

## ***COVID-19 and social distancing – the impact on property transactions***

**31 March 2020**

With the rapid outbreak in Australia of COVID-19 and the social distancing advice from the Australian government, most people are now avoiding any non-essential face-to-face contact with other people and are instead self-isolating and working remotely from home. This has obviously dramatically changed the working landscape very quickly and is going to pose challenges going forward for many property lawyers and conveyancers who are not used to conducting property transactions electronically or remotely. Unfortunately, in some jurisdictions in Australia, conveyancing transactions are still paper based and usually involve social interactions (e.g. paper settlements). Many types of property dealings also still need to be physically lodged in paper in land registries in Australia; however, until this pandemic is over and we are no longer required to socially distance ourselves from each other, property lawyers and conveyancers will have to avoid face-to-face interactions and instead try to conduct property transactions electronically, by adopting new technologies if required. Their clients may also want to consider lodging priority notices or caveats if they think that there will be a delay in their transactions being completed or in documents being lodged and registered at land registries.

### **E-conveyancing**

In those states where e-conveyancing is now fully operational (New South Wales, Victoria, Queensland, Western Australia and South Australia), property lawyers and conveyancers can now complete conveyancing transactions (post exchange) and lodge most land registry documents electronically on the electronic conveyancing platform of an Electronic Lodgment Network Operator (**ELNO**) such as PEXA or Sympli.

### **VOI checks**

As noted in our previous legal [update](#) on 23 March 2020, for the purposes of electronic conveyancing, ARNECC has advised that:

- a client authorisation form may be signed electronically (if it is permitted in the relevant jurisdiction, e.g. s107(1A) *Real Property Act 1900* (NSW)); and
- a face-to-face meeting is not required to verify the identity of a client if the lawyer takes “reasonable steps” and retains evidence of those “reasonable steps”.

The same would apply to paper conveyancing transactions. This means that, instead of meeting face-to-face, property lawyers and conveyancers could now consider using video technology such as FaceTime or Skype to verify the identity of a client.

Some of the approved [information brokers](#) are also offering remote VOI checks using online verification and facial recognition technology.

### **Exchanging contracts**

Contracts no longer have to be physically exchanged. Contracts can be exchanged by post, DX, phone or email. Online signing tools are also now available which allow contracts to be signed electronically using an electronic device such as a smart phone, tablet or a compute/laptop. The *Electronic Transactions Act 1999* (Cth) (as adopted in all jurisdictions in Australia) recognises the validity of electronic signatures in Australia.

### **Deeds and paper land registry dealings**

Unfortunately, most dealings with land must be in the form of a deed and therefore should be in paper form, signed with wet ink and witnessed (by a person who is not a party to the deed and is present when the deed is signed); however, there is an exception in New South Wales, where it is now possible to electronically sign and witness a deed in electronic form (s38A *Conveyancing Act 1919* (NSW)).

For paper land registry paper dealings, there may also be specific execution requirements. For example, in New South Wales, a witness must know the person signing the dealing for more than 12 months and have taken reasonable steps to ensure the identity of the person (see s12E *Real Property Act 1900* (NSW) and the [Registrar General's Guidelines](#)). Electronic dealings lodged via an ELNO can be digitally signed by the property lawyer or conveyancer on behalf of the client.

### **Social distancing measures implemented at land registries**

For those property lawyers and conveyancers who:

- do not transact electronically through an ELNO; and
- still need to physically lodge paper documents or dealings for registration in a land registry,

the good news is that all of the relevant land registries in each of the jurisdictions are still open for business and most seem to have also now adapted their procedures to accommodate social distancing. Some have provided updates on their website:

- **New South Wales (NSW Land Registry Services).** All customers should use the “drop and go” document service at the Queens Square Lodgment Office and leave their documents with the Concierge. Uplift requests should be sent by email and invoices should be paid online. See [update](#).
- **Victoria (Victoria Land Registry Services).** Employees who are unwell or who have recently travelled overseas are requested not to come to work. Customers who have symptoms or who have travelled abroad in the last 14 days are asked to contact VLRS before attending the office to discuss alternative ways to lodge transactions. Additional hand sanitisers have been provided for customers, visitors and employees. See [update](#).

- **Queensland (Queensland Titles Registry).** It is following the advice of Queensland Health's Chief Health Officer. See [update](#).
- **Australian Capital Territory (ACT Land Titles Office).** Measures are in place including extra hygiene, cleaning arrangements, hand sanitisers and tissues. Social distancing spacing has been marked and cash payments have been suspended (payments can only be made electronically). See [update](#).
- **Western Australia (Landgate).** If customers do not wish to attend in person, a customer service team is available by phone or via webchat to assist with enquiries. It is maintaining a high standard of hygiene at its counters with regular cleaning of surface areas. See [update](#).

### Protecting an interest in land – priority notice or caveat

If:

- a person has an interest in land but, because of the current circumstances, envisages a delay in a transaction being completed or in being able to lodge the appropriate document in a land registry to register that interest (e.g. a purchaser thinks that there will be a delay in his/her purchase being completed); and
- he/she wants to protect that interest,

then that person could consider instructing his/her lawyer or conveyancer to lodge a priority notice or a caveat to record his/her interest on the register until he/she is in a position to lodge the relevant document for registration.

A **caveat** will put others on notice of the unregistered interest and will protect the unregistered interest by preventing the registration of any dealings in competition with the interest claimed by the caveator. It effectively puts a freeze on the registration of any other dealing affecting the title (subject to any statutory exceptions) until the interest the subject of the caveat has been resolved or the caveator consents to the registration of the dealing; however, a caveatable interest should exist. See [Checklist of caveat interests](#) and [Checklist of non-caveatable interests](#). Lodging a caveat that does not protect a caveatable interest may give rise to compensation being payable to any person who suffers loss as a result (e.g. see s74P *Real Property Act 1900* (NSW)). For example, a purchaser's interest under a contract for sale of land is a caveatable interest. In most cases, a caveat will usually remain recorded on a title until it is withdrawn, lapsed, removed by order of court or the interest is satisfied by the registration of another dealing. For example, a caveat protecting a purchaser's interest under a contract for sale of land will automatically lapse on registration of the transfer of the title to the purchaser.

A **priority notice** reserves priority for anticipated dealings specified in the notice for a specified period of time (e.g. 60 days in the case of NSW). It can be extended for an additional period of time (e.g. 30 days in NSW). It will cease to have effect when the anticipated dealings are lodged (or withdrawn) and will automatically expire if the dealings are not lodged within the specified period of time. While the priority notice is

in force, any dealings lodged that affect the same land but which are not specified in the priority notice will not be registered. They will be noted on the title and dealt with when the priority notice ceases to have effect. Priority notices are a cheaper option to caveats.

### **The real estate industry**

The real estate industry will also have to adopt new ways of conducting property inspections and auctions (e.g. by adopting video technology) following the orders enacted last week by the state and territory governments (effective from 26 March 2020 for at least the next 3 months) prohibiting:

- open inspections for the purpose of selling or leasing property (excluding a single party inspection by appointment); and
- auctions at which persons attend in person.

### **Take away**

We are in a new social distancing era and it looks like we could all be working remotely for the foreseeable future. Property lawyers and conveyancers therefore need to avoid face-to-face contact with other people and instead adopt technology so that, as far as is possible, property transactions can be completed electronically and as effectively as before. They can consider carrying out VOI checks using video technology, exchanging contracts electronically and, if available in their jurisdiction, completing conveyancing transactions and lodging land registry documents electronically using an ELNO. If they have to lodge paper documents at land registries, they need to keep on top of the social distancing measures in place for the land registries. If a consequence of the current COVID-19 pandemic is that the completion of a transaction or the lodgment of a document in a land registry is likely to be delayed, then their clients could consider lodging a priority notice or a caveat to protect their interests in the interim.