

28th February 2019

Jeremy Cox
Registrar General
Office of the Registrar General
Better Regulation Division (DFSI)
Department of Finance, Services and Innovation
McKell 2-24 Rawson Place, SYDNEY NSW 2000
Email: ORG-admin@finance.nsw.gov.au

Dear Jeremy

Re: Australian Institute of Conveyancers NSW Division (AICNSW) Submission to Discussion Paper: Certificates of Title (CT's) Next Evolution

AICNSW supports the NSW Government's commitment in the development of digital innovation in the property, legal and financial industry and the move towards Electronic Conveyancing (EC) by conveyancers and legal practitioners in NSW.

1. Conversion of ADI CTs

The conversion of bulk paper CTs, where the first registered mortgagee is an ADI, has been well implemented and successful.

AICNSW believes the key to this success has been the User Workshops involving professional organisations conducted by the Office of the Registrar General (ORG) and the follow through education by the various professional industry bodies to their subscriber members.

2. Conversion of the remaining CTs

Due to the disparate nature of the non-encumbered titles, the long historical confidence as to evidence of ownership, the right to deal and cultural reliance on these beliefs and understandings the conversion to eCTs will need a broader approach.

We understand that the User Workshops will commence as soon as the model is determined at which time education to subscribers and other users can be organised.

However, we also have the view that information needs to be circulated in the general community to build awareness of these significant changes and to be targeted to those

owners of real property who hold their own CT's and being either deposited or held on their behalf by another party; and for holders of paper CTs who believe they hold a paper CT as a lien or as a security.

Such communication needs to be in advance to facilitate alternative arrangements before the commencement of the 100% eCTs regime.

3. Model 1 Retaining Paper CTs for unencumbered Titles

This model is not supported by AICNSW.

The benefits of EC are now widely experienced by Conveyancers and the clear majority would not want to return to a paper-based system. There is no advantage in retaining paper CTs in EC.

The holding of paper CTs should not be considered as evidence of the right to deal, removing the need for practitioners having to retain a paper CTs for seven years.

4. Model 2 eCTs and CoRD Holder Consents

In the absence of a paper CT, model 2 is the suggested preferred model supported by AICNSW.

We believe eCTs should retain the use of CoRD Holder Consents as a means of providing fraud protection from dishonest subscribers and persons posing as registered proprietors.

An authorisation provides the subscriber with authority to act in a transaction, however a copy of that authorisation is not provided to the subscriber of the party on the other side of the transaction. The receiving subscriber accepts that the sender subscriber has the consent to deal with the property as per the authority.

However, a CoRD Holder Consent clearly provides for the stated consent from the registered proprietor, and that CoRD Holder Consent must be in accordance with the authority from the registered proprietor to the subscriber. This is much the same in the Paper CT system where the production notice attached to the paper CT provides for the use of the CT, a CoRD Holder Consent fills the same function.

Importantly, this would provide, in the case of an audit from the ORG, or an investigation or claim in the case of fraud or negligence, a clear trace and examination of authority from the registered proprietor to the consent.

5. Not Required for all Dealings

Aside, from Caveats, Priority Notices or Writs, a CoRD Holder Consent need not be necessary for every transaction. For instance, the registration of a Discharge of Mortgage, a Notice of Death or Transmission Application as the Discharge of Mortgage is in the interest of the registered proprietor and the Notice of Death and Transmission Application need to be evidenced by the subscriber with the retaining of Death Certificate, Probate or Letters of Administration.

6. Self-Representation

EC does not support self-representation which will come to an end as of 01/07/2019.

It is difficult to know what percentage of unencumbered title holders represent themselves. However, a part of private holders of paper CTs, small lessors and others represent themselves. The need to engage a Conveyancer or lawyer for the preparation and lodging of leases and other dealings, EC should be a part of the public information program.

7. Liens and Equitable Mortgages by Deposit

Most practitioners holding a lien should have reasonable notice to enable them to make alternative arrangements to holding a Paper CT as a lien or security.

With equitable mortgages and security, the public information program should advise that any person or organisation holding a Paper CT in agreement for a security or mortgage over real property should be aware of the non- status of that paper CT from 01/07/2019 and of the need to seek legal advice before that date in order to make alternative arrangements.

8. Plans of Subdivision

In relation to plans and CoRD Holder Consents, most plans contain easements, covenants or restrictions, which are usually drawn by Conveyancers and Lawyers in conjunction with Surveyors. In that regard Conveyancers and Lawyers together with their mutual registered proprietor clients, are involved in the drafting and advice of Section 88B Instruments which are instruments that will be registered on eCTs.

The options might be to allow a Surveyor to obtain a CoRD Holder Consent for the purposes of lodging a plan. However, the Surveyor will need to meet the requirements of a CoRD, Verification of Identity (VOI) and obtaining an authority from a client. Alternatively, they will need their client/s to instruct a Conveyancer or Lawyer to obtain a CoRD and thereby comply with the above requirements.

Either way, the question as to a Surveyor dealing in land, by way of a plan, should be considered as meeting or ensuring that the right to deal is met by the Surveyor responsible for the plan of subdivision or the registered proprietor's Conveyancer or Lawyer.

9. Model 3 No CTs and No Consents

Whilst the administrative burden might be lesser for a subscriber in transacting in EC with no paper titles or Consents, the removal of consents would remove a measure of protecting the registered proprietor from fraud, mistake or swindling by a dishonest subscriber.

Such an action may not be limited to a transfer of title but could include the registration of a non-ADI mortgage, the monies being transferred to the practitioner, who in turn mortgages a following client's property, to pay the first mortgage in a scheme that continues until eventually caught out.

In addition, for reasons as set out in Model 2 a consent enables regulatory or investigating authorities to better audit practitioners and in the case of fraud or mistake, clearly trace

from authority to consent. However, as noted in Model 2 above, all dealings need not require a consent.

In addition, as no consent would be required for the lodging of a dealing, clients may wish to protect their title from the lodgment of any fraudulent dealings with the registration of a caveat. The lodging of a caveat to protect a client's eCT may become best practice considerably adding to the fees and cost of the preparing, lodging and registration of a caveat and the eventual need to withdraw the caveat.

As in Model 2 it is suggested that a Notice of Registration is provided once the transfer has been registered.

10. Other Suggestions

Where there is no incoming mortgage some practitioners are now obtaining a search of the Register a few days after settlement/registration to confirm registration on the title and to forward a copy of the search of the Register showing the purchaser as being noted in the first schedule as the proprietor of the land.

Whilst the obtaining of an updated search may be considered by some as an add on service, others think it is "best practice", and should be a part of a conveyancing transaction, evidencing their client's question of "*What have I got to Show for spending my hard earned 1.5 million dollars?*" In any case a notice of registration need be provided once the dealing has been registered as information of the change noted on the Register. A subscriber may then, if it is a part of their best practice, obtain a search confirming their purchaser client is the registered proprietor, provide a copy to their clients, and retain for their file records.

Thank you for the opportunity of providing this feedback. AICNSW supports the EC model and the opportunity to participate in the discussions enabling the next revolution in eCTs to benefit all users and consumers of conveyancing in NSW.

Yours Sincerely



Chris Tyler
CEO
AICNSW