



Position paper

In response to submissions made to the discussion paper
Certificates of title: the next evolution

December 2019

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Glossary

<i>Consent</i>	given by the CoRD holder. There are two types of consents: <ol style="list-style-type: none">1. transacting party consent, for CoRD holders participating in a transaction (e.g. the CoRD holder discharging their mortgage); and2. third-party consent, for CoRD holders not participating in a transaction (e.g. consenting to the registration of a lease between the registered proprietor and a lessee).
<i>CoRD</i>	Control of the Right to Deal. The right of the holder of the first-ranking registered mortgage on the title to control the registration of instruments affecting ownership of the estate or other registered interests in the estate.
<i>eCT</i>	electronic certificate of title with CoRD notation.
<i>ELNO</i>	Electronic Lodgment Network Operator.
<i>No-CT</i>	no paper CT and no CoRD.
<i>Paper CT</i>	paper certificate of title.
<i>RPA</i>	<i>Real Property Act 1900 (NSW).</i>

1. Position Summary

The NSW Government is committed to a regulatory regime that delivers a secure and reliable eConveyancing system. This regime must both protect the interests of landowners and other participants in the system as well as support efficient conveyancing transactions.

Of the options outlined in the discussion paper titled [Certificates of title: the next evolution](#), Model 3 provides the greatest efficiencies without sacrificing security and reliability. In an electronic environment, paper certificates of title provide no additional protections and complicate processes. The eConveyancing system is a closed application that can be operated only by subscribers, with a robust framework for verification of identity and scrutiny of a party's right to deal. Within this framework, transacting parties will always be required to consent to any dealing with their land, removing the need for a separate regime of CoRD holder Consents.

As with all the eConveyancing reforms, replacement of the CoRD holder Consent process and removal of the remaining paper certificates of title will transition safely and appropriately. Protections, like legislative changes and the introduction of new safeguards against fraud, will be implemented before all paper CTs are cancelled and new procedures commence.

The security and reliability of the Torrens system will not change. While paper CTs will no longer be issued, the Torrens register will continue to record the details of all registered interests in land, backed by the State guarantee of title.

2. How we got here

On 7 December 2018, the Office of the Registrar General (ORG) released a public discussion paper titled *Certificates of title: the next evolution*. The discussion paper put forward three proposals for the replacement of paper certificates with an electronic alternative in NSW. ORG called for submissions in response to the paper and received 17 submissions, which are available at:

<http://www.registrargeneral.nsw.gov.au/publications/discussion-papers/discussion-paper-certificates-of-title-the-next-evolution>

On 1 October 2018, almost half of all paper CTs in NSW were converted to eCTs. These titles are held by Authorised Deposit-Taking Institutions (ADIs) as security for their mortgages. There are now approximately two million titles that still have paper CTs. These are either unencumbered (i.e. not affected by a mortgage or charge) or mortgaged to non-ADIs.

The three models proposed in the discussion paper were:

- Model 1 – 'status quo'. Retain paper CTs for registered proprietors with unencumbered titles and non-ADI first mortgagees. Issue eCTs to ADIs with registered first mortgages.
- Model 2 – convert all paper CTs to eCTs and require Consents from both registered mortgagees and registered proprietors with unencumbered titles.
- Model 3 – no CTs and no CoRD holder Consents.

Model 1 received little support. Three groups strongly supported Model 2, and two groups strongly supported Model 3. The remaining submissions expressed support for either Model 2 (or a variation of it) or Model 3. A more detailed analysis of the submissions is in chapter 4.

Irrespective of the model supported, there was general agreement in the submissions that:

- paper CTs should no longer exist
- transacting party Consents are not required, but there is some support for retaining third-party Consents
- a 'Title Watch' service, or a similar service, should operate in NSW.

3. The Government's Position on Model 3

Under Model 3, there will be no paper CTs or eCTs and CoRD holder Consents will not be required. The Government position is to adopt Model 3. This model will provide the greatest efficiency within a secure and reliable electronic environment.

Digital transactions should be seamless and efficient. Eliminating paper is an obvious improvement to achieve a seamless digital transaction. Removing CoRD and CoRD holder Consents will further improve the efficiencies of digital transactions and remove another administrative burden, in conjunction with stronger requirements for verification of identity, right to deal and retaining proper evidence. It will also reduce delays which could hold up a transaction, such as a CoRD holder's Consent not given in time.

The Government expects all land titles dealings to be made available electronically by October 2020. The legislative amendments to support Model 3 will be implemented soon after that.

Other reasons Model 3 is preferred:

- The protections afforded by CoRD holder Consents is of less benefit when all parties are transacting electronically.
- The lack of transacting party Consents is offset by the fact that the registered proprietor will always be a party to the transaction.
- Model 3 promotes national consistency as it is in line with the current situation in South Australia and Queensland, and soon to be Western Australia, where there is no CoRD.
- Where Model 3 or versions of Model 3 have been adopted, there has been no apparent increase in the incidence of mortgage and title fraud.
- The NSW Conveyancing Rules can be used to mandate all dealings that are available electronically (after meeting certain specific criteria). There is no need for separate Consent processes when a subscriber to an ELNO already has the necessary authority to transact on behalf of their client.
- In the absence of Consents, there continues to remain legislative protections for mortgagees regarding the registration of dealings which materially affect their interest.
- There are other methods currently available which can protect the registered proprietor's interest or that of an incoming purchaser (or mortgagee) without the need for CoRD, such as the use of Priority Notices.
- It will reduce the costs associated with storing paper CTs used to support electronic transactions, and replacing lost CTs, which is not uncommon.
- It will reduce delays in settlements caused by delivering the paper CTs.
- The administrative burden for subscribers associated with separate lodging of CoRD holder Consents for paper transactions will be reduced.

4. Feedback

The issues raised by the submissions to the discussion paper concerning Model 3 seem to be primarily related to third-party CoRD holder Consents. Below is a summary of the main points drawn from the submissions, together with a Government response for each.

Comments	NSW Government Response
<p>Concerns that Model 3 may increase fraud as CoRD holder Consents are abolished.</p>	<p>The Government believes that Model 3 poses no increased risk of fraud. Since 2004, paper CTs in NSW have specific security features, the most important of which is the Certificate Authentication Code number (CAC number). In an electronic workspace, the CAC number serves two purposes – it is used to verify that the paper CT is genuine and implies that the owner has given consent to the transaction. While these security features make it next to impossible to replicate a fake paper CT, its primary purpose was limited to that.</p> <p>The existence of a CAC number does not, in itself, prevent fraud, but can be a barrier to a fraudulent transaction because the number must be included in the electronic workspace. However, a rogue subscriber may have access to a CAC number from a copy of a paper CT obtained as part of a transaction. The subscriber would therefore have access to the CAC number.</p> <p>Theoretically, a representative subscriber could enter an electronic workspace and choose to create a transfer of an unencumbered property of one of their clients to themselves, or someone else. The subscriber would already have a copy of the paper CT and CAC number as part of their files. Despite this, transfer fraud is extremely rare in NSW. The logistics involved without getting caught makes it unattractive for fraudsters.</p> <p>There is no concept of CoRD in South Australia and Queensland, and Western Australia is also removing the concept. Since moving away from paper CTs, there has been no apparent increase in the incidence of mortgage and title fraud in these jurisdictions.</p> <p>Property fraud in NSW has generally relied on identity fraud to obtain monies from a fraudulent mortgage. Since 2016, the law requires that solicitors, conveyancers and mortgagees must take reasonable steps to identify their borrowers. This requirement applies to both electronic and paper dealings. For this reason, there has been a significant reduction in mortgage fraud compensation claims against the Torrens Assurance Fund.</p> <p>Model 3 requires each subscriber to properly identify their client and establish that they have the right to deal.</p> <p>A 'Title Watch' service, or similar, will also be considered (see page 9).</p> <p>The register itself is the source of truth, not the paper CT.</p>

<p>Concerns that under Model 3, a first registered mortgagee will not have a right to refuse to consent to the registration of a dealing that may affect its interest.</p>	<p>Mortgagees are protected by statute, even without CoRD. For example, a mortgagee of land is currently required to execute any dealing which creates an easement, profit à prendre or restriction on the use of the land (see section 47 of the RPA). A lease of land which is subject to a mortgage is not binding on the mortgagee unless the mortgagee has consented to the lease (see section 53(4) of the RPA).</p> <p>Although under Model 3 further mortgages can be registered without the Consent of the first registered mortgagee, the terms of the mortgage may require the registered proprietor to seek the mortgagee's consent outside the register.</p> <p>The Registrar General does not consider that its role extends to policing the registered proprietor's compliance with obligations in the mortgage. If the mortgagee objects to a subsequent dealing being lodged, this is a matter to be resolved between the mortgagor and mortgagee.</p>
<p>Suggestions for implementing a variation of Model 2 which eliminates the need for transacting party Consents but keeps third-party Consents.</p>	<p>A review of this "hybrid" Model reveals significant changes which would need to be made to business rules, processes and changes to the national data standards. There is also an issue regarding those titles which have multiple first ranked registered mortgagees. Who of the multiple mortgagees has the right to deal with the title? Depending on the decision made, a significant amount of time and effort would then need to be made to the electronic systems of both the Land Registry and the electronic network operators to implement. Given the Government's view of the effectiveness of CoRD in a 100% electronic environment, it is unnecessary to pursue this hybrid model any further.</p>
<p>Concerns regarding increased costs associated with 100% eCTs and CoRD holder Consents due to forced legal representation for every transaction.</p>	<p>Model 2 proposes keeping CoRD. Under this Model, people would need to engage the services of a legal practitioner to provide Consent. However, it is unlikely that a person would not consent to use of their title for a transaction to which they are a party.</p> <p>Model 3 removes CoRD, which means that people will not be forced to seek legal representation simply to give consent.</p>
<p>Concerns relating to impacts to requirements to consent to a plan of subdivision.</p>	<p>Currently a plan of subdivision must be wet-signed by all people who have an interest in the land, including the registered proprietor or registered mortgagee. Despite this wet signature, a CoRD holder Consent still needs to be lodged electronically. This means that the registered proprietor is consenting to the plan's lodgment twice, through the wet signature and again by lodging the CoRD holder Consent. This dual process is inefficient and unnecessary in a wholly electronic environment.</p> <p>Also, because surveyors are not eligible to be subscribers to electronic conveyancing, the registered proprietor currently needs the services of a lawyer or conveyancer to lodge the CoRD holder Consent. The registered proprietor therefore needs to engage both a surveyor and a lawyer to lodge a plan.</p>

	<p>Under Model 3, a mortgagee (or anyone who has an interest in land) will still be required to sign the plan of subdivision – there is no change to the current process. The only difference in that scenario is that a separate third-party CoRD holder Consent is not required, and the services of a surveyor alone may be sufficient.</p>
<p>Concerns regarding the timing of implementing the recommendations by 1 July 2019. Models 2 or 3 will require legislative, technical, and practice changes, with close coordination of each of these elements.</p>	<p>The bulk conversion of remaining paper CTs to eCTs did not occur on 1 July 2019 as originally planned.</p> <p>When progressing with Model 3, enough time will be allowed to make changes to the technical, legislative and business practice requirements. Once all the necessary requirements are in place, the Registrar General will announce a nominated date for the cancellation of paper CTs and removal of CoRD.</p>
<p>Support for the introduction of a system like Title Watch to alert owners and mortgagees.</p>	<p>A service like 'Title Watch' is being investigated for introduction in NSW to complement Model 3. This service could provide notifications to advise of changes taking place on a particular title.</p>
<p>Suggestions of an education program driven by the ORG for all industry stakeholders in NSW, including extensive and consistent communication to affected parties before commencement of eCTs.</p>	<p>ORG will provide comprehensive guidance to industry and landowners before the conversion of the remaining paper CTs. This will prepare industry and owners ahead of time before paper CTs are cancelled and give ample opportunity for people to deal with and complete 'in-flight' transactions during the transition period.</p>
<p>Paper CTs are a unique source of history and should be retained.</p>	<p>Cancelling paper CTs does not necessarily mean the existing paper CTs will be physically destroyed – they will just be made void as a document to evidence title. People can keep their existing paper CTs for posterity. The most significant practical change is that after the conversion, any new owners or mortgagees won't receive a paper CT when the land has been transferred or mortgaged.</p>

5. Next steps

Several steps will be required to implement Model 3 in NSW. The most significant of these are:

- Government approval to make the necessary legislative changes to remove the concept of title control in NSW. The RPA is predicated on the existence of title control.
- NSW will consider whether a service like Title Watch should be introduced in NSW. Title Watch, which operates in South Australia and Western Australia and several foreign jurisdictions, is an online subscription service that monitors activity against a selected title. When an activity is detected, a person who subscribes to the service will automatically receive an email and an optional SMS alert.
- The Registrar General will nominate a date for the conversion of paper CTs to No-CTs once system changes are implemented and public education has occurred. This includes:
 - Producing clear guidelines to practitioners and industry on the practical changes that will be made to the eConveyancing process with no CTs. For example, the Registrar General's Guidelines will need to be updated to address changes to registration, subscriber compliance and right to deal requirements.
 - Introducing directions regarding retention of cancelled paper CTs, such as having the option to either retain them for historical records or to securely dispose of them, and whether any cancelled duplicate title that is lodged with NSW Land Registry Services will be securely destroyed upon lodgment.
 - Developing a communications strategy to all the different participants (banks, local councils, 'mums and dads', etc.) about the effect of the conversion.
 - Completing data cleansing to make every folio in the Register electronically tradeable.
 - Introducing guidance for any RPA transactions which cannot be done electronically.

6. Conclusion

The Registrar General will need to be satisfied that all outstanding issues have been identified and addressed before a date can be nominated for the conversion of paper CTs to No-CTs.

An overriding principal is that everyone will be made aware of the changes before anything is finalised. This means that ongoing community awareness campaigns will be run to prepare all stakeholders for the change.

In the meantime, the Government will begin work on the necessary legislative, technical and business rule changes that will need to be made. During this time the Government will work in close consultation with stakeholders such as Australian Banking Association and financial institutions, Law Society of NSW, Australian Institute of Conveyancers NSW Division, NSW Land Registry Services, ELNOs, and others to identify the changes needed to make the conversion a success.

This reform, along with the transformation of remaining paper dealings, is the final step in NSW moving to 100 per cent electronic conveyancing.