



# Major Changes to the Real Property Act

PHILIP PAGE, MELLOR OLSSON; CHAIR, PROPERTY COMMITTEE

The *Real Property (Electronic Conveyancing) Amendment Bill 2016* is currently before Parliament. It will make the most dramatic changes to conveyancing practice in South Australia since the commencement of the first *Real Property Act* here in the 1860s. Besides allowing for electronic conveyancing, the Bill will also require paper transactions to be conducted in a way that is significantly different to current practice. The purpose of this is to align the provisions for paper transactions with the new requirements for electronic transactions.

Subject to the legislation being passed by Parliament, it is currently scheduled to commence operation potentially as early as May. It is anticipated that there will be a transitional period after the commencement date.

Some of the most important changes are:

- abolition of duplicate certificates of title
- a requirement for legal practitioners and registered conveyancers to obtain “Client Authorisations” from their clients
- a requirement to verify a client’s authority to deal, as well as identity
- execution of Land Titles Office (LTO) documents by practitioners on behalf of clients, instead of by clients themselves
- registration of mortgages executed by the mortgagee only

- a range of new certifications to be given by practitioners
- the ability to conduct most common real property transactions and financial settlements electronically
- introduction of a “Title Watch” service

## DUPLICATE CERTIFICATES OF TITLE AND LESSEES’ COPIES OF CROWN LEASES

The Bill removes the requirement for the Registrar-General to issue, and for registered proprietors to produce, duplicate Certificates of Title and Lessees’ copies of Crown Leases. On commencement of the legislation, those muniments of title will cease to have any legal status. Clients who lend funds on the basis of the deposit of a duplicate title should be advised that this will no longer provide any form of security.

Whilst duplicate paper titles have long been regarded as an essential aspect of property practice, it is recognised that they have no place in the world of electronic conveyancing. In addition, the argument that production of the paper title is proof of a right to deal with the land is countered by the fact that titles can, and do, get into the wrong hands and become instruments of fraud. It is expected that any loss of protection resulting from abolition of duplicate titles will be balanced by the

increased use of Priority Notices and the new Title Watch service, as well as the safeguards associated with the new standards relating to verification of identity and authority to deal.

## CLIENT AUTHORISATIONS

With the introduction of Client Authorisations, legal practitioners and registered conveyancers will execute Lands Titles Office documents on behalf of their clients **in all cases**, irrespective of whether the transaction is proceeding electronically or in paper. The Client Authorisation is a prescribed form which must be signed by clients, authorising the practitioner to conduct transactions on their behalf. It does not replace letters of engagement or costs agreements but will be additional to them. It can be limited to a specific transaction or extend to a series of transactions.

## VERIFICATION OF AUTHORITY

In conjunction with the Registrar-General’s existing *Verification of Identity Requirements*, new *Verification of Authority Guidelines* will be introduced, requiring parties to a conveyancing transaction to provide formal evidence that they have the right to deal with the land. Practitioners will be required to take “reasonable steps” to verify that their client is a legal person or body corporate and has the right to enter into the conveyancing transaction.

## CERTIFICATIONS

Various new certifications will have to be given by legal practitioners, registered conveyancers or parties acting in person, for both electronic and paper transactions. These certifications will vary, depending on the nature of the particular dealing. Example certifications include:

**It is expected that any loss of protection resulting from abolition of duplicate titles will be balanced by the increased use of Priority Notices and the new Title Watch service, as well as the safeguards associated with the new standards relating to verification of identity and authority to deal.**



- The Representative holds a properly completed Client Authorisation for the Conveyancing Transaction including this Registry Instrument or Document.
- The Representative has taken reasonable steps to verify the identity of the transferor/transferee, etc.
- The Representative has taken reasonable steps to ensure that this Registry Instrument or Document is correct and compliant with relevant legislation and any Prescribed Requirement.
- The Representative has retained the evidence supporting this Registry Instrument or Document.

### TITLE WATCH

A subscription service known as Title Watch will be introduced, which will notify the subscriber via email and SMS that activity has been detected on the nominated Title. Items that will trigger notification will include, but are not limited to:

- ordering a Property Interest Report or Form 1 Template
- lodgement of a Priority Notice
- lodgement of a dealing (e.g. Transfer, Mortgage etc.)

### MORTGAGES

Currently, mortgages are usually executed only by the mortgagor. Under the changes to the Act, mortgages will be required to be executed by both the mortgagor and the mortgagee. However, mortgages will be able to be lodged for registration electronically or in paper executed only by the mortgagee if the Registrar-General is satisfied that the mortgagee holds a mortgage in the same terms executed by the mortgagor (“the corresponding mortgage”). The corresponding mortgage must be retained by the mortgagee until the mortgagee ceases to be the mortgagee. Maximum penalties up to \$10,000 or imprisonment for two years will be imposed on mortgagees if they:

- fail to retain the corresponding mortgage in accordance with the Act;
- enter into the mortgage without first verifying the authority of the intended mortgagor to enter into the mortgage in accordance with the Verification of Authority Requirements; or
- fail to retain, for the prescribed period, a copy of any document used for the purpose of verifying the mortgagor’s authority to enter into the mortgage.

If a mortgagee fails to comply with the requirements of the Act, or is unable to produce the corresponding mortgage when requested by the Registrar-General, the Registrar-General may cancel the registration of the mortgage.

### ELECTRONIC CONVEYANCING

In order to participate in electronic conveyancing, legal practitioners and registered conveyancers will need to register with Property Exchange Australia Limited (PEXA). Not all transactions will be able to be conducted electronically. Initially, the scope of electronic dealings will be restricted to mortgages, discharges of mortgage, transfers, priority notices and certain standard caveats. In order to conduct a settlement electronically, it will be necessary for all of the participants to be subscribers to the system and for all of the documents involved to be capable of being lodged electronically. If the practitioner representing one of the parties is not a PEXA subscriber or if, for example, it is necessary for an Application to Register Death to be lodged for registration as part of the series, the whole transaction will have to proceed in paper.

When a settlement is conducted electronically, the authorised representatives of the various parties will use digital signatures to confirm that the property transaction is ready to proceed and to authorise the electronic transfer of funds. At the specified settlement time,

the dealings will be lodged for registration electronically and the funds transfer will take place. Upon completion of settlement, a fee will be payable to PEXA in addition to the LTO registration fees.

### NEW LTO FORMS

New forms are being developed by the LTO for paper transactions. Among other changes:

- there will be no “Encumbrances” panels
- references to the “Encumbrances” panel will be removed from operative clauses
- execution clauses will be replaced by the certifications to be given by practitioners on behalf of parties

### TRANSITIONAL PROVISIONS

It is anticipated that there will be a transitional period of several months after the commencement of the legislative changes during which documents executed by parties in accordance with the current requirements will be able to be lodged for registration. During that period, however, practitioners will need to ensure that they become familiar with the use of Client Authorisations and the new forms of certification.

### INFORMATION AND TRAINING

The Law Society will be providing information sessions regarding the changes, in conjunction with the Lands Titles Office and the Australian Institute of Conveyancers. PEXA will also be providing training, both online and in person.

The following web sites provide additional useful information:

- [http://www.lawsocietysa.asn.au/LSSA/Lawyers/Support/Electronic\\_Conveyancing\\_System](http://www.lawsocietysa.asn.au/LSSA/Lawyers/Support/Electronic_Conveyancing_System)
- [www.sa.gov.au/landservices](http://www.sa.gov.au/landservices)
- [www.pexa.com.au](http://www.pexa.com.au)
- [www.arnecc.gov.au](http://www.arnecc.gov.au) **B**