereby assisting in Councils and other authorities obtaining more accurate and timely information. The Committee is concerned that the introduction of a certificate of correctness on a notice of sale may inhibit the ability to change the eNOS data. Practitioners who have certified the eNOS as being correct may well be cautious about giving edit-access to, for instance, an incoming mortgagee (it is unclear whether the system would require a fresh certification by the editing party – if that were the case, the concern on this issue may be diminished to an extent).

The Committee was also concerned about what would be the effect of the LPMA receiving a notice of sale and a dealing containing inconsistent information, each certified to be correct. Would any attempt be made to reconcile such conflict?

The possibility of a penalty being imposed under section 117(2) for false or negligent certification raises the spectre of "double jeopardy" in that there are already penalties in the ratings statutes which impose requirements to notify a change of ownership. (for example, section 81(2) *Rural Lands Protection Act*).

Schedule 1 items [5] and [6]:

The Committee strongly opposes these amendments.

The Committee believes any amendment to the Act which limits access to the Torrens Assurance Fund (TAF) needs to be the subject of careful consideration. The Committee believes the operation of the TAF should be given a broad and beneficial interpretation. There is considerable merit in the comments of Bryson J in *Challenger Managed Investments Ltd v Direct Money Corporation Ltd* [2003] NSWSC 1072 at [76] regarding the operation of Part 14 of the Act:

"Overall a regime is established in which loss or damage as a result of the operation of the Act is compensated for as part of the ordinary workings of the Torrens System. Compensation is not an extraordinary remedy, and is not reserved for faults, blunders or enormities."

Even greater caution should be exercised where the attempt involves limiting recourse to the TAF arising from the operation of a LPMA facility which:

- is not yet implemented;
- is dependent on an as yet unpublicised form; and
- will operate in an as yet unpublicised manner.

The Committee was also concerned about the ambiguities in the wording of the proposed amendment. Under proposed section 129(1) (g), compensation will only be payable where the Registrar-General makes an error in recording details. Under proposed section 129(2) (p), compensation will not be payable where the loss or damage arises from the provision of information (presumably extending to a delay in providing the information as well as an error in the information provided). It is difficult to see why the Registrar-General should not be liable in those circumstances. The amendments appear to be silent on the consequences of a *failure* to provide information at all.

In summary, the Committee believes that the attempt to identify circumstances in which recourse will and will not be available to the TAF arising out of the operation of eNOS is inappropriate, premature and, as drafted, ambiguous.

Schedule 1 items [7] and [8] are unobjectionable.

Schedule 1 item [9]

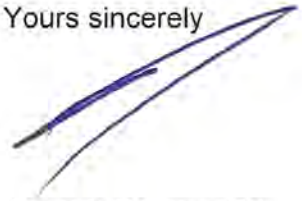
The Committee expressed concern that the transitional provision as drafted may be unduly restrictive. The example was suggested of a contract for sale of land entered into two days prior to the commencement of section 39(1C). It would appear on the wording of the transitional provision that an eNOS could never be used for that transaction, even though settlement (and preparation of a notice of sale) may not occur for months or even years after eNOS became operational (for example, the subject matter of the contract might be a strata unit off the plan). It may be that there is some feature of the eNOS software which precludes use where the contract date predates the eNOS start-up. If

that is the case the Committee wonders if the software could be fine-tuned so that the benefits of electronic lodgement of notices of sale can be available to as many transactions as possible. Alternatively, perhaps the proposed Schedule 3 clause 24 could be amended to permit an electronic notice of sale even where the date of the contract predates proclamation of the amendments.

If the concerns of the Committee regarding certificates of correctness set out at section 3 of this submission were addressed there would need to be a consequential amendment to this clause.

If you would like to make any inquires about this submission, please contact Ms Liza Booth, Executive Member, Property Law Committee by telephone on 9926 0202 or by email to liza.booth@lawsociety.com.au

Yours sincerely



Joseph Catanzariti
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