



Discussion Paper

Certificates of title: the next evolution

December 2018

Submissions accepted until **5:00pm on 28 February 2019**

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Purpose of this Paper

eConveyancing is a critical part of the NSW Government's commitment to leading digital innovation. The move to digital has the support of the property, legal, conveyancing and financial industries. It is in line with the commitment by the Council of Australian Governments (COAG) to the development of a national eConveyancing system. Part of transitioning to the eConveyancing system involves shifting away from paper certificates of title (CTs).

This Paper:

- outlines the current status of certificates of title in NSW
- reviews the legislative environment relating to certificates of title in NSW and in comparable jurisdictions
- discusses proposals for the future of electronic certificates of title (eCTs) in NSW.

We are seeking feedback on issues surrounding certificates of title and the proposals outlined in this Paper for replacing paper certificates of title with an electronic alternative.

How to make a submission

Anyone wanting to comment on the issues raised in this Paper is invited to make written submissions. Please send all submissions to ORG-admin@finance.nsw.gov.au

Alternatively, please send any paper submissions to:

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All submissions must be received by 5:00pm on 28 February 2019.

All submissions may be made publicly available. Should you wish to have your personal details omitted in the course of publication, please clearly indicate this in your submission.

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1. Background

1.1 What is eConveyancing?

eConveyancing is the name given to property transactions completed in a digital environment. Currently, eConveyancing extends to lodgment and financial settlement only.

eConveyancing allows lawyers, conveyancers and financial institutions to enter a secure, online workspace where they can interact and transact together online. Within that digital environment, information can be fed from the Torrens title register to populate documentation. Documents are created, signed and lodged- and parties complete necessary steps to settle the transaction- all within the same online environment.

eConveyancing is part of the NSW Government's commitment to leading digital innovation. In response to industry consultation, the NSW Government set a timeline for the transition to eConveyancing to help everyone plan for the change. The benefits of eConveyancing include:

- parties can lodge documents online 24/7, creating flexibility for time critical transactions
- in most cases, settlement and lodgment occur simultaneously compared to the paper system, which can take days, weeks or months
- electronic funds transfers provide instant access to funds and save bank charges and labour costs
- a reduction in the potential for fraud and other issues that arise around paper-based transactions.

Since 1 July 2018, caveats, standalone transfers, mortgages, refinances and discharges of mortgages have been required to be lodged electronically.¹ All standard property transactions are to be lodged electronically from 1 July 2019.

Take-up of eConveyancing in NSW has already been strong. In November 2018, 69% of all possible transactions were lodged electronically. Solicitors, conveyancers and banks have embraced eConveyancing, with 93% of all caveats, 70% of all mortgages, and 60% of all transfers lodged electronically in November 2018.

The only way to transact electronically is through an electronic lodgment network (ELN). Until recently, the only electronic lodgment network operator (ELNO) was Property Exchange Australia Limited (PEXA). In November 2018, the national regulator, the Australian Registrars National Electronic Conveyancing Council (ARNECC), assessed Sympli Australia Pty Ltd (Sympli) as eligible to be Australia's second ELNO. It is expected that Sympli will commence operation in NSW in 2019, increasing competition and creating a wider choice for lawyers and conveyancers.

For more information on eConveyancing visit <http://www.registrargeneral.nsw.gov.au/eConveyancing>.

1.2 The role of paper CTs

The Torrens land Register kept by the Registrar General is stored and maintained electronically.

Each parcel of land is represented by a separate computer folio. This folio is the formal evidence of ownership and is a definitive record of all interests in land.

A certificate of title (CT) is a paper copy of the related computer folio, issued to the registered proprietor of unencumbered land or the first registered mortgagee of encumbered land. Legitimate possession of the CT has traditionally been used as evidence that the person possessing it is entitled to deal with the land.

Almost 150 legislative provisions refer to paper CTs. Paper CTs fulfil numerous roles, including:

¹ For more details, see [ORG Circular 2018/03](#).

- a CT is evidence of a registered proprietor or first mortgagee’s right to deal with the land
- CTs have a role in mitigating fraud. For example, CTs issued from 1 January 2004 have security features like a Certificate Authentication Code (CAC), a unique and randomly generated number accessible only to the person possessing the CT
- the requirement to produce and lodge the CT with certain dealings at NSW Land Registry Services (LRS) gives the first mortgagee control over subsequent dealings
- possessing the CT provides a sense of security to registered proprietors and first mortgagees.

1.3 What are eCTs?

A transaction cannot be completely electronic with a paper CT, and so the transition to eConveyancing includes the gradual phasing out of paper titles.

When a paper CT is cancelled by LRS it is replaced by an electronic CT (eCT), which is a notation on the Register that records the details of the person with control of the right to deal (CoRD) with land.

The right to deal is the inherent right of the registered proprietor to deal (i.e. transact) with their land. A party has CoRD when that party has the authority to consent to the registration of most subsequent registry instruments. If land is mortgaged, the first registered mortgagee has CoRD. When there are no registered mortgages or charges on a title, the registered proprietor has both the right to deal and CoRD.

Land Parcel	Right to deal	CoRD
With mortgage or charge	Registered proprietor	First registered mortgagee
Without mortgage or charge	Registered proprietor	Registered proprietor

Eligibility for eCTs is currently limited to authorised deposit-taking institutions (ADIs) with a registered first mortgage.²

A title search of a folio with an eCT contains the following text:

NO CERTIFICATE OF TITLE HAS ISSUED FOR THE CURRENT EDITION OF THIS FOLIO.
CONTROL OF THE RIGHT TO DEAL IS HELD BY [Name of first registered mortgagee].

eCTs issue automatically on registration of any dealing or plan that results in an ADI becoming or remaining the first registered mortgagee.

During September and October 2018 LRS successfully completed a bulk conversion of paper CTs to eCTs for folios of the Register where the first registered mortgagee is an ADI. It is estimated there are now two million eCTs in NSW.

Despite the shift towards eCTs, paper CTs continue to be issued in some circumstances. A paper CT will issue if the registration of a dealing results in the land title becoming:

- unencumbered (no mortgage)
- encumbered with a first mortgagee who is not eligible for an eCT.

1.4 What are CoRD Holder Consents?

A CoRD Holder Consent (Consent) is an electronic document lodged through an ELNO by a CoRD holder to provide consent to the registration of registry instruments.

Previously, a first mortgagee could produce the paper CT with an instrument for lodgment to signify consent to

² See rule 9 of the Conveyancing Rules at <http://www.registrargeneral.nsw.gov.au/publications-and-rules/conveyancing-rules>.

registration. Where there is an eCT a CoRD Holder Consent must be lodged electronically prior to settlement.

The table below illustrates what would occur during a typical transfer of land when there is both an outgoing and incoming mortgagee.

Transfer of land	Consent	Lodgment/Registration	After registration
Paper CT/paper transaction	Paper CT is physically produced by the outgoing mortgagee at settlement	Paper CT is presented at LRS along with any instruments for lodgment	New edition of the Paper CT delivered by LRS to the incoming mortgagee
eCT/electronic transaction	Consent is lodged by the outgoing mortgagee through the ELN prior to settlement	Instruments lodged through the ELN are registered by LRS	Folio of the Register updated to show incoming mortgagee as the CoRD holder

Where there is an eCT, the Consent must be provided irrespective of whether the transaction it relates to is in paper or electronic. For dealings lodged electronically, the Consent is lodged together with the dealings.³ For dealings lodged in paper, the Consent is lodged separately via the ELN as a standalone document. The Consent must include a list of the dealings being consented to and the parties to those dealings.

As NSW moves towards a 100% eConveyancing environment, there will be fewer paper transactions, and the inconvenience of having separate electronic Consents for paper transactions will be reduced. Once lodged, a Consent may only be withdrawn in paper at LRS.

There are currently two standard types of Consents:

1. Transacting party Consents, for CoRD holders participating in a transaction (e.g., a discharging mortgagee)
2. Third party Consents, for CoRD holders not participating in a transaction (e.g., a mortgagee consenting to a lease).

Consents serve the following purposes:

- where there is an upcoming settlement, they provide assurance to the incoming transferee and mortgagee that control of the right to deal will pass at settlement
- they provide a mechanism for mortgagees to enforce their right to consent to subsequent dealings or plans
- they replace the risk mitigation measures provided by a paper CT.

1.5 Previous investigations

In 2010, LRS's predecessor Land and Property Information (LPI) commissioned law firm Clayton Utz to undertake an extensive study into CTs. In 2011, Clayton Utz issued a multi-stage report identifying and evaluating possible solutions to provide the necessary functionality and risk management provided by paper CTs in the context of a concurrent paper and eConveyancing environment. The Clayton Utz report:

- reviewed the existing conveyancing environment
- identified and described the requirements, purpose, and performance objectives of a CT solution
- evaluated and ranked several possible CT solutions.

In 2012, PricewaterhouseCoopers (PwC) issued a report containing an economic appraisal of the CT solutions developed by Clayton Utz and LPI. It is important to note that neither the Clayton Utz nor the PwC report considered the implications of a fully digital conveyancing system. An underlying assumption

³ Note that a Consent is also required for electronic dealings where there is a paper CT.

of both reports was that paper conveyancing would continue into the foreseeable future. As a result of those reports, LPI published a consultation paper on 31 October 2012, seeking NSW industry participants' views on the proposed CT solution.

After considerable expert investigation and industry consultation, the option identified as the preferred solution was:

- Optional eCTs for a restricted class of entitled parties, i.e. ADIs registered as first mortgagees, and CAC CTs for all other titles.

Now, eight years on, the conveyancing environment in NSW has significantly advanced, and a further investigation into CT solutions is required.

1.6 The future of CTs in NSW

The future of CTs in NSW should be considered against the backdrop of 100% electronic lodgment. The complexity of mixing paper CTs with electronic transactions led the NSW Government to announce in 2017 that all paper CTs would be converted to eCTs from 1 July 2019.

This Paper goes back to basics and looks at 3 different ways that CTs can be dealt with in an electronic environment. The Paper identifies the different issues that arise depending on the model used. Regardless of which model is chosen, legislative, technical and practical changes will be required to pave the way. By releasing this Paper for public discussion we hope to uncover all outstanding issues and concerns so they can be fully considered.

The remainder of this Paper is divided into the following 3 parts:

1. **Model 1 considers the current environment** where paper CTs are retained for registered proprietors with unencumbered titles and non-ADI first mortgagees, and eCTs are issued to ADIs with registered first mortgages
2. **Model 2 considers an environment with eCTs and CoRD Holder Consent** where all paper CTs are converted to eCTs and there is a system of eCTs and CoRD Holder Consents for both registered mortgagees and registered proprietors with unencumbered titles
3. **Model 3 considers a no CT, no CoRD Holder consent environment** without paper CTs, eCTs or CoRD Holder Consents.

The Paper goes on to describe the situation surrounding CTs in comparable jurisdictions and invite dialogue with stakeholders on the issues surrounding CTs in NSW.

The following criteria are central to the NSW Government's consideration and analysis of the various models for the future of eCTs in NSW.

Efficiency	✓
Fewer errors	✓
Public confidence	✓
Preserving the integrity and security of the register	✓
Easy to use	✓
Minimising fraud	✓

2. Model 1- The current mixed eCT and paper CT environment

In the existing model, eCTs are only issued where there is a first registered mortgage to an ADI. CoRD Holder Consents are only lodged by eCT holders. Registered proprietors with unencumbered titles and non-ADI first mortgagees retain paper CTs and CoRD is dealt with in the traditional way, by physical possession and production of the paper document.

2.1 Encumbered and unencumbered titles

The current model makes a distinction between encumbered and unencumbered titles.

For encumbered titles, mortgagees (particularly ADI mortgagee) are less interested in having control of a physical document. There are significant administrative costs in storing and maintaining custody of large volumes of paper CTs. ADI mortgagees will likely be subscribers, or represented by a subscriber, to an ELNO, making transacting with an eCT streamlined and cost effective.

Unencumbered registered proprietors are more likely to see a benefit in retaining paper CTs and will be less concerned about the costs associated with securing the paper document.

In an environment without paper CTs all registered proprietors will be required to engage a solicitor or licensed conveyancer to deal with their land. A waiver currently grants unrepresented parties the right to lodge a standalone transfer in paper to allow unrepresented parties leeway while the eConveyancing requirements are still new.⁴ It is anticipated this waiver will conclude on 1 July 2019.

2.2 Transacting electronically with an unencumbered paper CT

Currently, a registered proprietor selling or mortgaging their unencumbered land electronically does not need to physically produce the paper CT at LRS. Instead, the paper CT is physically handed to a subscriber, normally the registered proprietor's solicitor or conveyancer. The subscriber then enters the CT's Certificate Authentication Code (CAC) into the ELNO's online workspace.⁵ If the transaction will result in the registration of a mortgage to an ADI, an eCT is issued on settlement. Otherwise, a new paper CT is sent to the subscriber. The old paper CT is retained by the subscriber for seven years as evidence of the registered proprietor's right to deal with the land. Prior to the introduction of eConveyancing, LRS would have cancelled the title and destroyed it.

As more dealings are made available electronically, using a paper CT to transact through the ELN may prove to be cumbersome. Consider, for example, a transaction involving a lease. Every time a landlord registers a lease a new paper CT is returned to the subscriber with a new edition number. If the landlord registers many leases over time, management of paper CTs in the subscriber's office may become complex. From a fraud prevention perspective, having many editions of a paper CT relating to the same folio is not ideal.

The Registrar General's Guidelines state that a CT should not be marked as cancelled or destroyed.⁶ Removing this restriction will make it easier for subscribers to manage old paper CTs. Changes may also be needed to the Conveyancing Rules with regards to the requirements for retaining evidence.

⁴ See waiver at https://www.registrargeneral.nsw.gov.au/_data/assets/pdf_file/0018/364410/Waiver-CR4-2018-Unrepresented-transfers-final.pdf.

⁵ Having said this, pre-2004 certificates of title must be physically produced at LRS as they do not have a CAC.

⁶ See http://rg-guidelines.nswlrs.com.au/e-dealings/procedures/evidence_for_electronic_instruments.

Plans

In the current model, a paper CT needs to be physically produced at LRS to enable a plan to be registered. This applies whether or not the plan is lodged over the counter or electronically through the ePlan system provided by LRS.

2.3 Transacting electronically and in paper with an eCT

Because the CoRD Holder Consent has been designed to take the place of production of a paper CT, Consents are required whenever there is a transaction with an eCT. Consents can only be lodged electronically, even for paper transactions.

Many ADIs have requested that the requirement for transacting party Consents be removed, arguing it is unnecessary and time consuming to provide a Consent to a transaction they are already a party to, especially when required for paper transactions. As the next eConveyancing mandate on 1 July 2019 approaches, the frequency of paper transactions will lessen, minimising this issue.

Another issue with Consents relates to the requirement to list all the dealings being consented to and the parties to those dealings. The subscriber for the vendor may find it difficult to obtain the details of the incoming purchaser's mortgagee for inclusion on the Consent form. Subscribers who act for developers handle sales of off-the-plan units which could number in the hundreds for a single strata scheme. Not knowing the details of each purchaser's incoming mortgagee until the last minute could lead to errors and delays.

Transacting party Consents were implemented as a fraud prevention measure. The requirement that the Consent list the incoming dealings and parties prevents fraudulent dealings being lodged in paper before a legitimate paper settlement takes place. This is less of an issue with electronic settlements.

Currently, ADIs and some other banks have the ability to select a panel of subscribers entitled to transact on their behalf, meaning that subscribers who are not on the panel will be unable to transact on the ADI's behalf. This reduces the risk of rogue subscribers enabling fraudulent transactions. It might be worth considering that this system be expanded to other parties.

2.4 Questions for discussion

1. What features, if any, of the existing CT environment should be retained in NSW?
2. Are there any issues arising in the existing environment which have not been considered in this discussion paper?

3. Model 2- eCTs and CoRD Holder Consents

In model 2, after the conversion of all paper CTs to eCTs, CoRD Holder Consents will fulfil in practice many of the functions of paper CTs. There will be no change to the current processes for ADI mortgagees, but there will be changes for registered proprietors of unencumbered titles and non-ADI first mortgagees.

An entirely electronic system will provide convenience and time efficiencies to those who interact with the land titles system. The eCT/CoRD Holder Consent model protects consumers from fraud by fulfilling many of the functions that paper CTs once did.

3.1 Transacting electronically with an unencumbered title

In the absence of paper CTs, subscribers will need to rely on other evidence (e.g. rates notices, electricity bills, etc.) to establish that their client has the right to deal.

When the registered proprietor is a party to the transaction (for example, for a transfer of land), the CoRD Holder Consent is lodged as part of the transfer lodgment case, and is therefore streamlined. The subscriber will complete the Consent on behalf of the registered proprietor. No paper CT will issue to the subscriber upon registration of the transaction, even if there is no incoming mortgagee.

A third-party Consent must be lodged when the registered proprietor is not a party to the transaction. This is the electronic equivalent of producing a paper CT at LRS. The registered proprietor must specify the type of Consent being provided and the details of the instrument which is being consented to. Unrepresented parties would be required to engage a subscriber to transact, even if just to lodge a standalone Consent.

3.2 Transacting in paper with an unencumbered title

If a transfer of land is occurring in paper (in reliance on a waiver or exception in the Conveyancing Rules), the subscriber must still lodge a Consent on the ELN. This applies to all paper transactions, regardless of whether or not they are mandated to take place on the ELN.

When the paper documents are lodged for registration, LRS will check that the relevant Consent has been lodged. The incoming party to the transfer will also need to verify, before attending the paper settlement, that the Consent has been lodged.

For paper transactions with an electronic Consent, there is a possibility that the information on the Consent will not exactly match the paper dealings lodged for registration. This could lead to delays in settlement and requisitions.

As the next eConveyancing mandate on 1 July 2019 approaches, the frequency of paper transactions will lessen, minimising this issue.

3.3 Fraud and mitigation

CoRD Holder Consents were introduced to mitigate fraud. For transactions with a paper CT, the electronic Consent form requires the Client Authentication Code (CAC) to be entered. If the CT does not have a CAC, the CT must be physically produced at LRS and the production receipt number entered into the Consent. Converting paper CTs to eCTs removes a check in the process that provides some protection against fraudulent transactions perpetrated by the subscriber or a person posing as the registered proprietor.

As noted earlier, ADIs and some other banks are able to select a panel of subscribers entitled to transact on their behalf on the ELN. This offers some protection to them as it prevents anyone other than a panel

member lodging Mortgages and Discharges of Mortgage for them electronically. There is no corresponding system for private lenders and registered proprietors of unencumbered titles. It may be worth considering extending the system to other users, but this may prove to be unwieldy due to the number of private lenders and registered proprietors.

3.4 Other considerations

Legal representation will be necessary for almost every transaction

Registered proprietors are not entitled to transact on their own behalf on the ELN. Even if a transaction occurs in paper, the required CoRD Holder Consent can only be lodged through an ELNO, which means a lawyer or conveyancer would need to be engaged by the registered proprietor just for that purpose.

This shift away from self-representation may not have a big impact for larger transactions, like a purchase of land, but could be significant for more routine transactions. For example, a strata owners corporation wanting to register a change of by-laws will be required to lodge a CoRD Holder Consent through an ELNO. This will require the owners corporation to approach a lawyer to allow the change of by-laws to be registered, even if the transaction itself is being lodged in paper.

Liens and equitable mortgages by deposit

A lien is a lawyer's right to keep a client's legal documents, including paper CTs, until the client has paid the lawyer's fees and disbursements. After full conversion to eCTs, the paper CT will not be available to form part of the lawyer's lien, significantly reducing the effectiveness of this type of security.

Similarly, an equitable mortgage over Torrens Title land can be created by the deposit of the paper CT as security. The conversion of all paper CTs to eCTs will eliminate this form of equitable mortgage.

Plans

Before a plan can be lodged for registration (either in person or by ePlan) it must be wet-signed by all people who have an interest in the land, including the registered proprietor. Despite this wet signature, a CoRD Holder Consent will still be required to be lodged electronically. This creates a situation where the registered proprietor is effectively consenting to the plan's lodgment twice, through the wet signature and again by lodging the CoRD Holder Consent.

In addition, the registered proprietor will need the services of a lawyer to lodge the CoRD Holder Consent, as surveyors are not eligible to be subscribers to an ELNO. The registered proprietor will need to engage both a surveyor and a lawyer to lodge a plan, where previously the services of a surveyor alone may have been sufficient.

3.5 Questions for discussion

3. In a scenario where all paper CTs are converted to eCTs with a system of CoRD Holder Consents, are there any practices that should be changed or any new features that should be introduced?
4. Are there any issues arising in a 100% eCT and CoRD Holder Consent environment that have not been considered in this discussion paper?

4. Model 3- No eCTs and no CoRD Holder Consents

In Queensland and South Australia the role of eCTs and CoRD Holder Consents has been eliminated entirely. Model 3 is heavily reliant on subscribers to the ELN verifying the identity and right to deal of their clients and mortgagors to prevent fraud.

4.1 Transacting with no CTs and no Consents

In model 3, no separate Consent is required to be lodged for electronic transactions. This is true whether or not the title is encumbered. This would reduce the administrative burden for subscribers associated with lodging separate Consents for paper transactions.

For example, lodgment of a mortgage would not need to be accompanied by a Consent from the registered proprietor. The absence of a Consent in this scenario should have minimal impact, as the registered proprietor will be a party to the transaction and the mortgage will have been executed by or on behalf of the registered proprietor.

Other transactions may be more problematic. Registration of a second mortgage to a different bank would occur without the lodgment of the first mortgagee's Consent. Similarly, the registered proprietor could lodge a change of name without the Consent of either mortgagee.

Under the current regime in NSW, the first mortgagee must consent to the registration of a second mortgage, as well as to a variety of other dealings. In the absence of paper CTs, eCTs and Consents, each party would be relying on the fact that the other party has properly identified their client and established that they have the right to deal and that all necessary consents have been obtained.

In this scenario, instead of receiving a paper CT after registration of an unencumbered Transfer, the new registered proprietor will receive a registration notification advising that registration has occurred.

Similarly, on registration of a plan, the registered proprietor will receive registration notifications for each of the new lots created. For large strata schemes, this has advantages. The management of paper CTs is eliminated, together with the requirement for Consents for each lot.

This would reduce the administrative burden for government agencies, local councils and other entities in obtaining paper CTs to register conveyancing instruments (including removing the need to apply for a replacement when the paper CT cannot be located).

4.2 Fraud and mitigation

One area of increased risk in a scenario without eCTs and Consents is the possibility of a rogue subscriber registering, for example, a transfer of property to themselves. A fraudulent transfer might only be identified by a random subscriber audit, conducted on behalf of the Registrar General. All subscribers are subject to an initial review process by an ELNO, which adds some level of protection.

Without paper CTs or Consents, a fraud could be committed in a paper transaction simply by forging the signature of the registered proprietor on a dealing form. There would be no need to physically produce a paper CT. However, with the mandate requiring Transfers and Mortgages to be lodged electronically through an ELN, the opportunity for this type of fraud is minimized. It is also important to note that transfer fraud in NSW is extremely rare, and occurs even in a 100% paper CT environment.

NSW has always had a small number of mortgage fraud cases, where a fraudster poses as the registered proprietor and approaches a bank for a loan based on false identity documents and a false paper CT. Once the money has been lent, the fraudster absconds, leaving the registered proprietor with a mortgage. The Torrens Assurance Fund provides protection in these cases.

South Australia eliminated eCTs and Consents in 2016 and Queensland has had the option of no CT for 20 years. There has been no appreciable increase in the incidence of mortgage fraud in these jurisdictions. However, South Australia and Queensland have always had a lower incidence of mortgage fraud than NSW. NSW has more properties and a higher volume of property transactions, together with higher property prices. These factors mean that the fraud experience in other jurisdictions is not necessarily reflective of the NSW experience.

4.3 Other considerations

Priority Notices

It is expected that the use of Priority Notices will increase in the absence of Consents. A Priority Notice alerts people undertaking a search that a transaction is pending, and reserves priority for a particular transaction. For example, a prospective mortgagee may wish to lodge a Priority Notice to ensure no intervening transactions are registered prior to the registration of the mortgage at settlement.

Title Watch

In some Australian States a subscription service called Title Watch allows users to monitor activity against a selected title. When activity is detected, the subscriber will automatically receive an email and an optional SMS alert. Consideration could be given to implementing a similar service in NSW.

Verification of identity for unrepresented parties

If the requirements for CoRD Holder consents are removed, unrepresented parties may be able to lodge dealings in paper (where otherwise allowed by the eConveyancing mandates). In South Australia, self-represented parties must have their identity verified before they can lodge a dealing in paper. The same rule would need to apply in NSW in the absence of eCTs and CoRD Holder Consents.

The Commonwealth Government's Digital Transformation Agency is delivering a digital identity program that will allow Australians to create a digital identity which can be used to access online government services.⁷ The NSW Government is also exploring digital identity solutions. In future, eConveyancing in NSW may utilise digital identity systems.

Paper transactions

As noted above, some transactions will, for the foreseeable future, fall outside the NSW Government's mandate for 100% eConveyancing. This includes the lodgment of dealings not yet able to be lodged via the ELN, and dealings which are not yet required to be lodged electronically. These transactions should be borne in mind in relation to a scenario without CoRD Holder Consents and eCTs.

4.4 Questions for discussion

5. In the event there are no eCTs/CoRD Holder Consents, are there any practices that should be changed or any new features that should be introduced?
6. Are there any issues arising from a no eCT/no CoRD Holder Consent environment which have not been considered in this discussion paper?
7. What are the risks of removing transacting party Consents only?

⁷ See <https://www.dta.gov.au/what-we-do/policies-and-programs/identity/>.

5. Other jurisdictions

5.1 Queensland

In 1994, the Queensland government abolished the automatic issue of paper CTs.⁸ Paper CTs are only issued on request by the registered proprietor and with the consent of any mortgagee. Where a paper CT has been issued, it is recorded on the register. Paper CTs must be returned for cancellation before the lodgment of most instruments with the Titles Registry.

Queensland has not implemented eCTs or CoRD Holder Consents, but other measures have been adopted to combat fraud. Although not mandatory, priority notices (formerly known as settlement notices) have been common in Queensland since their introduction in 1994. Priority notices are used to protect an incoming purchaser or mortgagee's interest between exchange of contracts and lodgment of transfer and mortgage documents.

5.2 South Australia

Amendments to the *Real Property Act 1886* (SA) in 2016 resulted in the removal of paper CTs in South Australia. Unlike in Queensland, Land Services no longer issues paper CTs and paper CTs no longer have any legal status.

South Australia has not implemented eCTs or CoRD Holder Consents, but other measures have been adopted to combat fraud:

- The Registrar General must take reasonable steps to verify the authority of a self-represented party to enter into a transaction.
- As noted earlier in this discussion paper, Title Watch is a subscription service that enables users to monitor activity against a selected certificate of title.
- The *Real Property Act 1886* (SA) contains offences relating to fraud and improperly obtaining or executing documents, document certification, verification of identity, and verification of authority.
- 2016 amendments to the *Real Property Act 1886* (SA) clarify that a registered proprietor can caveat their own property to prevent potential fraudulent activity. This can also be done currently in NSW.
- Priority Notices are used to reserve priority for a particular transaction, and to notify searching parties that a transaction is pending.

5.3 Victoria

Paper CTs are still used in Victoria but must be converted to eCTs to support electronic transactions. In Victoria, since 1 October 2018, lawyers and conveyancers must lodge certain documents electronically, including transfers.

The right to deal in the land is held by the 'eCT controller', much like the CoRD holder in NSW. A search of the register will list the name of the eCT controller in the additional information section. eCT control is restricted to subscribers to the ELN, together with some government bodies and statutory authorities.

Administrative notices are used by eCT controllers to request that the Registrar of Titles deal with the CT in a particular way. Administrative notices are available in both paper and electronic format and are used

⁸ See the *Land Title Act 1994* (QLD) at <https://www.legislation.qld.gov.au/view/html/inforce/current/act-1994-011>

to nominate a CT to a paper instrument or electronic lodgment case. Administrative notices are not required if the eCT controller is a party to the transaction.

Like CoRD Holder Consents in NSW, administrative notices in Victoria require the person with CoRD to lodge an instrument to demonstrate they are aware of and consent to a particular transaction.

5.4 Western Australia

In Western Australia, paper CTs are issued unless the registered proprietor requests otherwise.⁹

Where a title is encumbered by a registered mortgage and no paper CT has been issued, a letter of consent to subsequent lodgment from the first mortgagee is required to be lodged with most documents that would normally have required production of the paper CT by the first mortgagee.

As in South Australia, Title Watch is available. Registered proprietors can also place a caveat (improper dealings) on their title to prevent registration of instruments that would ordinarily need to be signed or consented to by them.

5.5 New Zealand

In New Zealand, all paper CTs were converted into computer registers between 1999 and 2002. Computer registers prove the ownership of land and the rights and restrictions that apply to the land. eConveyancing is mandated for lawyers and conveyancers. Paper registration of instruments is available for unrepresented parties.

There are no eCTs or equivalent in New Zealand. Legal and conveyancing practitioners must certify that their clients authorise registration of electronic instruments, with prescribed witnessing requirements for paper documents. The practitioner certifying an electronic instrument must ensure they hold evidence of their client's authority and identity, and the appropriate consent (if applicable). This means that before a certification is completed, the certifier must determine if a consent is required and ensure any consent has been obtained.

Mortgagee consent is required by a number of provisions in the *Land Transfer Act 2017* (NZ).¹⁰

⁹ See section 48B of the *Transfer of Land Act 1893* (WA) at https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_a829.html.

¹⁰ The *Land Transfer Act 2017* (NZ) is available at <http://www.legislation.govt.nz/act/public/2017/0030/latest/whole.html>.

6. Comparison of models- transfer of unencumbered title

The following table sets out the main differences between Model 1, Model 2 and Model 3 in a typical transfer of land involving an unencumbered title.

	Model 1- Current mixed eCT and paper CT environment	Model 2- eCTs and CoRD Holder Consents	Model 3- No eCTs and no CoRD Holder Consents
Status of unencumbered CT	Paper	eCT	None
Transfer	Under the existing waiver, standalone transfers where one party is unrepresented can be lodged in paper at LRS	Registered proprietor needs to engage a subscriber to lodge the transfer electronically	Registered proprietor needs to engage a subscriber to lodge the transfer electronically
CoRD Holder Consent	No CoRD Holder Consent needed for unencumbered titles	The registered proprietor's subscriber will also need to lodge a CoRD Holder Consent electronically	None
Issue of CT to incoming registered proprietor	Paper	eCT	None
Issue of CT to incoming mortgagee	eCT (if ADI)	eCT	None

7. Comparison of models- transfer of encumbered title

The following table sets out the main differences between Model 1, Model 2 and Model 3 in a typical transfer of land involving an encumbered title.

	Model 1- Current mixed eCT and paper CT environment	Model 2- eCTs and CoRD Holder Consents	Model 3- No eCTs and no CoRD Holder Consents
Status of unencumbered CT	eCT	eCT	None
Transfer	Mortgagee to lodge a transfer electronically	Mortgagee to lodge a transfer electronically	Mortgagee to lodge a transfer electronically
CoRD Holder Consent	Mortgagee to lodge a CoRD Holder Consent electronically	Mortgagee to lodge a CoRD Holder Consent electronically	While there is no CoRD Holder Consent to be lodged by the mortgagee, the mortgagee will still need to execute the discharge of mortgage
Issue of CT to incoming registered proprietor	Paper	eCT	None
Issue of CT to incoming mortgagee	eCT (if ADI)	eCT	None

8. Questions for discussion

Model 1- The current mixed eCT and paper CT environment

1. What features, if any, of the existing CT environment should be retained in NSW?
2. Are there any issues arising in the existing environment which have not been considered in this discussion paper?

Model 2- eCTs and CoRD Holder Consents

3. In a scenario where all paper CTs are converted to eCTs with a system of CoRD Holder Consents, are there any practices that should be changed or any new features that should be introduced?
4. Are there any issues arising in a 100% eCT and CoRD Holder Consent environment that have not been considered in this discussion paper?

Model 3- No eCTs and no CoRD Holder Consents

5. In the event there are no eCTs/CoRD Holder Consents, are there any practices that should be changed or any new features that should be introduced?
6. Are there any issues arising from a no eCT/no CoRD Holder Consent environment which have not been considered in this discussion paper?
7. What are the risks of removing transacting party Consents only?

General

8. Are there any other issues that should be considered in comparing the potential options for unencumbered titles beyond 1 July 2019, which have not been considered in this discussion paper?
9. Do you have a preference for a particular model and why?