



6 June 2011

77.5, E6, C110  
RB; rp

Mr Bill Grant  
Secretary-General  
Law Council of Australia  
GPO Box 1989  
CANBERRA ACT 2601

Dear Bill

### **Operational Roles – NECS**

Thank you for your memorandum of 9 May 2011, and the attached Discussion Paper, seeking our views regarding the operational roles of subscribers and certifiers in the proposed National E-Conveyancing System (NECS).

The material was referred to the Society's Property Committee and we submit the following responses.

#### ***The Discussion Paper***

A couple of aspects of the "Certification Requirements" section of the Discussion Paper require correction or clarification with respect to their references to current South Australian practice.

Paragraph 65 correctly states the requirement in SA that instruments lodged for registration must be certified correct. However, the reference to "licensed land broker" is obsolete. In this State, since the passing of the *Conveyancers Act 1994 (SA)*, the term "licensed land broker" has been replaced by "registered conveyancer".

We are aware that, in several other States, the equivalent term is "licensed conveyancer".

Paragraph 66 of the Paper sets out the requirement in NSW for witnesses to signatures to certify that they are personally acquainted with or otherwise satisfied as to the identity of the person signing. Whilst not apparent from the Paper, similar requirements in relation to witnessing exist in SA under Sections 267 and 268 of the *Real Property Act 1886*. Section 267 (1) provides:

*The execution of an instrument by or on behalf of a party to the instrument must be witnessed by a person who either knows the person executing the instrument personally or is satisfied as to his or her identity.*

In addition, under Section 267 (3):

*The witness must sign his or her name as witness and the full name and address of the witness and a telephone number at which he or she can ordinarily be contacted during business hours must be legibly printed under the witness' signature.*

### **Discussion Questions**

Page 3 of the Discussion Paper sets out seven specific "Discussion Questions" on which feedback was sought. Those questions and the Society's responses are as follows:

1. **Should NECDL be advised that only legal practitioners who hold Practising Certificates which allow them to practise in their own right should be permitted to be representative subscribers?**

Since "representative subscribers" are defined in the Paper as subscribers who act on behalf of clients, the Society considers that this is an area of legal practice which should only be conducted by legal practitioners who are entitled to practise in their own right. Accordingly, the answer to the question is "**yes**".

We assume, however, that this question relates only to legal practitioners and is not intended to exclude licensed conveyancers ("registered conveyancers" in SA) from also becoming representative subscribers.

2. **Should representative subscribers, who are legal practitioners or licensed conveyancers, be able to employ certifiers who are not legal practitioners or licensed conveyancers (employee certifiers) provided they are subject to supervision?**

The Society's response to this question is "**no**". This response is consistent with the current practice in SA under the paper system in which instruments must be certified correct for the purposes of the *Real Property Act* by a qualified solicitor or registered conveyancer, even if unqualified employees are involved in the process of preparing those instruments.

3. **Are contractual arrangements between legal practitioners who practise in their own right and their employees likely to be sufficient to address acts and omissions of employee or practitioner certifiers?**

The Society's response to this question is "**yes**".

4. **Are discussions with legal practice PI insurers and Fidelity Fund regulators and insurers required in relation to possible liabilities arising from the acts or omissions of employee or practitioner certifiers?**

**Yes.** Such discussions are essential.

5. **Does the restriction of the certifier role to employees rather than contractors alleviate concerns relating to activities of persons working as mortgage processors or in the mortgage securitisation industry?**

The Society answers this question "**no**". It is our view that mortgage processors should not be permitted to participate in their own right.

6. **Should there be any restrictions on principal subscribers, such as restrictions limiting banks to conducting transactions relating to mortgages?**

The Society's response to this question is "yes". The Society believes that it is in the best interests of maintaining the integrity of the Register and protection of the public that dealings by principal subscribers, such as banks, should be restricted to transactions relating to mortgages.

7. **Are there any other relevant issues relating to operational roles that should be considered by the Law Council and NECDL?**

It is the Society's view that it is essential for both the protection of the public and of the integrity of the Register that all subscribers, whether they be legal practitioners, licensed conveyancers ("registered conveyancers" in SA) or financial institutions, should be subject to appropriate professional regulation.

Please contact us if you require any further input in relation to these matters.

Yours sincerely



Ralph Bönig  
**PRESIDENT**