



20 June 2011

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The Honourable Stephen Wade MP  
Shadow Attorney-General  
Parliament House  
North Terrace  
ADELAIDE SA 5000

Dear Mr Shadow Attorney-General

***Legal Services Commission (Charges on Land) Amendment Bill 2010***

Thank you for your invitation to comment on the above Bill, which seeks to amend Section 18A of the *Legal Services Commission Act 1977* to clarify and improve the status of statutory charges lodged over land by the Legal Services Commission (LSC) as security for payment of legal aid costs.

The Society makes the following comments on the individual proposed amendments set out in the Bill:

**Amendment of Section 18A(5)**

1. The Society supports this amendment, which removes doubts that might otherwise exist regarding the registration status of LSC charges and their priority in relation to other registered interests.

**Amendment of Section 18A(6)**

2. This amendment inserts a provision that a sale of land by the LSC pursuant to its charge when default is made in payments towards legal assistance costs is, for the purposes of the *Real Property Act 1886* ("the RPA"), to be treated as if it were a sale by a mortgagee.
3. Subsection (6) of section 18A already gives the LSC the same powers of sale as a mortgagee has under the RPA. The purpose of this amendment can therefore only be to remove any doubt that all of the other provisions of the RPA relating to sales by mortgagees also apply to sales by the LSC. That appears desirable.

**Insertion of subsection 18A(6a)**

4. Under this new subsection, in the event of a sale of the charged land by another mortgagee or encumbrancee, the LSC's charge is, for the purposes of sections 135 and 135A of the RPA, to be treated as if it were an *encumbrance*.
5. It appears curious that, the preceding subsections having treated the LSC charge as if it were a mortgage for most purposes, the proposed new subsection now seeks to treat the charge as if it were an *encumbrance* for some particular purposes.

6. Section 135 of the RPA deals with the appropriation of the proceeds of a sale of land by a mortgagee and, for that purpose, makes no distinction between subsequent mortgagees or encumbrancees in the way those proceeds are to be distributed.
7. Section 135A of the RPA, on the other hand, applies only to encumbrances and contemplates situations in which long-term obligations to pay annuities or rent-charges may exist under an encumbrance. Such obligations might not be satisfied by a one-off payment, as would be possible with a debt secured by a mortgage. To meet such circumstances, section 135A sets up a procedure whereby surplus sale proceeds are to be paid to the Public Trustee upon trust to satisfy the accruing payments of the annuity, rent-charge or other sum secured by the encumbrance.
8. The Society questions the relevance of the encumbrance-related provisions of Section 135A to charges lodged by the LSC as security for payment of legal aid costs. Liability for payment of legal aid costs is surely more akin to a debt secured by a mortgage than to the kinds of ongoing obligations that are secured by encumbrances, such as payment of annuities and rent-charges.
9. In the Society's view, the procedure under Section 135A, involving payments of surplus sale proceeds to the Public Trustee, is inappropriate to LSC charges. Surplus sale proceeds should simply be paid to the former registered proprietor of the land, as the deemed "mortgagor", in accordance with Section 135 of the RPA.
10. Accordingly, in the Society's opinion, the wording of the proposed subsection (6a) should be amended to read as follows:

"If the charged land is sold by a mortgagee or encumbrancee, the charge is, for the purposes of section 135 of the *Real Property Act 1886*, to be treated as if it were a mortgage referred to in that section."

### **Transitional provision**

11. The transitional provision in the Bill seeks to make the changes retrospective and to apply to LSC charges created before or after the commencement of the amendments.
12. In the Society's view, such retrospectivity would be unfair to mortgagees or encumbrancees who have existing registered interests that are subsequent to LSC charges. The amendments made by this Bill will have the effect of entitling the LSC to a distribution of sale proceeds under Section 135 of the RPA in priority to subsequent mortgagees and encumbrancees. That entitlement does not exist at present. Existing mortgagees and encumbrancees should be entitled to rely on the legal position as it was at the time they registered their mortgages or encumbrances. They may have advanced loans or incurred other detriment on the basis that their entitlement to sale proceeds would not be postponed to a prior LSC charge, as is the current position.
13. Accordingly, in our opinion, the amendments should not be retrospective but should only apply to LSC charges registered after the date of commencement of the amendments.
14. We note the statement by the Attorney-General, in his second reading speech in relation to the Bill, that: "*Without such a transition provision, there would be an inconsistency in the priority rules for mortgages registered after a statutory charge, depending on whether they*

*are registered before or after the commencement of the amending legislation, and this might cause confusion in years to come."*

15. The Society submits that any such "confusion" could readily be avoided if new LSC charges, following the commencement of the amendments, are endorsed on titles by the Registrar-General in a manner that differs from endorsements of such charges under the former legislation. For example, the new charges could be described as "charge in the nature of mortgage". This would make the status of such a charge perfectly clear and would distinguish it from ones registered under the previous legislation.

Please do not hesitate to contact the Society if you wish to discuss any aspect of this matter.

Yours sincerely



Ralph Bönig  
**PRESIDENT**