THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Prop:JWgl2033543

5 February 2021

Office of the Registrar General
NSW Department of Customer Service
2-24 Rawson Place
SYDNEY NSW 2001

By email: ORG-eConveyancing@customerservice.nsw.gov.au
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Dear Registrar General,

Exposure Draft Real Property Amendment (Certificates of Title) Bill 2020

The Law Society of NSW appreciates the opportunity to comment on the Draft Real Property Amendment (Certificates of Title) Bill 2020 ("Draft Bill"). The Law Society's Property Law Committee has contributed to this submission.

General Comments

1. Commencement date

We broadly support the proposed commencement date of August 2021 for the Draft Bill. This will provide a good lead time for the education of legal practitioners, members of the public and the industry generally. We would be pleased to work with you in that regard.

As previously raised with you, we submit that a title watch scheme should be implemented prior to the commencement of the Draft Bill, as originally flagged in the Discussion Paper released by the Office of the Registrar General.[1] In our view, the trigger for the alert should include early activity on the title that may indicate a proposed transaction, such as a request being sent to NSW Land Registry Services for Lodgment Support Services in respect of a title. We understand that development work for a title watch scheme is progressing, and we would be pleased to receive an update. If the scheme cannot be fully implemented and operational by August 2021, we suggest that the commencement of the Draft Bill should be deferred until the scheme is in place.

2. Removal of the concept of Control of the Right to Deal ("CoRD")

As you are aware, the Law Society has concerns about the removal of CoRD. One of our primary concerns is that practitioners may mistakenly believe that mortgagee consent to certain transactions is no longer required, given that CoRD consent will not be required for

[1] *Discussion Paper Certificates of title: the next evolution*, Office of the Registrar General, December 2018, https://www.registrargeneral.nsw.gov.au/__data/assets/pdf_file/0005/433985/Discussion-Paper-certificates-of-title-the-next-evolution.pdf

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registration, either through the lodgment of an electronic consent or the production of the paper duplicate certificate of title. The potential exposure of the legal practitioner to a negligence claim if the mortgagee enforces its rights under the mortgage is significant.

As NSW Land Registry Services will no longer effectively play a gatekeeper role through the CoRD consent mechanism, responsibility will be wholly shifted to the practitioner subscriber and their insurer. The responsibility on the practitioner to obtain mortgagee consent will be a critical aspect of education measures developed to support the Draft Bill. It must be highlighted that despite the abolition of CoRD and Paper CTs, the responsibility to obtain mortgagee consent remains unchanged.

The practice ramifications of these changes need to be clear. In our view, where mortgagee consent is required for a dealing, and currently CoRD consent is required for registration, the dealing should be accompanied by the written consent of the mortgagee. We note that with the ability to attach a consent to a dealing electronically, a more comprehensive approach to mortgagees' consents could be readily implemented. Uploading the mortgagee's consent (where applicable) should form part of the requirements for registration. Perhaps the annexing of the mortgagee's consent to a dealing could form part of the "approved form". We would be pleased to further discuss this aspect with you and NSW Land Registry Services. It may also be appropriate to discuss this with the various financial institutions.

We note that there was a previous indication that provisions would be inserted into the Draft Bill to highlight the need to obtain mortgagee consent in the context of the creation/variation of easements. Noting that such provisions do not appear in the Draft Bill, we are similarly concerned that the need to obtain mortgagee's consent may be overlooked.

3. Electronic lodgment by means other than through an Electronic Lodgment Network Operator ("ELNO")

We support the possibility for other documents such as powers of attorney and water access licences to be lodged electronically for registration. Any such changes would need to be made having regard to the relevant legislation governing those instruments, such as the *Powers of Attorney Act 2003* and the *Water Management Act 2000*.

However, we note that the regulatory framework and risk profile for eConveyancing is dependent upon only the ELNOs performing the role of the lodgment channel. We understand that these provisions are enabling in nature and we would be pleased to meet with you to better understand the intended scope of this alternative pathway.

Detailed comments on the Draft Bill

1. Schedule 1.1[3]: s 3(1)(a) new definition of Uplift

We note the insertion of "Uplift" as a new defined term in s 3(1)(a) of the *Real Property Act 1900* ("RPA"):

> ***Uplift*** means to temporarily remove a dealing that has been lodged for registration from its priority position, so that it can be corrected or amended, without withdrawing the dealing.

We suggest that the word "temporarily" should be removed from the definition as it may be a permanent removal if the defect cannot be cured, or the dealing is replaced rather than substituted.

We also suggest that confining the definition to "dealing" is too restrictive as dealing does not include a caveat or priority notice. The definition should expressly include a caveat and a

priority notice where currently only “dealing” is specified. Consequentially, the reference to “lodged for registration” should be expanded to “lodged for registration or recording”.

Consideration may also need to be given to adding a reference to electronic instruments by also including a "registry instrument for the purposes of the *Electronic Conveyancing National Law* (NSW)”. We suggest this on the basis that electronic instruments are separately, and collectively, defined as *registry instruments* in the *Electronic Conveyancing National Law* (NSW) (“ECNL”).

We suggest you may also wish to consider whether there is a need to define a "substitute dealing, caveat, priority notice or registry instrument”, particularly in the case of a paper dealing that is substituted for an electronic dealing in order to resolve a requisition, and in view of the express reference to substituting in the proposed new s 33A(d).

2. Schedule 1.1[18]: s 33(1) Information notice

We note that proposed new s 33(1) of the RPA refers to the notice “recording the registration of the dealing”. The term “recording” has a specific meaning with regard to the notation of instruments that are not registered (for example, caveats and priority notices). We suggest it may be clearer to use different terminology, such as “notifying the recipient of the registration".

We also seek clarification as to whether information notices will issue only upon registration of dealings. If so, we suggest that a Note should be added at the end of the section making it clear that the provision does not apply to the recording of non-dealings such as caveats and priority notices.

However, if information notices are not confined to the registration of dealings, we suggest that the section be expanded to specifically cover the issue of information notices in relation to the recording of a caveat or priority notice.

3. Schedule 1.1[21] replacement s 36(6) RPA

We note that the new wording is succinct, but we are concerned at the loss of the former s 36(6)(a) and (c), in particular with the replacement provision effectively covering only the former s 36(6)(b) (i) and (iii). For clarity and educative purposes, we would prefer to see a new subsection in s 36 that reflects long established practice as we understand it, along the following lines:

> Where a dealing, caveat or priority notice requires a material correction, alteration or addition, the dealing, caveat or priority notice must be uplifted in order to make the correction, alteration or addition and subsequently relodged by the lodging party.
>
> A dealing, caveat or priority notice that is lodged in registrable form and is subsequently uplifted shall be deemed not to be in registrable form until relodged in a manner approved for the time being by the Registrar-General and in registrable form. [formerly in s 36(6)(a)]
>
> Notwithstanding that it may have been accepted for lodgment by the Registrar-General, a dealing or priority notice that is not in registrable form shall, where it is not uplifted, be deemed not to have been lodged with the Registrar-General until it is in registrable form. [formerly in s 36(6)(c) and omits reference to caveats as s 36(6AA) applies a different rule to caveats]

4. Schedule 1.2[1] s 3(1)(a) new definition of “Lodge”

We note the revised approach adopted in the new definition of “Lodge” under the RPA. We further note that s 3 of the ECNL defines lodge as including “deposit, present and file”. Technically under the current construction that clarification applies only to registry

instruments under the ECNL rather than more broadly. The interplay of these definitions could be further considered.

5. Schedule 1.2[5] replacement of s 46A(5) RPA

We note that the new subsection removes the requirement for a mortgagee, chargee or covenant chargee to sign an instrument creating an easement, in addition to the removal of consent provisions. It appears that no consent from a mortgagee is required as there is no amendment to s 46A(6) which currently deals with required consents. In our view this seems anomalous if neither execution nor a consent is required from a mortgagee, but a consent may be required of a lessee, judgment creditor (under a writ) or a caveator of either the benefitted or burdened land.

It is our understanding that currently a mortgagee of the land burdened that has not signed or consented to the easement is not bound by the easement and could sell the land (pursuant to a power of sale) free of the easement. Presumably this will no longer be the case and the land will be bound regardless of the mortgagee's consent or even knowledge of the easement. We would welcome further clarification on this point. Additionally, a mortgagee may have a right to sell under a mortgage where the mortgagor fails to get consent where such is required as a term of the mortgage. This may be particularly relevant to the mortgagee of the burdened land as the creation of a burdening easement could reduce the value of the security for the loan.

We submit that removing the requirement for mortgagee consent is also inconsistent with the creation of an easement under s 88B of the *Conveyancing Act 1919* where the plan is required to be signed by the mortgagee under s 195D(1)(d) and (e)(ii) of the *Conveyancing Act,* and the s 88B instrument must be executed, inter alia, by the mortgagee pursuant to Schedule 9 clause 8 of the *Lodgment Rules*.[2]

6. Schedule 1.2[6] amendment of section 47(5B) RPA

This amendment will enable greater flexibility in the requirements specified by the Registrar-General for the "execution" of a variation of an easement, including potentially facilitating electronic execution. It also appears that the *variation* of easement still requires execution by every mortgagee, chargee and covenant charge, whereas the amendment to s 46(5) removes the requirement for execution by those parties on *creation* of an easement.

We also note that while s 47(6A) is to be appropriately amended by removing references to making notations on a certificate of title (Item 1.1[27]), that provision still requires the consent of any party having a registered interest and that does not appear to be amended.

We have prepared the following table which outlines apparent inconsistencies regarding execution and consent by mortgagees.

Easements – Requirements for mortgagees		
Action	*Requirement*	*Source*
Creation by s 88B Conveyancing Act	**Execution** by Mortgagee	*Lodgment Rules* Sch 9 cl 8(a)
Release by s 88B	**Execution** by Mortgagee	*Lodgment Rules* Sch 9 cl 8(e)
Note: Variation by s 88B is not available		

[2] See further in section 6 the table entitled "Easements – Requirements for mortgagees" which outlines apparent inconsistencies regarding execution and consent by mortgagees.

Creation by RPA dealing under s 46 RPA	No execution or consent required under new proposal.	
Release by RPA dealing under s 46 RPA	Currently, **consent** of mortgagee, lessee or chargee of dominant tenement is required.	*Registrar General's Guidelines* on transfer Releasing Easement
Variation by RPA dealing under s 47 RPA	The dealing effecting the variation must be **executed** by every "by every mortgagee, chargee or covenant charge" of the benefitted and burdened land.	s 47(5B) RPA

7. Schedule 1.4[1] new Part 12 of Schedule 3 RPA

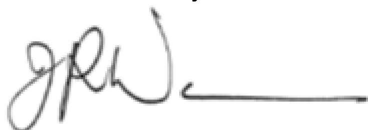
We suggest that new subclause 32(1) needs to additionally address transactions which require:

- a certificate of title to be lodged or produced (the underlined concept being absent from the drafting); and
- CoRD consent.

For clarity, we suggest that subclause 32(3) might also refer to dealings which are withdrawn and relodged after the cessation day.

Thank you for the opportunity to provide feedback on the Draft Bill. We would be pleased to meet with you to further discuss any of the issues raised above and we look forward to working with you on this significant development. Any questions should be directed to Gabrielle Lea, Policy Lawyer on 9926 0375 or email: gabrielle.lea@lawsociety.com.au.

Yours sincerely,



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