

NECS in NSW Consultation Papers

A consultation process addressing transaction specification, business practice and implementation arrangements for the National Electronic Conveyancing System (NECS), and relevant requirements of industry and community members in NSW.

2. Instrument Certification

being the nature and extent of certifications required of Certifiers signing instruments prepared using the NECS and intended for lodgment with a Land Registry.

02 November 2009



Land and Property
Management Authority



About this Consultation Paper

This paper is published by the Land and Property Information Division (LPI) of the NSW Land and Property Management Authority (LPMA). It describes proposed changes in conveyancing practice, risk management and systems arrangements for the settlement of real property transactions and the lodgment and registration of real property registry instruments (dealings) in NSW. Its intention is to make widely known the detail of proposed changes under consideration and to invite feedback on them. It does not represent NSW Government policy.

This Consultation Paper and the issues it raises need to be considered in the context of the intention of all jurisdictions and industry participant groups to achieve a single national system for electronic conveyancing in Australia. The paper forms part of a series of public consultation papers designed to ensure NSW based industry requirements are considered in the design, functionality and supporting arrangements of a National Electronic Conveyancing System (NECS).

Your feedback, comments, suggestions and criticisms should be made available to Land and Property Information by one of the following means:

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Letter:	NECS in NSW Industry Consultation Feedback
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Additional copies of this paper can be downloaded free of charge in PDF file format from Lands website at http://necsnsw.lands.nsw.gov.au/industry_consultations/consultation_papers

Comments and responses should be submitted by the dates specified in the introduction sections of each consultation paper.

Responses will be acknowledged and may be published on the Lands website and/or referenced in report/s recording consultation findings unless you indicate in your submission that you wish your comments to be confidential. Responses will not be used for any other purpose than to determine the preferred technology and business practice arrangements for implementation of NECS in NSW.

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Further information

Further information on the National Electronic Conveyancing System (NECS) proposals, and supporting information, analysis and specifications relevant to implementation of NECS in NSW is available at www.necs.gov.au and <http://necsnsw.lands.nsw.gov.au/home>.

Publisher's Note

The National Electronic Conveyancing System (NECS) is Australia's joint government and industry initiative to create an efficient and convenient way of completing property based transactions and lodging land title dealings for registration. The national work program to specify the legal framework, systems requirements and business practices for NECS is maintained and coordinated by the National Electronic Conveyancing Office (NECO). NECS documents and progress information are available at www.necs.gov.au.

NECO is coordinating national consultations on a range of legislation, business practice and technology specification subjects during 2009. The principal NECS industry consultation mechanism is the National Project Team, a representative group comprising members drawn from industry and government, with its role to make recommendations on business requirements, supporting arrangements and implementation issues for NECS. Land and Property Information encourages participants in these 'NECS in NSW' consultation arrangements to consider also forwarding responses and contributions on NECS technology specification, business practice and implementation arrangements to the attention of the NECS National Project Team, using contacts accessible through the NECS website at <http://www.necs.gov.au/National-Project-Team/default.aspx>.

In the interests of consistency and transparency, where the National Project Team has reviewed or made recommendations on an issue relevant to a NECS in NSW Consultation Paper, those comments or recommendations will be made clear in the paper. Land and Property Information also undertakes to contribute outcomes and recommendations arising from NECS in NSW industry consultations to the relevant NECS processes, to assist in development of consistent national system requirements, risk management and business practice arrangements for NECS.

Acknowledgment

Land and Property Information acknowledges the ongoing engagement with and contribution by industry stakeholders to the NECS development program, in particular the NSW Law Society, Australian Institute of Conveyancers NSW Division, Information Brokers and Law Stationers Association and Australian Bankers' Association; additionally, the assistance of Clayton Utz in the research and preparation of these NECS in NSW consultation papers is acknowledged.

Disclaimer

Land and Property Information has produced these consultation papers to provide general information relating to business practice, legislative and systems technology arrangements being considered in the development of a National Electronic Conveyancing System for Australia and for its implementation in NSW.

LPI has used its best endeavours to ensure that the information contained in this paper is correct at the time of publication but takes no responsibility for any error, omission or defect herein. The contents do not constitute legal advice and should not be relied upon as such. LPI disclaims any liability to any person in respect of anything done or not done by any such person in whole or partial reliance upon the whole or part of the information in this paper.

Registrar General's Message

In July 2008 the Council of Australian Governments (COAG) announced a commitment to implementation of a National Electronic Conveyancing System (NECS)¹.

The NECS is to be a single national facility serving industry and government needs in all State and Territory jurisdictions and providing a convenient electronic means for legal practitioners, conveyancers, banks and mortgage processors to:

- prepare instruments and related documents to register changes in property ownership and interests;
- settle financial transactions, including payment of duties, taxes and disbursements;
- comply with the tax and duty requirements of the relevant State or Territory Revenue Office;
- lodge their instruments with the relevant State or Territory Land Registry; and
- receive confirmation of the lodgment and registration of instruments.



In March 2009 the agreement was extended and confirmed through the National Partnership Agreement to deliver a Seamless National Economy, increasing the efficiency of the economy by reducing costs incurred by business in complying with unnecessary and inconsistent regulation across jurisdictions. A national electronic conveyancing system is specified for achievement in the agreement and implementation plan, with electronic conveyancing transactions to be achieved in jurisdictions not later than 2011.

The initiatives described in this series of consultation papers represent a major development in the systems, procedures and practices of the conveyancing and mortgage financing industry in New South Wales. The Torrens land titling system as adopted in New South Wales has deservedly earned a reputation as being among the most efficient and reliable in the world. Introduced in 1863, the system served us well for 120 years as an entirely paper-based system requiring the noting of titles and interests using pens, stamps and typewriters. For the past 25 years an electronic register has provided faster recording and far easier access to title information crucial to many processes associated with land development, conveyancing and financing.

NSW led the way in development and implementation of an electronic register, and it is now time to take the next step in improving the efficiency of processes associated with land development, conveyancing and financing. Electronic conveyancing will be introduced in NSW by 2011, and participation by NSW industry and community members in specification of technology, business practice and implementation arrangements will be vital to prompt take-up of electronic conveyancing, and to achievement of associated cost savings.

Land and Property Information is conducting a thorough program of preparation to support implementation of NECS in NSW. An internal 'readiness' program is developing the technology services required to service NECS transactions and efficiently examine and apply electronic interest and ownership changes to the register. A critical part of the program is determining the technology specification, business practice and implementation requirements for NECS of industry participants in NSW, to ensure that NECS is structured and implemented so as to facilitate prompt widespread adoption and use in NSW.

The move to an electronic business environment for conveyancing represents a significant change in industry practices. The roles, relationships and responsibilities of many of the participants in the industry must be adapted to facilitate the new way of working. Legislation will be adjusted in the States and Territories, conveyancing business practices changed, and new requirements and controls introduced that will change existing risk allocations and mitigation responsibilities. New systems and technology arrangements must be implemented, to provide for creation and validation of electronic document cases suited to electronic settlement and lodgment for registration.

¹ The announcement of COAG agreement on a national electronic conveyancing system may be viewed at <http://www.pm.gov.au/node/5715>.

² The Seamless National Economy National Partnership Agreement and associated Implementation Plan including arrangements for national electronic conveyancing may be viewed through the COAG secretariat website at www.coag.gov.au/intergov_agreements/federal_financial_relations/index.cfm.

In late 2008 LPI commissioned an independent Economic Appraisal of the implementation of NECS in NSW, to identify and confirm the potential economic benefits achievable through NECS. The study was conducted by KPMG and based on data confirmed with industry participants, quantifying savings achievable through business process and technology changes associated with NECS. The appraisal identified opportunity for industry to achieve substantial operational efficiencies, with findings including:

- a 'mature year' saving of \$49.8M pa in conveyancing costs in NSW;
- an average saving of \$170 per property sale or refinance;
- general agreement by stakeholders that national electronic conveyancing will result in significant industry cost savings; and
- a positive Net Present Value of \$164.1M over the period to 2020 for the estimated \$30M NSW proportion of industry, government and NECS setup costs.

The study identified that 62% of potential NECS cost savings arise in the settlement and lodgment stages of conveyancing activity, and include reduced duplicated data entry and re-work, courier and bank cheque savings, and Certificate of Title related savings. Qualitative benefits of NECS identified in industry responses included:

- faster lodgment of time-critical dealings
- earlier availability of cleared funds after settlement;
- automated business-to-business data exchange and compliance assurance;
- direct lodgment of dealings after settlement; and
- easier access to lodgment for rural and remote communities.

The NSW economy can attain the greatest benefit from electronic conveyancing where NSW is ready for implementation of NECS as soon as an acceptable system is in place. The consultation papers issued in this series present an important opportunity for industry participants involved in conveyancing and property financing in NSW to contribute to the specification of practice, risk management and systems arrangements that will become the principal method of documenting, settling and registering changes to property interests in Australia in coming years.

I am confident of continued industry support in NSW for these important reforms and I invite and encourage your consideration and feedback on the proposals raised in these consultations.

Warwick Watkins
Registrar General

August 2009

³ The KPMG Economic Appraisal of NECS in NSW may be viewed and downloaded through the Lands website at <http://necsnsw.lands.nsw.gov.au/publications>.

About the National Electronic Conveyancing System ⁴

The National Electronic Conveyancing System (NECS) is a computer system and a set of supporting rules and business practices within a legal framework that provides a reliable means of completing conveyancing transactions electronically. These arrangements are intended to replace the existing paper-based processes in all jurisdictions for the approximate 70% of transactions that are relatively common and routine.

The development of NECS is being co-ordinated by a National Electronic Conveyancing Office (NECO) through a National Project Team (NPT) and State Project Teams (SPT) overseen by a National Steering Committee (NSC) of government and industry representatives. The work is supported by the Council of Australian Governments (COAG) which has undertaken to establish permanent governance arrangements and provide establishment funding to support the system during implementation and take-up.

The basis of NECS is set out in roadmap documents published by NECO www.necs.gov.au in particular a National Business Model (NBM), National Implementation Strategy (NIS), NECS Operations Description (NOD) and NECS Requirements Definition (NRD). These documents provide essential background to the issues raised in this Consultation Paper.

Also available on the NECO website are an independent risk assessment and a comprehensive regulatory review of the NBM, other expert advice on key issues and the papers on specific issues being considered by the NPT. These documents also provide essential background to the issues raised in this Consultation Paper.

What NECS Will Do

As a national facility to assist industry participants in more efficiently completing conveyancing and mortgage financing transactions, NECS will provide an electronic environment to:

- collect transaction information and have it checked and verified for completeness and compliance;
- prepare instruments and reports to register changes in property ownership and interests;
- settle financial transactions, including payment of duties, taxes and disbursements;
- comply with the tax and duty requirements of Revenue Offices; and
- lodge instruments with Land Registries and receive confirmation of their lodgment and registration.

NECS is likely to be owned by government but operated as a corporation. NECS will be an industry facility available to all eligible industry participants to use in their delivering more efficient services to consumers.

What NECS Will Not Do

Inevitably, there are aspects of the total conveyancing process that will remain outside NECS and these include:

- disclosures required of vendors prior to sale;
- preparation and exchange of contracts for sale;
- pre-settlement investigations undertaken on behalf of purchasers;
- procurement of any insurances required by purchasers;
- creation of loan documentation by lenders;
- non-financial aspects of settlement; and
- processes for examining and registering instruments once lodged with the Land Registry.

The realisation of NECS may, however, have consequential impacts in some of these areas as industry practices evolve and adjust to make best use of NECS.

⁴ This outline of the National Electronic Conveyancing System has been provided by the National Electronic Conveyancing Office as an information resource for inclusion in the NECS in NSW Consultation Documents. More detailed information about NECS is available from the NECS website www.necs.gov.au

Key Roles in NECS⁵

The major change to current conveyancing practice that is necessary to move to an electronic business environment is that, with some exceptions, Transacting Parties will no longer sign the instruments that instruct the Land Registry in each jurisdiction how to update its Torrens Title Register. In most instances an independent party will certify to the correctness of instruments and sign them on behalf of the Transacting Party or Parties. This change necessitates prescription of several key business practices which, in the interests of achieving a single national system, need to be consistent across all jurisdictions.

The key roles in NECS that are involved in securing a safe and reliable electronic conveyancing environment are:

- **Transacting Parties** are the individual vendors, purchasers, mortgagors or mortgagees dealing in property. They are persons and corporations.
- **Clients** who are the collection of Transacting Parties acting together in engaging a Subscriber to complete their transaction. They may be joint tenants or tenants in common and there may be any number of them provided they are acting collectively with a common purpose.
- **Subscribers** who are engaged by their Clients to use NECS in completing conveyancing transactions. They are legal and conveyancing practices, financial institutions, mortgage processors and government agencies.
- **Users** who are employees or contractors of a Subscriber authorised by the Subscriber to use NECS on the Subscriber's and the Subscriber's Client's behalf.
- **Certifiers** who are Users authorised by a Subscriber to certify compliance and sign instruments and other documents in NECS. The compliance certifications are as to the Subscriber having complied with all prescribed business practice requirements and the signings are as to the intention of the Subscriber's Client.
- **Land Registries** and **Revenue Offices** that prescribe required business practices to secure community confidence and receive instruments for registration of property interests and reports for ensuring compliance with duty and tax requirements and duty payments.

Other roles include Licensed Service Providers and a Financial Settlement Manager that provide support services.

NECS Design Principles

The functions and features of NECS are intended to conform to the following design principles:

- financial settlement practice consistent and compatible with, and making maximum use of, established financial payments industry procedures and infrastructure;
- registry instrument⁶ preparation and lodgment practices independent of any Land Registry but accommodating of the requirements of all Land Registries;
- duty and tax payment practices independent of any Revenue Office but accommodating of the requirements of all Revenue Offices;
- a common standard for the electronic authentication of users whose certifications and signatures have to be relied upon in financial settlements and instrument registrations;
- a common format for the transmission of data to and from users, Land Registries and Revenue Offices;
- a single point of access and a common support infrastructure for users; and
- provision for users of varying sophistication, experience, technical competence and access requirement.

These principles are intended to secure the maximum possible utility, robustness and acceptance for NECS

⁵ Refer to the Glossary of terms (Section 9) for additional information and appendix for active role description of 'Users'.

in an environment characterised by long-standing practices, competing interests, market diversity, legislative constraints and public policy variations.

NECS Development Strategy

NECS is being developed with the intention of:

- minimum change to the long-standing concepts behind existing paper-based conveyancing and mortgage financing processes;
- maximum adoption of relevant and compatible concepts in existing jurisdiction business models;
- maximum adoption of relevant and compatible features and functions in the Victorian ECV system;
- maximum adoption of relevant and successful concepts from other electronic business environments;
- maximum utilisation of the common characteristics of relevant industry conditions and practices;
- maximum involvement of key stakeholder representatives in developing policies, systems and procedures; and
- avoidance of any concept, function or feature likely to preclude any jurisdiction or industry group from participating.

This approach is expected to secure maximum industry support and use by minimising the amount of change needing to be dealt with by jurisdictions and by industry participants in adopting NECS as their preferred way of completing conveyancing transactions and in readying their own facilities and practices to make maximum use of it.

Consistent Business Practices in NECS

The move to the electronic business environment of NECS represents the most significant change in industry practices in the last 150 years. The most significant of these changes is that in the main Transacting Parties will no longer sign the registry instruments that will change their registered interests in property. To accommodate this and other changes, the roles, relationships and responsibilities of many industry participants will need to evolve to facilitate the new way of working.

It is essential to the success of NECS that changes to legislation, business practices, risk allocations and controls are co-ordinated across all jurisdictions so that the outcomes deliver consistent business practices in all States and Territories.

The business practice change presented and discussed in this Consultation Paper is one critical to the effective deployment of NECS in NSW.

⁶ A registry instrument is also known as a “dealing” in NSW conveyancing.

Contents

1	Introduction	10
1.1	Certifications, evidence, and the ‘tell me don’t show me’ principle proposed for electronic conveyancing	10
1.2	Certifiers signing electronic instruments for a NECS Subscriber will provide certifications that each instrument complies with requirements	12
1.3	Context of this Consultation Paper	13
1.4	Commenting on this paper	15
2	Executive Summary	16
3	Specific questions for stakeholders	20
4	Background to Certification	22
4.1	Need for Instrument Certification	22
4.2	Current registry instrument certification requirements - New South Wales	23
4.3	Current registry instrument certifications requirements - other jurisdictions	24
4.4	Policy Principles for registry instrument certifications in NECS	24
4.5	Nationally consistent certifications	25
5	National Project Team position on Registry Instrument Certifications	27
6	How Registry Instrument Certifications will be used in NECS	27
6.1	How are the Certifications to be provided	27
6.2	Who can Certify a Registry Instrument and on whose behalf?	29
6.3	Effective Time of a Registry Instrument Certification	30
7	Risk issues and certifications, and consequences of an incorrect Certification	30
7.1	Risk Assessment of NECS	30
7.2	Current statutory positions in relation to an incorrect certification	31
7.3	Other consequences of an incorrect certification in NSW	32
8	Reliance on Registry Instrument Certifications	33
9	Glossary of terms	34
10	Source material	36
11	Appendix: Extract from National Business Model	37

1. Introduction

1.1 *Certifications, evidence, and the 'tell me don't show me' principle proposed for electronic conveyancing*

The most common form of conveyancing 'case' is one involving three registry instruments – Discharge of Mortgage, Transfer, and Mortgage. This form of case also typically involves four parties – the vendor, purchaser, outgoing mortgagee and incoming mortgagee. In the paper environment, it is common practice that each of these parties signs the instrument or instruments by which they are relinquishing or receiving an interest.

In the electronic conveyancing environment, it is intended that digital signatures on electronic instruments replace 'wet signatures' on paper instruments. The digital signature on an electronic instrument is made by a Certifier signing for the Subscriber who is acting for the Client. The signing process also requires that certifications are provided by the signing Certifier as to the correctness and compliance of the signed document, including the correctness and compliance of any supporting evidence required for the document.

The first of these NECS in NSW consultation papers outlined that where a Subscriber is to sign an instrument on behalf of a Client in using NECS, a real-property specific unequivocal form of Client Authorisation from the Client(s) to the Subscriber to effect digital signing of instruments on their behalf is required. The Client Authorisation documentation is therefore among the evidence documents required to support the correctness and compliance of an electronic instrument, and the effect of the certification in the instrument is to provide confidence to the other parties to a transaction, to NECS, the Land registry, and the community at large, that

- all necessary evidence to support an instrument exists,
- has been reviewed and is in good order, and
- that the instrument may correctly be registered to effect a change in recorded property interests without risk to the transaction participants, the community or the Torrens Assurance Fund.

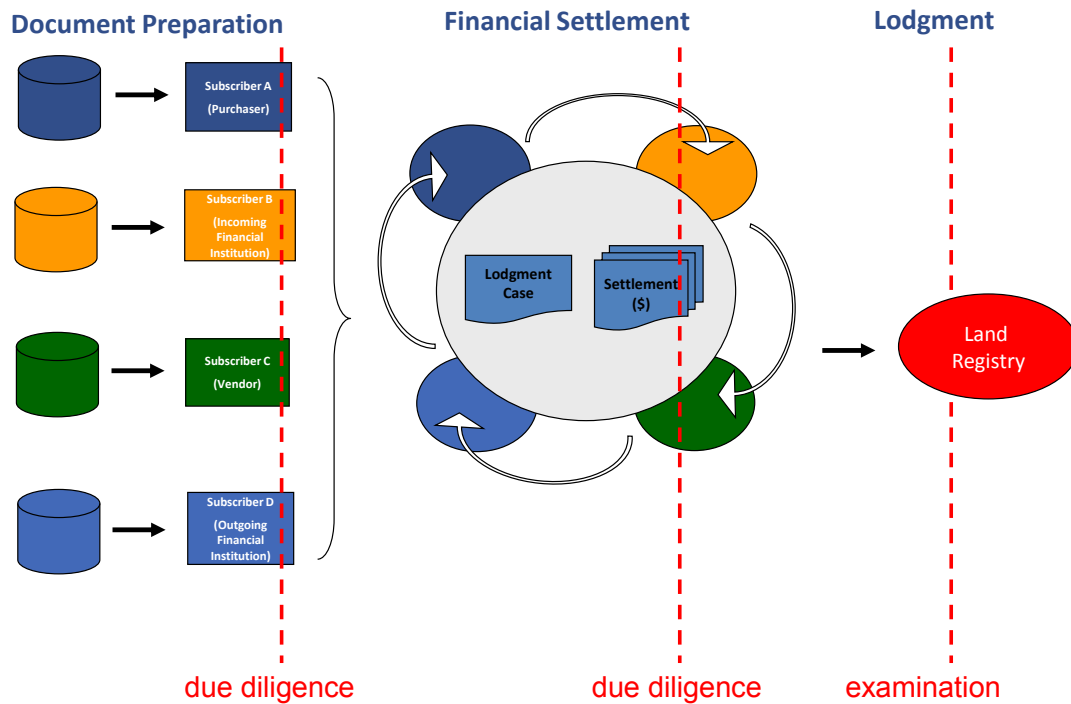
The move to electronic instruments signed by authorised Certifiers where Supporting Evidence stays with the Subscriber, rather than hard copy instruments signed directly by Transacting Parties where Supporting Evidence is submitted to the Land Registry, is a significant one.

Under the current paper-based conveyancing approach, instrument cases presented to Land Registries for examination and registration are accompanied by the evidence documents required to support the transaction. The most common forms of Supporting Evidence under current arrangements, apart from the Certificate of Title, include Statutory Declarations regarding change of name, and consent documents. In the electronic conveyancing environment the common forms of supporting evidence will include the Client Authorisation Agreement document(s) and evidence of compliance by the Subscriber with identity verification obligations⁷.

⁷ The Certificate of Title may also continue to be a common form of Supporting Evidence for electronic conveyancing transactions in NSW. Future practice and risk management arrangements in relation to the Certificate of Title are to be addressed in a future NECS in NSW consultation paper.

Under current arrangements for paper conveyancing, prior to presentation to the Land Registry for lodgment, Supporting Evidence is used by the legal or conveyancing practitioner(s) acting for a Transacting Party to inform the preparation and signing of instruments with which they are associated.

Figure 1: Due diligence review of evidence documents in paper-based Conveyancing.

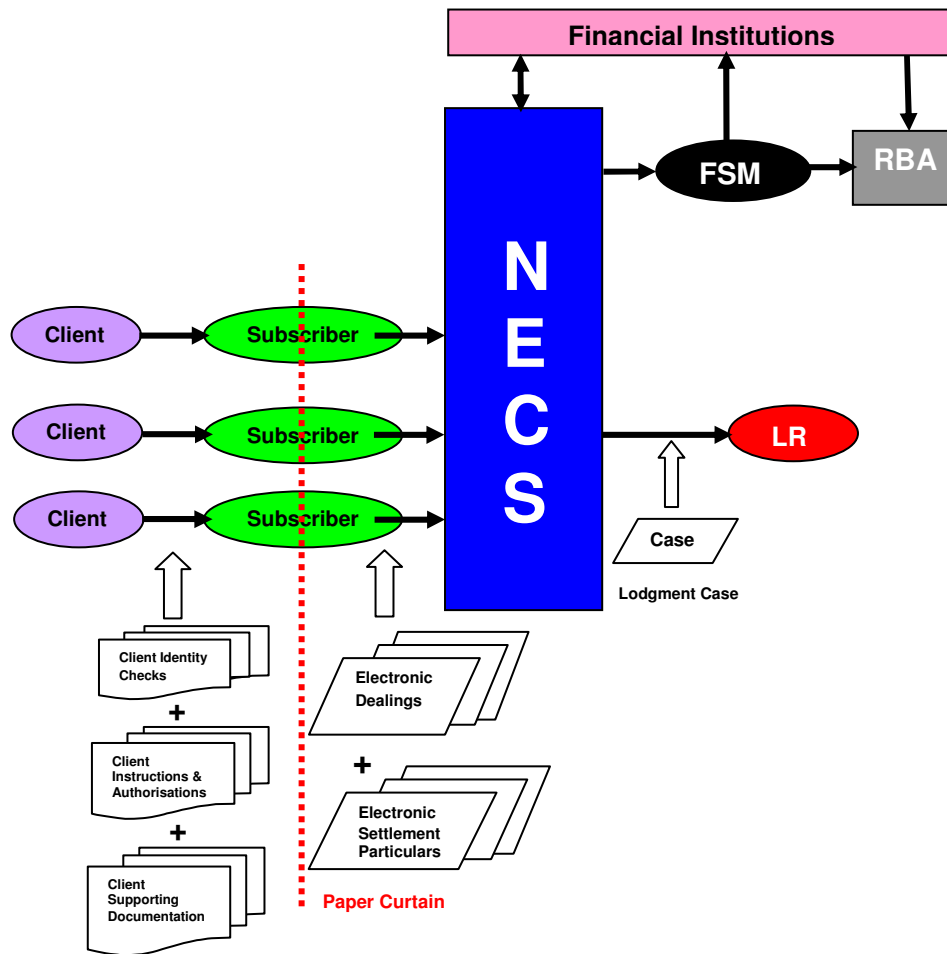


The documents comprising the paper-based lodgment case, including instruments and evidence documents, are reviewed for the transacting parties at settlement, with the Parties Receiving typically conducting a ‘lodgment acceptability check’ and determining whether to exchange cheques for instruments and other documents, based on whether the instruments and evidence comprising the case appear in good order for registration. The instruments and supporting evidence are presented to and then examined by the Land Registry, prior to registration or requisition.

For electronic conveyancing to achieve significant efficiencies, the approach proposed for adoption in Australia and in peer jurisdictions is to utilise the ‘tell-me-don’t-show-me’ principle. Where under current arrangements all the evidence to support a transaction is presented for review by the Land Registry as part of examination, for electronic conveyancing the evidence documents are to be reviewed for compliance and retained by the Subscriber. The Subscriber will be bound by legislation and NECS Participation Rule provisions to review and retain Supporting Evidence for a transaction, and provides to the Land Registry for registration signed electronic instrument(s) containing certifications as to the correctness and compliance of instrument(s) and Supporting Evidence.

The ‘tell-me-don’t-show-me’ principle creates an effective ‘paper curtain’ for an electronic conveyancing transaction, where the paper documents involved in the case are provided by the Transacting Party(s) to their Subscriber, but from the Subscriber onwards only electronic instruments are prepared, certified and signed, and presented for settlement and for lodgment for registration.

Figure 2: Supporting Evidence and the Paper Curtain.



From the perspective of the Land Registry, Subscribers ‘tell’ the Registrar what changes should be applied to the Land Title by lodgment of electronic instruments to effect the changes. They do not concurrently ‘show’ the Supporting Evidence to the Registrar to justify the changes. Hence, the ‘tell-me-don’t-show-me’ principle⁹.

1.2 Certifiers signing electronic instruments for a NECS Subscriber will provide certifications that each instrument complies with requirements

Instrument Certification is an important component of the risk management framework providing confidence to relying parties of the compliance assurance and veracity of registry instruments in a transaction. The legal requirement for certifications also creates the potential for liability of the party representing the certification as true to relying parties.

The process of certification is described in more detail in the NECS National Business Model – see the extract provided in selection 11, Source Material.

Instrument Certification is the process of:

- verifying compliance with prescribed requirements which the certification states have been complied with
- affirming the relevant certification statement as true

- signing to bind the Certifier to the certification that the prescribed requirements in the certification statement have been complied with for the registry instrument.

Currently in NSW, the party executing a registry instrument makes the certification that the instrument is 'Certified correct for the purposes of the Real Property Act 1900'. The witness makes a certification about the identity of the executing party by affirming the statement 'I certify that the [role name], with whom I am personally acquainted or as to whose identity I am otherwise satisfied, signed this [instrument name] in my presence'. These certifications are affirmed by the signing of the paper registry instrument.

The current certifications are a legal requirement in s117 of the Real Property Act 1900 which requires the two certificates of correctness for compliance for registration. S117 also states that 'Any person who falsely or negligently certifies to the correctness...' should incur a penalty and 'Such penalty shall not prevent the person who may have sustained any damage or loss in consequence of error or mistake in any such certified application, dealing or caveat from recovering damages against the person who has certified the same'.

In electronic conveyancing, Subscribers will be transacting in the electronic NECS environment as agent on behalf of their Client. The Client Authorisation Agreement¹⁰ will 'AUTHORISE'¹¹ the Subscriber to act as the agent in NECS of each Transacting Party making up the Subscriber's client to:

- (a) sign documents on the Transacting Party's behalf by affixing a digital signature to each document;
- (b) cause the documents to be lodged electronically for registration with the relevant Land Registry;
- (c) authorise any financial settlement involved in the Transaction to be effected, unless the Transacting Party instruct the Subscriber otherwise; and
- (d) do anything else necessary in NECS to complete the Transaction'.

The signing of instruments on behalf of the Transacting Party will be done by a Certifier on behalf of the Subscriber. The Certifier will therefore be required to conduct the necessary compliance assurance before affirming the certifications and signing the instrument to bind themselves and the Subscriber to the certifications.

This paper aims to provide stakeholders with an understanding of the concepts of Instrument Certification and seeks feedback on how Instrument Certification should be implemented.

1.3 Context of this Consultation Paper

Land and Property Information is developing and publishing a number of consultation papers and supporting information during 2009 and 2010, as part of a 'NECS in NSW' Readiness Program, to prepare and implement business practices, operational systems, legislation and stakeholder communication in

⁹The obligation for Subscribers to review and retain supporting evidence for electronic conveyancing transactions is related to the reliance that the other transacting parties, the Land Registry, and through the Land Registry the community at large, place upon the evidence as supporting and justifying changes to registration of estates or interests in Land effected by those transactions. While evidence documents are not presented to the Land Registry as part of a digital lodgment case, they may be required to be presented for review as part of practice compliance audit arrangements. The 'tell-me-don't-show-me' principle is applied to the lodgment activity, and does not imply that review, compliance and statutory retention of evidence for electronic conveyancing transactions is any less critical than for paper based conveyancing.

¹⁰ Refer to Glossary of terms (Section 9) for definition.

¹¹ The authorisation shown is an adaptation of the wording from the draft Client Authorisation agreement published to NECS stakeholders for road-testing at www.necs.gov.au.

NSW to support implementation of national electronic conveyancing by 2011. Consultation papers and supporting information may be downloaded from the Lands website at <http://necsnsw.lands.nsw.gov.au/home>.

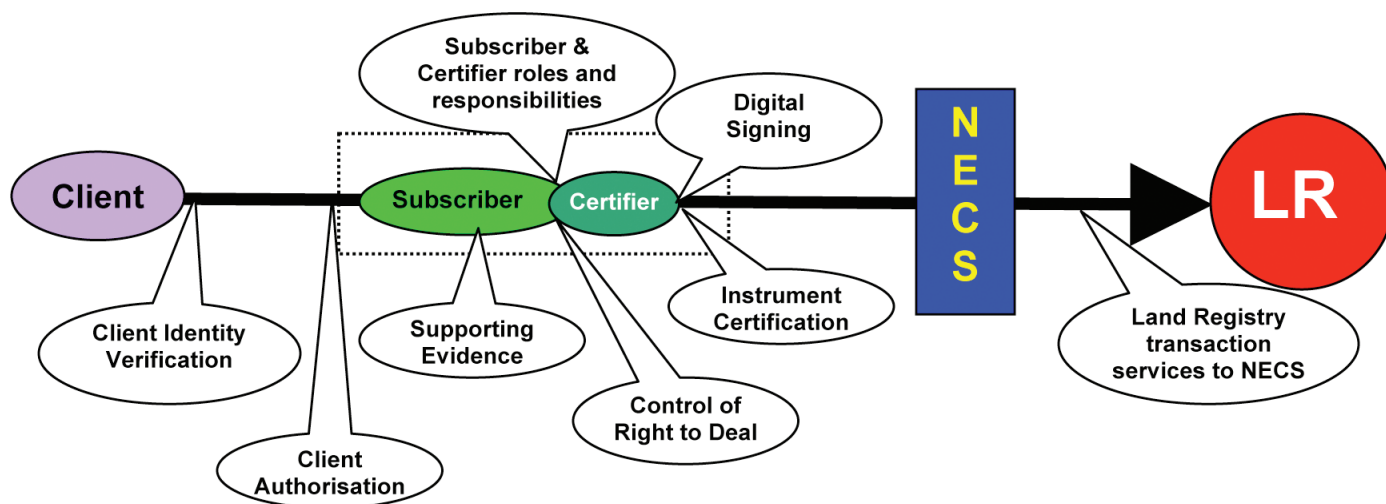
The following NECS transaction specification, business practice and implementation arrangement topics are expected to be addressed in the 'NECS in NSW' consultation program:

Client Authorisation Agreement for use of NECS	being the requirements of Subscribers to obtain written authority to represent a party to a transaction in the NECS. Published: http://necsnsw.lands.nsw.gov.au/industry_consultations_consultation_papers
Instrument Certifications	being the nature and extent of certifications required of Certifiers signing instruments prepared using the NECS and intended for lodgment with a Land Registry
Digital Signing arrangements	being the signing of electronic documents in the NECS by Certifiers using Digital Signatures
Subscribers and Certifiers Operational Roles and Responsibilities	being the requirements for the roles of Subscriber and Certifier set out in the National Business Model (NBM) for the NECS
Certificates of Title and Control of the Right to Deal	the means by which the right to deal in a land title is evidenced by the controlling party for a transaction in the NECS
Client Identity Verification practices	the requirements for Subscribers to identify parties to a NECS transaction
Supporting Evidence Requirements	being the documentation required to be obtained by Subscribers in support of instruments prepared using the NECS
Land Registry transaction services for the NECS workspace	details of the land involved in the transaction, equivalent to a Title Search, sourced from the Land Registry workspace validation, verification and lodgment acceptability check assurance services to be available in the NECS and their adequacy for assuring readiness of workspaces for transaction completion

NECS Role Relationships

The following diagram shows the roles and relationships most directly affected by the consultation paper topics:

Figure 3: NECS Role Relationships



1.4 Commenting on this paper

Comments are invited on any matter in this paper. Comments are specifically invited on the issues listed in section 3.

Comments on this paper should be sent to Land and Property Information by one of the following means:

Email:	NECSinNSW@lands.nsw.gov.au
Letter:	NECS in NSW Industry Consultation Feedback
	Land and Property Information
	GPO Box 15
	SYDNEY NSW 2001
	or
	DX 17
	SYDNEY
Telephone:	(02) 8236 7173 (8:30am to 4:30pm weekdays)

Comments on this paper are due by the 17th of December 2009

2 Executive Summary

2.1 *Certifiers signing Registry Instruments for a NECS Subscriber will provide certifications that each instrument complies with requirements (section 1)*

For electronic conveyancing to achieve significant efficiencies, the approach proposed for adoption in Australia and in peer jurisdictions is to utilise the 'tell-me-don't-show-me' principle. Where under current arrangements all the evidence to support a transaction is presented for review by the Land Registry as part of examination, for electronic conveyancing the evidence documents are to be reviewed and retained by the Subscriber. The Subscriber will be bound by legislation and NECS Participation Rule provisions to review and retain supporting evidence for a transaction, and provides to the other participants in a case – and to the Land Registry for registration - signed digital instrument(s) containing certifications as to the correctness and compliance of instrument(s) and supporting evidence. The certifications are made and the electronic instruments are digitally signed by a Certifier acting on behalf of the Subscriber.

Instrument Certification is an important component of the risk management framework providing confidence to relying parties of the compliance assurance and veracity of registry instruments in a transaction.

The process of certification is described in more detail in the NECS National Business Model – see the extract provided in section, Source Material.

2.2 *Need for Instrument Certification (section 4)*

In a NECS transaction, Transacting Parties will not themselves sign (or control the signing of) registry instruments (unless they are also a NECS Subscriber). Instead, the Transacting Party will engage a Subscriber to represent them. The Subscriber will use a Certifier to digitally sign registry instruments (and other reports and statements) on behalf of the Transacting Party.

Certifiers acting for a Subscriber sign registry instruments to be lodged with the Land Registry using NECS. Where the Subscriber is acting for themselves, for example a mortgagee signing a Discharge of Mortgage, the Certifier signs for the Subscriber. Where the Subscriber is acting for a Transacting Party, the Certifier signs for the Subscriber who is acting for the Transacting Party.

The purpose of an Instrument Certification is to provide confidence to all the parties involved in the transaction, to the community, to NECS, to the Land Registry and to other government agencies that relevant laws, practices and procedures have been complied with in relation to the transaction represented by the signed instrument(s)

Internationally recognised as a leader in land administration, the Land and Property Management Authority maintains a secure, efficient and guaranteed system of land ownership for NSW. The NSW Land Registry defines the legal ownership and boundaries of land parcels throughout the State, both private and public, and records changes as they occur.

The Torrens Title Register protects title to land by State Government guarantee and has operated since 1863. From property buying and selling to financing, the NSW Land Registry underpins billions of dollars of economic activity in NSW each year.

The Land Registry considers that certifications on registry instruments are vital in maintaining the integrity of the Torrens Title Register and confidence in the system of land ownership in NSW.

2.3 Who can certify a registry Instrument (section 6.2)

The assumption for the purposes of this consultation document is that there are to be two types of Certifiers who will be pre-registered with NECS¹²:

- **Industry Certifiers** are authorised legal practitioners or licensed conveyancers who certify and sign registry instruments on behalf of Subscribers acting for Transacting Parties. An Industry Certifier may be an employee of or a contractor to a Subscriber.
- **Restricted Certifiers** are delegated employees of a Subscriber who is acting for themselves in a transaction, for example, a mortgagee signing a Discharge of Mortgage. Restricted Certifiers need not be legal practitioners or licensed conveyancers but are restricted to certifying and signing registry instruments on behalf of their employer Subscriber.

2.4 Nationally consistent certifications (section 4.5)

The Land Registries in all States and Territories have recommended a consistent national practice where Instrument Certifications are required as to five areas of assurance in relation to a transaction and/or registry instrument in NECS:

- (i) the instrument is correct in the context of the transaction;
- (ii) the instrument is in compliance with all relevant legislation and the Land Registry's prescribed requirements;
- (iii) (where relevant) a Representative Subscriber has obtained a properly completed and signed Client Authorisation Agreement from each Transacting Party being represented by the Subscriber as its Client;
- (iv) (where relevant) a Representative Subscriber has properly conducted a Client Identity Verification of each Transacting Party who is the Subscriber's Client; and
- (v) the Subscriber has, in the approved manner, obtained, scrutinised and securely retained originals or copies of all Supporting Evidence required for the instrument (including, where relevant, originals of the Client Identity Verification documentation, and Client Authorisation Agreement).

2.5 National Project Team position on Registry Instrument certifications (section 5)

The National Project Team (**NPT**) is a group of key NECS stakeholders convened by NECO with members representing financial institutions, legal practitioners, licensed conveyancers, non bank lenders, information brokers, mortgage processors, liability insurers, Land Registries and Revenue Offices.

The NPT considered the Land Registries' proposals in February 2009 and resolved in support of the proposed certifications and implementation arrangements subject to review of the final wording of each certification statement.

¹² As at the date of this paper, the NECS National Project Team has not made recommendations in respect of minimum criteria for Subscribers and Certifiers in all jurisdictions. It is possible that a NPT recommendation may be made supporting minimum criteria applying either to the Subscriber or the Certifier to determine who can sign in a representative capacity.

2.6 How are the Instrument Certifications to be provided (section 6)

The first two certifications as to correctness and compliance apply to all instruments in all circumstances. Under the NECS Participation Rules¹³ a Certifier who digitally signs an instrument submitted through NECS for lodgment to a Land Registry will be taken to have certified that the instrument, within the knowledge and diligent enquiry of the Certifier;

- is correct in the context of the transaction; and
- is compliant with all relevant legislation and the Land Registry's prescribed requirements.

These certifications will not be specified within the text of the registry instrument to be signed but will arise from the Certifier's prior commitment to the NECS Participation Rules.

The other three certifications do not apply to all registry instruments in all circumstances and will appear, when relevant within the text of each registry instrument presented through NECS for lodgment. The Certifier signing the instrument must specifically certify, when relevant, as follows:

Aspect	Certification Statement (suggested wording)	Applicability
Identity	The Subscriber has properly carried out and securely retained records of the identity verification as prescribed by the Land Registry.	Only where applicable (i.e. where a Client Identity Verification is required)
Authority	The Subscriber holds a properly completed and signed Client Authorisation for the transaction as prescribed by the Land Registry.	Only where applicable (i.e. where a Client Authorisation is required)
Support	The Subscriber has obtained, verified, properly considered and securely retained originals or copies of all supporting evidence for the transaction and instrument as prescribed by the Land Registry.	On every instrument

The specific wording of these three certifications (where relevant) will be automatically formatted on registry instruments prepared using NECS for review, certification and signing by Certifiers. Certifiers will be required to positively affirm the correctness of the certification statements presented in the instrument and will not be able to sign the instrument until the affirmation has been given and recognised by the system. The Land Registry will not accept for lodgment any registry instrument for which the text of the certification statements has been changed or qualified.

The applicable certifications will form part of the registry instrument after signing, including any rendered copy of a registry instrument that forms part of the Torrens Title Register.

2.7 Instrument Certification relationship to Digital Signing (section 6)

Certification and digital signing work hand-in-hand to confirm the correctness of the information in an electronic registry instrument. The certifications are first affirmed by the Certifier, who then digitally signs the document. The signature is evidence of the affirmation of the certifications. Issues pertaining to digital signing and the types of digital signature best suited to NECS will be addressed in another NECS in NSW consultation document.

2.8 Risk issues and certifications and consequences of making an incorrect certification (section 7)

The instrument certifications are to be used to mitigate risks associated with the transaction. The Risk Assessment of NECS¹⁴ identified a number of risks relating to instrument certifications and the matters addressed by those certifications.

In NSW, section 117 of the Real Property Act 1900 provides that where a person falsely or negligently certifies to the correctness of any registry instrument, or where a witness falsely attests, that person shall incur a penalty¹⁵. The section also contemplates that a person who sustained damage or loss might have a cause of action against the person, although section 117 does not itself create a cause of action¹⁶. There is a separate offence in section 141 of fraudulently procuring a recording in the Torrens Title Register. It is intended that these provisions will apply to certifications provided in electronic instruments.

A person who suffers loss or damage as a result of relying on a false or negligent certification may have a cause of action against the Certifier who gave the certification, as they may have now against the certifying individual (such as a licensed conveyancer), and the Subscriber on whose behalf the Certifier acted. The elements of the relevant cause of action would need to be established by the plaintiff (for example, a duty of care in negligence and breach of the duty which causes a loss).¹⁷

The professional indemnity insurance consequences of an incorrect certification also need to be considered. For example, the LawCover professional indemnity policy denies indemnity to an insured law practice when the claim arises from any dishonest or fraudulent act or omission of a sole practitioner, partner or officer of the law practice, whether directly or indirectly.

In addition, making an incorrect certification might constitute grounds for suspension or termination of the Certifier's and/or the Subscriber's registration to use NECS, generally, or in the relevant jurisdiction. Sanctions and administration of penalties for false or incorrect certifications in NECS will be determined by the NECS Participation Rules which remain to be developed.¹⁸

2.9 Reliance on Registry Instrument Certifications (section 8)

Prior to lodgment the Certifications made in a registry instrument in the NECS would only be visible within the NECS environment where certifications may be viewed and relied on by parties potentially including other Subscribers in a transaction, the Client(s) of those Subscribers, the NECS Operator, and a Land Registry or other government agency, where provided access.

The Land Registry relies on the certifications at lodgment. After lodgment, the Certifications made in a registry instrument may be available to any party through the Land Registry where a request is made for a copy of an unregistered instrument.

After registration of a registry instrument, the instrument becomes part of the Torrens Register and is

publicly available and stands as an assertion of the correctness of the matters certified.

LPMA seeks comment on who can rely on instrument certifications before and after lodgment and registration and for what purpose.

3 Specific questions for stakeholders

Comment is invited on any matter in this paper. Comment is specifically invited on the following issues, which are repeated in their relevant context in the body of this paper.

Issue 1 – Policy Principles

- 1.1 Are these the right policy principles to achieve transaction assurance, community confidence, and to maintain the integrity of the Torrens Title Register?
- 1.2 If not, what changes to the principles should be considered, and why?

Issue 2 – Certification content

- 2.1 Are the 5 proposed subject categories for certifications sufficient to provide assurance in relation to signed instruments?
- 2.2 Is the proposed wording of the certifications appropriate?
- 2.3 If not, why not and what changes are necessary?
- 2.4 Should there be an additional certification which affirms that the instrument reflects the intentions of each of the Transacting Parties making up the Subscriber's Client?

Issue 3 – Certifications embedded in Participation Rules

- 3.1 Is it appropriate that certifications about correctness and compliance are implied in instruments by the NECS Participation Rules?
- 3.2 Alternatively, should all relevant certifications be expressly provided in each instrument, and why?

Issue 4 – Certifications in Instruments

- 4.1 Should the certifications expressly provided in each instrument be:
 - individually acknowledged on the instrument?
 - acknowledged as a group?
 - implied by signing the instrument without a specific affirmation?

¹³Participation Rules: means a common set of policies, procedures, requirements and undertakings committed to by each Subscriber and Certifier prior to their first use of NECS.

¹⁴ Clayton Utz, "Risk Assessment of the National Electronic Conveyancing System" (2007) located at [http://www.necs.gov.au/ArticleDocuments/Final%20Report%20of%20Clayton%20Utz%20-%203%20Volumes%20%20\(Risk%20Assessment\).pdf.aspx](http://www.necs.gov.au/ArticleDocuments/Final%20Report%20of%20Clayton%20Utz%20-%203%20Volumes%20%20(Risk%20Assessment).pdf.aspx) viewed on 2 June 2009.

¹⁵ Real Property Act 1900 (NSW) ss 117(2) and (3). The penalty is up to \$110.

¹⁶ Chandra v Perpetual Trustees Victoria Ltd (2007) Aust Torts Reports 81-896 at [135].

¹⁷ The possible loss scenarios are complex. A party receiving an interest in land who relies on a false certification by the relinquishing party's Certifier may not suffer loss if they become registered and gain an indefeasible interest. But there may be a loss if they have paid money but not obtained registration. Where a digital signature was created without the authority of a Certifier or Subscriber there is an issue of attribution of the signature which will be dealt with in the Digital Signing consultation paper.

Issue 5 – Effective Time of an Instrument Certification

- 5.1 Are there any reasons why certifications should not be considered to be effective at the time the registry instrument is signed and to remain so until the instrument is lodged with the Land Registry?
- 5.2 Should there be a specific obligation in the Participation Rules on the Subscriber to ensure that matters covered by the certifications remain true at the time of settlement and/or lodgment? If so why, and if not why not?

Issue 6 – Loss events and claims (section 6.1)

- 6.1 Should there be specific provision for loss suffered in a transaction where instrument certification(s) are:
- incorrectly provided
 - not supported by required evidence

or should existing remedies apply?

Issue 7- Statutory Penalty for a False or Negligent Certification

- 7.1 Should a penalty regime (e.g. section 117 (2) and (3) of the NSW Real Property Act 1900) apply to instrument certifications for NECS transactions where the instrument is lodged in NSW
- 7.2 Is the quantum of penalty in section 117 a sufficient and effective deterrent? If not, what should the penalty be and why?

Issue 8 - Other Consequences for a False or Negligent Certification

- 8.1 What should the potential civil liability of a Subscriber (or Certifier) be in respect of a false or negligent instrument certification? Does this need to be clarified in legislation and/or the NECS Participation Rules?
- 8.2 Should false or negligent certifications constitute professional misconduct and be grounds for suspension or termination of a registered legal practitioner's or conveyancer's practising certificate?

Issue 9 - Reliance on registry instrument certifications

- 9.1 Who (if anyone) should be able to rely on the certifications in a signed registry instrument:
- (a) prior to lodgment and for what purposes? and
 - (b) on and from lodgment and for what purposes?
- 9.2 Prior to lodgment should a registry instrument certification be treated as an affirmation to the world, or as a limited affirmation only to other Subscribers in the same transaction workspace, to NECS and to the Land Registry?
- 9.3 Should legislation and/or the NECS Participation Rules clarify any of the above issues and if so, how?

¹⁸ In the Victorian ECV system, the Registrar may terminate or suspend a Subscriber's registration for cause to be specified in a notice by the Registrar. An incorrect certification might, in some cases, be such a cause.

4 Background to Certification

4.1 Need for Instrument Certification

In NECS an electronic registry instrument is prepared and digitally signed on behalf of the Client before lodgment with the Land Registry. The registry instrument template will contain the certification statements required by the Land Registry and which must be affirmed by the Certifier for the Subscriber at the time of signing.

The purpose of a certification in relation to a registry instrument is to provide confidence to relying parties involved in a transaction, to the community, to NECS, to the Land Registry and to other government agencies that relevant laws, practices and procedures have been complied with in relation to the transaction represented by the signed instrument(s). The Certification relates to what the Subscriber has done in conducting the transaction in compliance with prescribed requirements.

The certifications are made and become binding at the time of digital signing by the Certifier. The digital signature identifies both the Certifier who signed and the Subscriber on whose behalf the instrument was signed.

In the paper conveyancing environment, it is common practice for Transacting Parties such as purchasers, vendors and mortgagees to sign the instrument by which they are relinquishing or receiving an interest.

In the electronic conveyancing environment, it is intended that digital signatures on electronic instruments replace 'wet signatures' on paper instruments. The digital signature on an electronic instrument is given on behalf of all the Transacting Parties making up the Client being represented by the Subscriber and has equivalent effect to signing a paper instrument.

The signature of each Transacting Party to a transaction is captured on a Client Authorisation Agreement, which provides authority for the Subscriber to complete and sign registry instruments on behalf of the Transacting Party. The certifications associated with an instrument, and affirmed and signed by a Certifier for the Subscriber, are the principal means by which assurance is provided that the relevant legal requirements in relation to the transaction have been complied with, and that an authorisation to sign on behalf of the Transacting Party has been obtained and is in good order.

NSW Land Registry therefore considers that certifications made in instruments lodged for registration are a vital component in maintaining the integrity of the Torrens Title Register. For Land Registries to be satisfied that the required compliance outcome has been achieved, they need to be assured that:

- all relevant business practices have been properly undertaken by the Subscriber
- all supporting evidence required for the instrument has been obtained and scrutinised, and copies of all supporting evidence for the instrument (including, where relevant, Client Identity Verification documentation and the Client Authorisation Agreement) have been retained by the Subscriber
- the certifications are made by a Certifier authorised to sign the instrument.

From a Land Registry perspective these are the principal purposes of the Certifier making certifications in relation to electronic instruments.

The scope of certifications required in electronic conveyancing is greater than currently required for paper-based instruments because of the need for:

- 4.1.1** Subscribers to represent and sign for Transacting Parties in transactions, especially in the relinquishing role where the Transacting Party or their attorney is required to execute instruments in that role, and
- 4.1.2** The “Tell-me-don’t-show-me” principle that applies for electronic conveyancing where the Subscriber is accountable for compliance assurance of supporting evidence rather than the supporting documentation being submitted to the Land Registry with the lodgment case.

The scope of certifications necessary for electronic instruments is identified by the Land Registry as:

1. **Correctness:** - meaning the instrument is, within the Certifier’s knowledge and diligent enquiry, correct in the context of the transaction.
2. **Compliance:** - meaning the instrument is in compliance with all relevant legislation and the Land Registry’s prescribed requirements.
3. **Identity:** - meaning the Subscriber has properly conducted a Client Identity Verification of each Transacting Party who is making up the Subscriber’s Client.
4. **Authority:** - meaning the Subscriber has obtained a properly completed and signed Client Authorisation from each transacting party who is the Subscriber’s Client.
5. **Support:** - meaning the Subscriber has obtained, scrutinised and retained copies of all supporting evidence for the instrument (including, where relevant, the Client Identity Verification documentation and the Client Authorisation Agreement).

The nature and extent of the five certifications provided on signed electronic instruments lodged with Land Registries or given by acceptance of the Participation Rules are a critical part of the risk management framework intended to provide:

- confidence generally for all participants engaged in electronic conveyancing using NECS;
- confidence for relying industry participants and transacting parties in particular transactions completed using NECS; and
- continuing confidence for the community in conveyancing practices and procedures generally and the integrity of land title registers.

4.2 Current registry instrument certification requirements - New South Wales

The Registrar-General requires the following certifications before registering a registry instrument:

- a certification (signed by or on behalf of each person by whom the instrument has been executed) to the effect that the instrument is correct for the purposes of the Real Property Act, and
- a certification (signed by each witness to the execution of the instrument) to the effect that:
- the witness is personally acquainted with, or is otherwise satisfied as to the identity of the person who’s execution of the instrument the witness is attesting; and
- the execution by that person of the instrument took place in the presence of the witness¹⁹.

Note: un-commenced amendments to Section 117 impose additional requirements for attesting

witnesses in NSW. Where the witness has not known the signing party for in excess of 12 months they will be required to take reasonable steps to ensure the identity of the signing party. The attesting witness will be considered to have taken reasonable steps if they comply with a prescribed process.

4.3 Current registry instrument certifications requirements - other jurisdictions

In South Australia, the Registrar-General will not accept any registry instrument purporting to deal with or affect land, unless it is endorsed by a certificate stating the instrument is correct for the purposes of the Real Property Act 1886 (SA) and is signed by the applicant or party claiming under or in respect of such instrument, or by a solicitor, or licensed land broker²⁰.

In Victoria, the Registrar has determined under section 44K of the Transfer of Land Act 1958 (Vic) that certain matters relating to electronic instruments must be certified by the Subscribers. These include 10 different (but similar) certifications for discharges of mortgage, transfers, mortgages, applications by surviving proprietors, caveats, withdrawal of caveats and controllers of Certificates of Title²¹.

In Queensland, Western Australia, Tasmania, Northern Territory, Australian Capital Territory and Victoria no certification is required on a paper transfer or mortgage instrument stating the instrument is correct for the purposes of the relevant State or Territory land Act.

In Queensland, the transferor declares and the transferee states in a transfer instrument that certain information attached to the transfer instrument is true and correct. In Tasmania, there is a declaration that information on the Notice of Sale Form which accompanies a transfer instrument is correct.

4.4 Policy Principles for registry instrument certifications in NECS

Through LPMA's discussions with other Australian Land Registries the following ten principles have been identified to guide implementation of registry instrument certifications (IC) in NECS. A rationale is provided for each principle.

1	IC is not to contain any jurisdiction-specific characteristics. <ul style="list-style-type: none"> • This is necessary to achieve one set of wordings for use in all jurisdictions.
2	IC is not to contain any instrument-specific characteristics. <ul style="list-style-type: none"> • This is necessary to limit the number of different certification wordings encountered by Certifiers.
3	The use of IC is to be enforced by reference to a consistent statutory power to set requirements in each jurisdiction. <ul style="list-style-type: none"> • This ensures there is an identifiable statutory means of enforcing provision of certifications and an available sanction in the event of non-compliance.
4	IC is to be provided as part of the instrument to which they refer. <ul style="list-style-type: none"> • This is necessary to ensure an unequivocal connection between the certification and the instrument.
5	IC is to be completed by the Certifier immediately prior to instrument signing. <ul style="list-style-type: none"> • This is necessary to securely and unequivocally bind the certification to the Certifier who signs the instrument.

6	IC is to be provided by a Certifier contracted to the Subscriber being or representing the transacting party. <ul style="list-style-type: none"> • This is necessary to bind the certification to the transacting party
7	IC is to confirm that the identity of the Client has been verified. <ul style="list-style-type: none"> • This is necessary to ensure that a Client Identity Verification has been undertaken in the prescribed manner and all necessary records of the verification have been made and securely retained.
8	IC is to confirm that a properly completed and signed CA has been obtained. <ul style="list-style-type: none"> • This is necessary to ensure that a properly completed, relevant and unrevoked Client Authorisation for the transaction has been obtained from the Client and securely retained.
9	IC is to certify that all prescribed evidence necessary to support the instrument has been obtained, perused, found to be in proper order and securely retained. <ul style="list-style-type: none"> • This is necessary to ensure that all prescribed items of supporting evidence for the instrument have been obtained and securely retained, i.e. "tell me, don't show me".
10	IC is to certify that, to the best of the Certifier's knowledge at the time, the instrument complies with all prescribed requirements. <ul style="list-style-type: none"> • This is necessary to ensure that best use is made of the skill and experience of industry practitioners

Issue 1 – Policy Principles

- 1.1 Are these the right policy principles to achieve transaction assurance, community confidence, and to maintain the integrity of the Torrens Title Register?
- 1.2 If not, what changes to the principles should be considered, and why?

4.5 *Nationally consistent certifications*

Applying the above principles, all Land Registries have reached the view that:

- certifications are required for five aspects of a transaction and/or instrument in NECS
- nationally consistent certification statements are achievable
- five certifications should be implemented, two through the NECS Participation Rules and three on each instrument.

The proposal made by the Land Registries is summarised as follows.

- The Participation Rules for NECS should include an obligation on all Subscribers and Certifiers to ensure that all instruments submitted for lodgment to the Land Registry are, within the Certifier's knowledge and diligent enquiry:
 - o correct in the context of the transaction, and
 - o compliant with all relevant legislation and the Land Registry's prescribed requirements
and deem each signed instrument to be lodged with those two certifications

- Each registry instrument will contain up to three additional written certifications (as relevant) as follows

Aspect	Certification Statement (suggested wording)	Applicability
Identity	The Subscriber has properly carried out and securely retained records of the identity verification as prescribed by the Land Registry.	Only where applicable (i.e. where a Client Identity Verification is required)
Authority	The Subscriber holds a properly completed and signed Client Authorisation for the transaction as prescribed by the Land Registry.	Only where applicable (i.e. where a Client Authorisation is required)
Support	The Subscriber has obtained, verified, properly considered and securely retained originals or copies of all supporting evidence for the transaction and instrument as prescribed by the Land Registry.	On every instrument

These certifications are intended to provide maximum confidence in the process of electronic conveyancing using NECS among industry participants, transacting parties and the community generally.

The Land Registries considered the first two certifications as to correctness and compliance to be generally applicable to all registry instruments, and can be included through the Participation Rules.

The remaining three certifications are considered to be instrument specific and must be applied when relevant in each instrument.

Issue 2 – Certification content

- 2.1 Are the 5 proposed subject categories for certifications sufficient to provide assurance in relation to signed instruments?
- 2.2 Is the proposed wording of the certifications appropriate?
- 2.3 If not, why not and what changes are necessary?
- 2.4 Should there be an additional certification which affirms that the instrument reflects the intentions of each of the Transacting Parties making up the Subscriber's Client?

¹⁹ Real Property Act 1900 (NSW) s 117.

²⁰ Real Property Act 1886 (SA) s 273(1).

²¹ Victorian Government Gazette No. S 280 (20 October 2008) pp 9-14.

5 National Project Team position on Registry Instrument Certifications

The National Project Team (**NPT**) is a group of key NECS stakeholders convened by NECO with members representing financial institutions, legal practitioners, licensed conveyancers, non bank lenders, information brokers, mortgage processors, liability insurers, Land Registries and Revenue Offices. See www.necs.gov.au/National-Project-Team/default.aspx.

The Land Registries proposed that:

- the two certifications concerning correctness of information and compliance with legal requirements could be considered general certifications, and be effected through the NECS Participation Rules; and
- the three other instrument-specific certifications be effected through inclusion in registry instrument templates, in respect of compliance with Client Authorisation, Client Identity Verification and Supporting Evidence requirements.

The NPT considered the Land Registries' proposals in February 2009 and resolved in support of the proposed certifications and implementation arrangements subject to review in due course of the final wording of each certification statement.

The Issues Paper on Instrument Certifications considered by the NPT is available from the NECS website at <http://www.necs.gov.au/National-Project-Team/default.aspx>

6 How Registry Instrument Certifications will be used in NECS

6.1 *How are the Certifications to be provided*

6.1.1 *Certifications in the Participation Rules*

Two certifications, as to correctness and compliance, apply to all instruments in all circumstances and will be provided in a manner that ensures they don't have to be specifically provided on each instrument. All Land Registries have reached a view that these certifications should be implied into each instrument by the NECS Participation Rules.

The NECS Participation Rules will include an undertaking from all Subscribers and Certifiers to ensure that all instruments submitted for lodgment to a Land Registry are correct in the context of the transaction and compliant with all relevant legislation and the Land Registry's prescribed requirements. This undertaking would be given by the Subscriber and each of their Certifiers at the time of their applying for registration to use NECS and would be taken under the Participation Rules to apply to every use they make of NECS to submit an instrument for lodgment.

In particular, a Certifier who digitally signs an instrument submitted through NECS for lodgment to a Land Registry will be taken to have made certifications as to:

- Correctness
- Compliance

The signing of the instrument by the Certifier binds the Certifier and the Subscriber to the certifications committed to in the NECS Participation Rules.

Issue 3 – Certifications embedded in Participation Rules

- 3.1 Is it appropriate that certifications about correctness and compliance are implied in instruments by the NECS Participation Rules?
- 3.2 Alternatively, should all relevant certifications be expressly provided in each instrument, and if so, why?

6.1.2 Certifications on the Registry Instruments

When relevant, on each registry instrument submitted through NECS for lodgment the signing Certifier must specifically certify as to three aspects as follows:

- Identity
- Authority
- Support

Each jurisdiction is to include the three agreed common certification wordings in its registry instrument templates for NECS. The specific wording (where relevant) of these three certifications will be included in the instrument and will be presented for review, affirmation and subsequent signing of the registry instrument by the Certifier(s).

The certifications may be affirmed in a number of ways. The options are:

- deemed to have been made by digitally signing the registry instrument
- affirmed as a group (e.g. by ticking a single box for all certifications)
- affirmed individually (e.g. by ticking a separate box for each certification).

LPMA's view is that Certifiers should be required to positively affirm as a group the certification statements presented in the instrument (for example by ticking a single box on a screen representation of the instrument) and, when the instrument is digitally signed the certifications are made. A Certifier should not be able to digitally sign any instrument until the affirmation of the certification statements has been given and recognised by the system.

The Land Registry will not accept for lodgment any instrument for which the text of the certification statements has been changed or qualified.

6.1.3 Instrument Certification relationship to Digital Signing

Certification and digital signing work hand-in-hand to confirm the correctness of the information in an electronic registry instrument counterpart, report or settlement statement. The certifications are first affirmed by the Certifier, who then digitally signs the document. The signature is evidence of the affirmation of the certifications. Issues pertaining to digital signing and the types of DSC best suited to NECS will be addressed in another NECS in NSW consultation document.

Issue 4 – Certifications in Instruments

4.1 Should the certifications expressly provided in each instrument be:

- individually acknowledged on the instrument?
- acknowledged as a group?
- implied by signing the instrument without a specific affirmation?

6.2 *Who can Certify a Registry Instrument and on whose behalf?*

The assumption for the purposes of this consultation document is that there are to be two types of Certifiers who will be pre-registered with NECS²².

- **Industry Certifiers** are authorised legal practitioners or licensed conveyancers who certify and sign registry instruments on behalf of Subscribers acting for Transacting Parties. An Industry Certifier may be an employee of or a contractor to a Subscriber^{22x}.
- **Restricted Certifiers** are delegated employees of a Subscriber who is acting for themselves in a transaction, for example, a mortgagee signing a Discharge of Mortgage. Restricted Certifiers need not be legal practitioners or licensed conveyancers but are restricted to certifying and signing registry instruments on behalf of their employer Subscriber.

In the National Business Model a Certifier, acting for a Subscriber, makes the relevant certifications and does so on behalf of the Subscriber. Certifiers are persons employed by or contracted to a Subscriber and authorised by that Subscriber to certify and sign registry instruments on their behalf using a digital signature.

The Certifier certifies, on behalf of the Subscriber, that an instrument submitted for lodgment is, to the Certifier's knowledge and diligent inquiry, correct in the context of the transaction and compliant with all relevant legislation and Land Registry requirements. The Certifier also certifies that the Subscriber has properly carried out Client Identity Verification and holds a signed Client Authorisation Agreement (where relevant) and has supporting evidence of those and other prescribed aspects of the transaction and instrument.

²² The National Project Team has considered issues associated with 'Industry Certifiers' and 'Restricted Certifiers' and who should be authorised to sign which document types in which circumstances. While some scenarios remain to be agreed, the NPT has provisionally resolved

- to allow Subscribers who are conveyancing industry regulated (ie legal practices or legal practitioners and licensed conveyancer practices or licensed conveyancers) to use supervised employees who are not regulated persons as Certifiers. This clarification provides greater flexibility for legal and conveyancer practices while still ensuring the involvement of conveyancing practitioners in all transactions; and

- that when the Subscriber is representing an independent Client as transacting party and the Subscriber is not a conveyancing industry regulated entity, the Subscriber must use a Certifier who is conveyancing industry regulated (ie a legal practitioner or licensed conveyancer) irrespective of whether the Certifier is an employee of the Subscriber or a contractor to the Subscriber.

National Project Team issue papers may be viewed on the NECS website at www.necs.gov.au/Issue-Papers/default.aspx.

^{22x} As at the date of this paper, the NECS National Project Team has not made recommendations in respect of minimum criteria for Subscribers and Certifiers in all jurisdictions. It is possible that a NPT recommendation may be made supporting minimum criteria applying either to the Subscriber or the Certifier to determine who can sign in a representative capacity.

6.3 *Effective Time of a Registry Instrument Certification*

A Certification in a registry instrument is an affirmation that is made at the time of signing and may be considered to be effective immediately upon signing.

In the event of a Subscriber (or Certifier) wishing to withdraw a Certification:

- where settlement has not completed or a lodgment not made, a Certifier or Subscriber may take action in NECS to un-sign a document, or
- where a matter has settled or a lodgment case has been lodged with the Land Registry, and it is not possible for the document to be un-signed in NECS, it is the responsibility of the Subscriber to identify and pursue relevant remedial action.

Issue 5 – Effective Time of a Registry Instrument Certification

- 5.1 Are there any reasons why certifications should not be considered to be effective at the time the registry instrument is signed and to remain so until the instrument is lodged?
- 5.2 Should there be a specific obligation in the Participation Rules on the Subscriber to ensure that matters covered by the certifications remain true at the time of settlement and/or lodgment? If so why, and if not why not?

7 Risk issues and certifications, and consequences of an incorrect Certification

7.1 Risk Assessment of NECS

The instrument certifications are to be used to mitigate risks associated with the transaction. The Risk Assessment of NECS identified a number of risks relating to instrument certifications and the matters addressed by those certifications.

Risks related to the matters to be certified include:

- the risk of a Subscriber or Certifier not having sufficient authority to act as agent of a Transacting Party because:
 - o a representative of a Transacting Party signing the instrument certifications (e.g. under Power of Attorney or on behalf of a company Transacting Party) signs without proper authorisation from the Transacting Party;
 - o a Transacting Party limits their Subscriber's authority to certain acts and the Subscriber exceeds that authority;
- the risk that a Subscriber fails to conduct the prescribed Client Identity Verification process and as a result there is;
 - o no verification of the Transacting Party(s) identity(s); or
 - o a non-compliant Client Identity Verification process, so that identity fraud is not detected;

- the risk of a Subscriber (or Certifier) either not properly undertaking checks of supporting documentation, or not having the experience or skills to ensure that supporting documentation is satisfactory;
- the risk that a Subscriber fails to mandate appropriate internal processes or fails to keep accurate records of Client Authorisation, including supporting documentation such as a Representation Agreement and (where relevant) Power of Attorney.

Risks directly related to the role of the Certifier include the risk that a Certifier:

- prepares and signs instruments without the authority of the registered proprietor (e.g. creates an entirely fictitious transfer and mortgages an unencumbered interest without the registered proprietor's knowledge and absconds with funds);
- is suspended by the relevant regulator but is still able to sign instruments, and does so fraudulently;
- manipulates existing information in a NECS workspace for their own benefit (e.g. specifies their own account for receipt of funds);
- through carelessness or otherwise, has information allowing the use of their NECS access and digital signature stolen and used by a third party who commits fraud.

Issue 6 – Loss events and claims (section 6.1)

6.1 Should there be specific provision for loss suffered in a transaction where instrument certification(s) are:

- incorrectly provided
- not supported by required evidence

or should existing remedies apply?

7.2 Current statutory positions in relation to an incorrect certification

In NSW, section 117 of the Real Property Act 1900 provides that where a person falsely or negligently certifies to the correctness of any registry instrument or where a witness falsely attests, that person shall incur a penalty and may also be liable for any consequent loss or damage suffered by a person²³. Note that the section contemplates that a person who sustained damage or loss might have a cause of action, but section 117 does not itself create a cause of action²⁴. There is a separate offence in section 141 of fraudulently procuring a recording in the Torrens Title Register.

In South Australia a false or negligent certification to the correctness of any application attracts a penalty of \$5,000²⁵. This penalty does not prevent any party sustaining damage or loss in consequence of the false or negligent certification from recovering damages against the certifier²⁶. In addition anyone who wilfully and fraudulently makes any false statement in any application to bring land under the provisions of this Act, or in any application to be registered as proprietor, whether in possession, reversion, remainder, or otherwise on a transmission, or in any other application to be registered under the Act as proprietor of any land, or any estate or interest in any land is guilty of an indictable offence. The penalty is \$40,000 or imprisonment for 10 years²⁷.

In Victoria there does not appear to be a specific offence of making a false or negligent certification in e-conveyancing. There is a potentially relevant separate offence of wilfully making a false statement or knowingly misleading or deceiving a person authorised to require information in respect of any land in a dealing²⁸.

Issue 7- Statutory Penalty for a False or Negligent Certification

- 7.1 Should a penalty regime (e.g. section 117 (2) and (3) of the NSW Real Property Act 1900) apply to instrument certifications for NECS transactions where the instrument is lodged in NSW?
- 7.2 Is the quantum of penalty in section 117 a sufficient and effective deterrent? If not what should the penalty be and why?

7.3 *Other consequences of an incorrect certification in NSW*

In NECS, a person who suffers loss or damage as a result of relying on a false or negligent certification may have a cause of action against the Certifier and Subscriber as they may have now against the certifying individual (such as a licensed conveyancer) and the conveyancing firm which employed the individual conveyancer who made the certification. The elements of the relevant cause of action would need to be established by the plaintiff (for example, a duty of care in negligence and breach of the duty which causes a loss)²⁹.

The professional indemnity insurance consequences of an incorrect certification also need to be considered. In NSW, the LawCover professional indemnity policy denies indemnity to an insured law practice when the claim arises from any dishonest or fraudulent act or omission of a sole practitioner, partner or officer of the law practice, whether directly or indirectly. In addition, the Legal Practitioners Liability Committee's professional indemnity insurance policy (which is used by some NSW law firms) holds an insured liable for losses arising from a false representation, including by way of a certificate. Where the insured permits (whether knowingly or recklessly) the making of a representation by way of a certificate (including an acknowledgment or other document) which was known at the time it was made to be false, the insured must indemnify the insurer for the amount paid or payable by the insurer arising from such representation³⁰.

In addition, making an incorrect certification might constitute grounds for suspension or termination of the Certifier's or the Subscriber's registration to use NECS in NSW. This will depend on the content of the Participation Rules which are yet to be developed, and potentially on any jurisdiction-based Certifier accreditation requirements³¹.

²³ Real Property Act 1900 (NSW) ss 117(2) and (3). The penalty is up to \$110.

²⁴ Chandra v Perpetual Trustees Victoria Ltd (2007) Aust Torts Reports 81-896 at [135].

²⁵ Real Property Act 1886 (SA) s 232.

²⁶ Real Property Act 1886 (SA) s 232. "Any person who shall falsely or negligently certify to the correctness of any application or instrument under this Act shall incur therefore a penalty not exceeding five thousand dollars; but such penalty shall not prevent any person sustaining loss or damage in consequence of error or mistake in any such application or instrument from recovering damages against the person who shall have certified the same."

²⁷ Real Property Act 1886 (SA) s 233.

Issue 8 - Other Consequences for a False or Negligent Certification

- 8.1 What should the potential civil liability of a Subscriber (or Certifier) be in respect of a false or negligent instrument certification? Does this need to be clarified in legislation and/or the NECS Participation Rules?
- 8.2 Should false or negligent certifications constitute professional misconduct and be grounds for suspension or termination of a registered legal practitioner's or conveyancer's practising certificate?

8 Reliance on Registry Instrument Certifications

LPMA seeks comment on whether, once a certification is made (at the time the instrument is digitally signed), it is open to any party to whom that certification is visible to rely on the certification.

Prior to lodgment the certifications made in a registry instrument in NECS would only be visible within the NECS environment where the certifications may be viewed and relied on by parties potentially including other Subscribers in a transaction, the Client(s) of those Subscribers, NECS, and a Land Registry or other government agency, where provided access.

The Land Registry relies on the certifications at lodgment. After lodgment, the certifications made in a registry instrument may be available to any party through the Land Registry where a request is made for a copy of an unregistered instrument.

After registration of a registry instrument, the instrument becomes part of the Torrens Register and is publicly available and stands as an assertion of the correctness of the matters certified.

Issue 9 - Reliance on registry instrument certifications

- 9.1 Who (if anyone) should be able to rely on the certifications in a signed registry instrument:
- (a) prior to lodgment and for what purposes? and
 - (b) on and from lodgment and for what purposes?
- 9.2 Prior to lodgment should a registry instrument certification be treated as an affirmation to the world, or as a limited affirmation only to other Subscribers in the same transaction workspace, to NECS and to the Land Registry?
- 9.3 Should legislation and/or the NECS Participation Rules clarify any of the above issues and if so, how?

²⁸ Transfer of Land Act 1958 (Vic) s 119(2).

²⁹ The possible loss scenarios are complex. A party receiving an interest in land who relies on a false certification by the relinquishing party's Certifier may not suffer loss if they become registered and gain an indefeasible interest. But there may be a loss if they have paid money but not obtained registration. Where a digital signature was created without the authority of a Certifier or Subscriber there is an issue of attribution of the signature which will be dealt with in the Digital Signing consultation paper.

³⁰ Legal Practitioners Liability Committee, "Contract for Professional Indemnity Insurance for Solicitors: 2007/2008" cl 14.

³¹ In the Victorian ECV system, the Registrar may terminate or suspend a Subscriber's registration for cause to be specified in a notice by the Registrar. An incorrect certification might, in some cases, be such a cause.

9 Glossary of terms

Certification refers to Instrument Certification.

Certification Statement is text in a Registry Instrument that specifies one or more conditions that must be complied with and that are intended to be certified as true in the circumstances

Certifiers are Industry Certifiers or Restricted Certifiers. Certifiers are also Users by default.

Client is defined as a collective term for the Transacting Party or parties specified in a Registry Instrument Counterpart and who are represented by the same Subscriber.

Client Authorisation Agreement (CA) is the authorisation by a Transacting Party of a Subscriber as agent of the Transacting Party to arrange the certification and signing of registry instruments by a Certifier, financial settlement and the lodgment of registry instruments and the delivery of information reports on the Transacting Party's behalf.

Client Identity Verification (CIV) is a prescribed procedure carried out by an industry participant or their delegate to verify the claimed identity of a Transacting Party and any representative of a Transacting Party.

Industry Certifiers are legal practitioners or licensed conveyancers who are employees of or contracted to Subscribers who represent Clients in a transaction and are authorised by the Subscriber to certify and sign registry instruments. Industry Certifiers are able to certify and sign registry instruments on behalf of Subscribers and their Clients as Transacting Parties.

Instrument Certification is the act of a legal entity acknowledging that a Certification Statement on a registry instrument has been complied with.

Information Reports are transaction information reports required by government taxing, valuing and rating authorities about a transaction. The content of the reports is determined by the receiving authority.

Land Registries are the jurisdiction-based custodians of the Torrens Title Registers of land titles and interests for the properties being dealt with in transactions.

National Business Model (NBM) describes the overall business context for NECS, the roles and responsibilities of the affected industry participants, and the commercial arrangements and risk management regime necessary to make it viable. It is the foundation upon which all of the subsequent documents are based. This document is published at www.necs.gov.au.

National Electronic Conveyancing System (NECS) is the central facility providing Subscribers with the means for creating transaction workspaces, for preparing registry instruments and other documents, for assembling the instructions and other requirements for electronic settlement of the financial aspects of transactions, and for transmitting registry instruments to a Land Registry.

National Electronic Conveyancing System Readiness (NECS-R) is a program that includes stakeholder consultations on business practice and risk management issues concerning the introduction of NECS in NSW.

NECS Participation Rules are a common set of policies, procedures, requirements and undertakings committed to by each industry participant prior to their first transaction.

Party Receiving is a party that is gaining an Estate or Interest in Land, or benefits from a Constraint or Administrative Action, and being one of, for example:

- Mortgagor in a Discharge of Mortgage Instrument
- Mortgagee (Lender) in a Mortgage Instrument
- Transferee (Purchaser; Buyer) in a Transfer Instrument
- Caveator in a Caveat Instrument

Party Relinquishing is a party that is disposing of or altering an Estate or Interest in Land, or removing or altering a Constraint or Administrative Action, and being one of, for example:

- Mortgagee in a Discharge of Mortgage Instrument
- Mortgagor (Borrower) in a Mortgage Instrument
- Transferor (Vendor; Seller) in a Transfer Instrument

Practitioner Accreditation being the satisfaction of the minimum eligibility requirements of a jurisdiction for an industry practitioner acting in accordance with a Client Authorisation Agreement to be able to certify and sign instruments lodged with that jurisdiction.

Principal Subscriber is a Subscriber who is also a Transacting Party, for example a Financial Institution as mortgagee.

Registry Instrument (RI) is a legal instrument in a form prescribed by the Land Registry as necessary to effect any change to the Land Registry's Torrens Title Register.

Representative Subscriber is a Subscriber, for example a legal or conveyancing practice, representing one or more Transacting Parties as a Client.

Responsible Subscriber is the Subscriber designated as lodging party responsible for fee payments and for requisitions raised by the Land Registry after registry instrument lodgments.

Restricted Certifiers are employees of Subscribers who are acting for themselves as the Transacting Party and not representing clients in the transaction. Restricted Certifiers need not be legal practitioners or licensed conveyancers and are restricted to certifying and signing registry instruments on behalf of their employer Subscriber. Restricted Certifiers are principally associated with Financial Institution Subscribers.

Subscribers are corporations, partnerships, government agencies and natural persons meeting the minimum requirements for using NECS to prepare, certify and sign registry instruments and to execute financial settlements, and where agreed to by all the Subscribers participating in a transaction, act as the Subscriber responsible for electronic lodgment of a lodgment case.

Supporting Evidence (SE) is the documentation in any form prescribed as necessary to support the registration of a Registry Instrument with the Land Registry

Torrens Title Register is a public register of information that is related to real property maintained by a Land Registry under the relevant legislation.

Transacting Party is a person who is engaged in some activity in relation to Torrens land which will result in the lodgment of an instrument in order to alter the Torrens Title Register in relation to that land whether by relinquishing or receiving an interest in the land or otherwise (e.g. by lodging or removing a caveat or effecting a subdivision of the land).

Transacting Party Representative is a party that has an authorisation from the Transacting Party to represent it in a transaction.

Users are employees or contractors authorised by a Subscriber to create and complete transaction workspaces for the preparation of registry instruments under supervision. Only Users who are also Certifiers can certify and sign registry instruments.

10 Source material

<i>Document Description</i>
National Electronic Conveyancing Office, 'NECS National Business Model' (v 10, 15 June 2007).
National Electronic Conveyancing Office, 'NECS National Requirements Definition' (v 6, 3 September 2008).
NSW Lands, 'Instrument Certification Paper for SPT' (v 6, 15 October 2007).
National Electronic Conveyancing Office, 'Wording for Instrument Certifications Paper for NPT' (23 December 2008).

11 Appendix: Extract from National Business Model

Extract from the National Business Model v10 150607 Page 28 of 52, published by the National Electronic Conveyancing Office.

12.4.1 Preparing Instruments, Reports and Statements

A registered User for the Subscriber representing one of the parties to the transaction accesses the NECS and requests the creation of a workspace to compile the information needed for the transaction⁶². After the User's nominating a jurisdiction, entering appropriate title references and designating the transaction type, the NECS retrieves relevant information recorded with the jurisdiction's LR and creates and populates the workspace to suit the jurisdiction's requirements⁶³.

The User is asked to confirm the populated information and complete all other workspace information requirements⁶⁴ related to their Subscriber's role in the transaction. The User then uses a messaging facility in the workspace to invite Subscribers for the other parties to the transaction to have one of their Users enter the workspace and complete the information related to their respective roles.

When all the confirmations and information requirements for the workspace have been completed, the NECS prepares and presents, on the request of a Certifier for each participating Subscriber, formatted registry instruments, information report(s) and settlement statements populated with the workspace data items for completion of the required certifications and signings by the Certifier on behalf of their Subscriber or the Subscriber's Client.

Certification and signing involves confirming the correctness of the information in the instrument, report or statement and attaching the Certifier's DSC to each, and prevents any changes thereafter to the workspace information used in preparing the instrument, report or statement. Before allowing a Certifier to sign an instrument, report or statement, the NECS verifies:

- that the name in the DSC being used matches that of the signed-in User
- that the signed-in User has certification and signing privileges (i.e. is registered with the NECS as a Certifier and has been authorised by the Subscriber to certify and sign on behalf of the Subscriber or the Subscriber's Clients)
- that the accreditation status of the Certifier is acceptable to the LR where the instrument is to be lodged

⁶² The requesting Subscriber is most likely to be the representative of the registered proprietor of the property in a re-financing transaction or of the purchaser of the property when a transfer is involved.

⁶³ After satisfying such a request, the LR may choose to record a notification on the relevant titles in its Register that a transaction affecting those titles has been commenced.

⁶⁴ One of the information requirements is a scheduled date and time for the settlement.

- that the DSC being used is current and unrevoked by reference to the independent Certification Authority that issued the DSC.

If any of these verifications fails, the Certifier is prevented from signing the instrument, report or statement.

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