

It's official – paper CTs are set to go. Is your practice prepared?



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With the cancellation of paper certificates of title expected to occur mid-2021, there are significant practical implications for legal practices and other businesses to consider, including the impact on liens and equitable mortgages.

The Office of the Registrar General ('ORG') announced in August 2020 that the New South Wales Government has approved the cancellation of all certificates of title as part of the implementation of electronic conveyancing. The announcement was made in a news item on the ORG website – 'Important changes to liens and equitable mortgages'.

The continued use of paper certificates of title is at odds with a fully electronic conveyancing system. Phase one of the move away from paper certificates of title ('CTs') involved converting the CTs held by authorised deposit-taking institutions ('ADIs'). As at 1 October 2018, all paper titles held by ADIs had been converted to electronic CTs. This next phase is the final step in cancelling paper CTs in NSW and is not unexpected. The Registrar General has had the power to declare a date upon which CTs will cease to issue since changes were made to the *Real Property Act 1900* in 2015 with the introduction of section 33AAA.

Legislation will be introduced to make this change, but in the meantime, practitioners need to carefully consider the impact of the changes on liens and equitable mortgages in relation to any security held by the legal practice, as well as the impact of this change on clients. There are also other practical matters to consider that follow from the cancellation of certificates of title.

Solicitor's lien

A solicitor's lien is a form of general possessory security which arises by operation of law. It automatically takes effect as a right against personal property to secure the discharge of actual or potential indebtedness.

It applies to any property of a client that comes into possession of the solicitor during the course of the retainer, other than a will. A practitioner may claim a general lien over files, money,

Snapshot

- All remaining NSW paper certificates of title are expected to be cancelled mid-2021.
- Solicitor's liens will become ineffective.
- Equitable mortgagees holding certificates of title as security should consider alternatives, including lodging a caveat.

deeds and certificates of title.

A significant advantage of a general lien for the practitioner is that it does not require an agreement between the parties, and normally general liens are outside the security regime established by the *Personal Property Securities Act 2009* (Cth).

A particular advantage of a solicitor's lien over a certificate of title is that it is akin to an equitable mortgage by deposit of title deeds. It effectively prevents the client from dealing with the property

without first satisfying the debt which the lien secures and that makes it a very valuable form of security, all the more so because (by virtue of the fact the title is available to the client to give to the solicitor) it normally concerns property which is otherwise unencumbered.

The abolition of certificates of title in 2021 will effectively render valueless the security covered by a solicitor's lien over a certificate of title. For those practitioners who hold certificates of title as security for existing or contingent fees it is a matter of great importance, and needs to be addressed urgently.

For those practitioners who occasionally rely on solicitor's liens to secure the obligations of clients, they need to be mindful that this form of security will cease in the course of 2021 and alternative arrangements need to be put in place.

One obvious alternative to the lien over a certificate of title is the creation of a charge by the client in favour of the lawyer over the property, which can be registered, or an agreement to create a charge, which could be protected by recording a caveat on the title.

Unlike a lien, which comes into existence by operation of law, the creation of a charge requires an agreement with the client and that may cause practical difficulties for the solicitor which need to be considered carefully. Foremost amongst these is the interests of the solicitor taking the charge being in conflict with those of the client/chargor, and the need for the client to understand what they are doing. The likelihood is that for many if not most clients, advice independent of the solicitor/chargee will need to be given before the charge is entered into to ensure the enforceability of the security.

It is beyond the scope of this article to deal with all of the possible solutions to securing costs in lieu of a lien over a certificate of title. The important thing for the practitioner to consider at this stage is that the security these liens provide will be valueless when titles are abolished. The alternative of creating a charge over the property is a fundamentally different form of security which has different requirements and, regrettably, is likely to be far more cumbersome and expensive for the lawyer.

Equitable mortgages

Holders of equitable mortgages may be affected by the cancellation of certificates of title in ways that registered mortgagees are not. An equitable mortgage may exist where money has been advanced under a specifically enforceable agreement to grant a mortgage, or where there has been an ineffective attempt to create a legal mortgage. An equitable mortgage can also be created where a certificate of title is deposited with a lender as security for money advanced.

Practitioners should identify any lender clients who are holding a certificate of title as security without a registered mortgage, and alert them to the impact of cancellation of certificates of title.

Affected lender clients will need to consider their options. Depending on the terms of the agreement with the borrower, the lender may be able to require repayment of the loan, or require registration of a mortgage. One option for equitable mortgagees is to lodge a caveat.

When lodging a caveat for an equitable mortgagee, practitioners should take care to ascertain whether duty is payable. Although mortgage duty was abolished on 1 July 2016, mortgage duty may apply under s 208(4) of the *Duties Act 1997* if security over the certificate of title was taken by the lender before that date.

Other practical considerations

The impending abolition of certificates of title provides an opportunity for practitioners to perform a stocktake of documents of title which they currently hold. Those documents could fall into a number of categories:

1. Certificates of title over which the solicitor holds a lien.
2. Certificates of title which are held on behalf of a client lender as part of the security for an equitable mortgage.
3. Certificates of title held under an agreement between the practitioner and a client to secure costs.
4. Certificates of title to properties which have been the subject of a conveyancing transaction as defined in the *Electronic Conveyancing National Law*.
5. Certificates of title which are not the sole documentary evidence of title – for example, the old system documents associated with a qualified or limited title, or an original survey report.
6. Certificates of title held for safe keeping on behalf of a client.

In the first three categories, the utility of holding a certificate of title will disappear as from cancellation day. Solicitors will need to consider (and advise their clients of) the impact of cancellation, and whether any alternative form of security is available. Where the beneficiary of the security is the law practice, any such advice will need to take account of the conflict between the interests of the practice and the duty to the client.

In the fourth category, the fundamental obligation of the practitioner is to comply with the retention of evidence requirements under the Conveyancing Rules, the Participation Rules and any Prescribed Requirement. Even after certificates of title are cancelled, those certificates of title that have been the subject of a transaction prior to the cancellation date should be retained for at least seven years from the date of lodgment of the relevant dealing at the Land Registry (Conveyancing Rule 5.2). Generally retaining a copy will suffice, although in some limited circumstances a Prescribed Requirement may specify that the original not be destroyed. ARNECC has provided useful guidance, see: https://www.arnecc.gov.au/__data/assets/pdf_file/0005/698792/MPR-Guidance-Note5-Retention-of-Evidence.pdf

Where the title is either qualified or limited or both, the bundle of old system documents will still be important until the caution has lapsed or the limitation has been removed.

Documents falling into the sixth category are properly the subject of client instructions. Even though a certificate of title will have no force and effect for titling purposes it may well still have value to a client for historical or sentimental reasons.

The Office of the Registrar General has advised there will be a detailed communications strategy to inform the public of the abolition of certificates of title. Solicitors and their staff should be prepared for client inquiries arising from that campaign, and be prepared to advise clients of the practical impact of the change. Clients may be reassured to know that New South Wales is not the first jurisdiction to abolish certificates of title. Queensland transitioned to a largely 'CT-free' system even before the introduction of electronic conveyancing with no significant difficulties or disruption.

The abolition of all remaining paper certificates of title is a significant step in the final stages of the transition to paperless conveyancing. The practical implications of cancelling paper certificates of title, particularly on solicitor's liens and equitable mortgages, need to be considered now. The abolition also reinforces the significant onus on the practitioner, that underpins electronic conveyancing, that is, to verify the identity of the client and ensure the client has the right to do what they propose to do with the title (a right to deal). **LSJ**