

Aligning paper and electronic conveyancing requirements

Analysis of
responses



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Authorised by the Registrar of Titles, Land Victoria

Department of Transport, Planning and Local Infrastructure

570 Bourke Street Melbourne Victoria 3000

Telephone (03) 8636 2010

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Analysis of responses to the Consultation Paper - Aligning paper and electronic conveyancing requirements

Introduction

1. An Introduction Paper - Aligning paper and electronic conveyancing-requirements was released to stakeholders on 22 October 2013. This paper outlined at a high level the proposals that Land Victoria was considering. A detailed Consultation Paper was released on 22 November 2013.
2. An information session was held on 26 November 2013. More than 60 people attended this session.
3. Stakeholders were able to provide a submission about the Consultation Paper until 1 February 2014. Ten submissions were received by the due date. A further two submissions were received after this date. All submissions received were considered.
4. Submissions were received from the following:
 - Mortgage and Finance Association of Australia
 - Zip ID
 - Law Institute of Victoria
 - Victorian Privacy Commissioner
 - SAI Global
 - Australian Bankers' Association
 - Real Estate Institute of Victoria
 - Australian Institute of Conveyancers
 - Veda
 - Australian Finance Council
 - LeadPoint Mortgage Services
 - National Electronic Conveyancing Development Limited
5. Overall, the submissions supported the proposals in the Consultation Paper though some submissions raised concerns over particular issues or opposed certain aspects of the proposals.
6. The key issues stakeholders raised are outlined in further detail below together with the Land Victoria response to these issues. The issues raised in submissions are grouped thematically using the chapters of the Consultation Paper as a basis.

Matters raised in Consultation Paper

Phasing out certificates of title

Questions included in Consultation Paper

- 2.1: Do the proposed safeguards outlined in Sections 4-8 of this Consultation Paper adequately replace the functions of the certificate of title?
- 2.2: Are there any other options that should be considered?
- 2.3: Are there any other safeguards that need to be considered prior to paper certificates of title being abolished?

Overview of stakeholder response to proposed phasing out of certificates of title

7. Eight submissions supported the concept of phasing out certificates of title though four submissions made this support conditional on resolution of issues related to how this would be implemented. Four submissions made no comment on this aspect of the Consultation Paper.

Overview of Land Victoria response to stakeholders

8. Land Victoria intends to proceed with phasing out certificates of title and will take into account the implementation issues raised in submissions and consult further with industry on these issues prior to implementation.

Key issues raised by stakeholders and Land Victoria's response to these issues

Issue	Land Victoria Response
The issuing of paper certificates of title currently enables lodging parties to verify that their transaction was registered and that the correct information was recorded on the Register. If certificates of title are phased out, lodging parties should receive, in their place, an electronic record free of charge confirming that the dealing has been registered and advising what information Land Victoria has recorded.	Land Victoria acknowledges the desirability of lodgement parties being able to easily verify that a transaction was registered and the correct information registered. When transactions are lodged via an electronic lodgement network, users will be able to check the system to verify that a transaction has been registered. For lodgements in paper, Land Victoria will investigate administrative options for providing information to users upon registration.
With the proposed interim approach (Option 3), will subscribers to an Electronic Lodgement Network be able to process a transaction via paper and if so, can they choose not to have a	During the proposed interim period, paper certificates of title will continue to be used for paper transactions. Users will have the option of using either paper or electronic lodgement

Issue	Land Victoria Response
paper certificate of title for the paper transaction?	mediums.
There are many certificates of title that list a mortgage as an encumbrance when in fact the mortgage was paid off but the mortgage never discharged. How will Land Victoria address this when phasing out certificates of title?	The mortgagee's records will indicate whether a mortgage has been paid out. It will still be possible to discharge a mortgage from a property after the certificate of title for that property has ceased to exist. In the future, Land Victoria will be asking mortgagees to discharge mortgages upon the ending of the mortgage.
During the interim period of phasing out certificates of title, how will mortgage service providers know whether or not to expect a paper certificate of title for a transaction?	Folio searches will indicate whether a paper certificate of title exists.
How will a lodging party know whether or not a lodgement has been successful if no paper certificate of title is issued? Will a report be issued and if so, what information will the report show?	Lodgement summary reports will continue to be issued.
Any changes to the current arrangements should commence during a non-peak period (eg March or September).	LV will certainly take this into consideration in determining implementation dates for new procedures.
Nationally consistent implementation strategies should be adopted in consultation with financial institutions.	Land Victoria is working with other jurisdictions to make conveyancing requirements as nationally consistent as possible. Business practices and legislative requirements may mean complete national consistency is not possible.

Applying electronic conveyancing requirements to paper conveyancing

Questions included in Consultation Paper

- 3.1: Should the requirements for paper and electronic conveyancing transactions be aligned? If not, why not?

Overview of stakeholder response to proposed application of electronic conveyancing requirements to paper conveyancing.

9. Ten submissions supported the proposals. Five of these submissions raised issues relating to how this would be implemented. Two submissions made no comment on this aspect of the Consultation Paper.

Overview of Land Victoria response to stakeholders

10. Land Victoria intends to proceed with applying electronic conveyancing requirements to paper conveyancing and will take into account the implementation issues raised in submissions.

Key issues raised by stakeholders and Land Victoria's response to these issues

Issue	Land Victoria response
Uniform procedures for paper and electronic conveyancing should be nationally uniform.	Land Victoria is working with other jurisdictions to make conveyancing requirements as nationally consistent as possible. Business practices and legislative requirements may mean complete national consistency is not possible.
Requirements (especially verification of identity requirements) need to ensure that non-Authorised Deposit Institution (ADI) lenders and lenders who do not have a large branch network are not disadvantaged.	Non ADI lenders and lenders without a branch network will have the option of becoming a subscriber to an electronic lodgement network. Once a subscriber, they will be able to undertake verification of identity. Agents may also be used.
The requirements may lead to greater conveyancing costs, which may be prohibitive for smaller firms.	The requirements are designed to reduce costs by making procedures consistent across the industry. Land Victoria's view is that prudent conveyancing and mortgage practices should already entail taking reasonable steps to verify the identity of parties.
Timelines for alignment may not be feasible.	Land Victoria will provide appropriate lead time before any new requirements become mandatory.
It should be possible to have electronic mortgages outside the established electronic conveyancing system.	Land Victoria supports amending legislation to facilitate electronic mortgages. It will be the responsibility of each mortgagee to assess whether an electronic mortgage is valid or not.

Verification of identity for paper conveyancing transactions

Questions included in Consultation Paper

- 4.1: Is it reasonable to introduce verification of identity requirements for paper conveyancing transactions? If not, why not?

- 4.2: Is the proposed list of Verifiers appropriate? Are there any other categories of persons who should have the authority to verify identity?
- 4.3: Is the proposed list of situations where identity must be verified appropriate? Are there any other situations where verification of identity should be required?
- 4.4: Is the proposed seven year period for retention of documents appropriate? If not, why not and what would be appropriate?

Overview of stakeholder response to proposed verification of identity requirements to paper conveyancing.

- 11. Three submissions supported the proposals in the Consultation Paper relating to verification of identity (VOI). Seven submissions, without necessarily opposing the concept of VOI requirements, raised issues related to the proposals in the Consultation Paper. In particular, there were concerns that the proposed safe harbour standard will be too onerous in some situations. Two submissions made no comment on this aspect of the Consultation Paper.

Overview of Land Victoria response to stakeholders

- 12. Land Victoria intends to proceed with its proposal to set requirements that parties take reasonable steps to verify the identity of their customers. Land Victoria’s view is that VOI is an essential probity and fraud mitigation measure that should already be undertaken. It is acknowledged that the proposed safe harbour situation may not cover some situations. However, parties can develop their own VOI procedures to cover these situations, provided the alternative VOI standard meets the ‘reasonable steps’ threshold.

Key issues raised by stakeholders and Land Victoria’s response to these issues

Issue	Land Victoria response
<p>VOI requirements will increase costs to lenders that do not transact face to face.</p> <p>VOI requirements need to be flexible enough to permit identification by mortgagees that do not have a large geographic spread and permit identification of remote clients.</p> <p>Any mortgagee should be an authorised verifier of identity.</p> <p>A broader range of authorised verifiers of identity is needed for situations where one of the parties is outside Australia.</p>	<p>The only absolute requirement is that parties take ‘reasonable steps’ to verify identity. The Registrar is publishing a ‘safe harbour’ standard, use of which will be optional. Stakeholders will be free to develop their own procedures to meet the ‘reasonable steps’ requirement.</p> <p>Version 2 of ARNECC’s Model Participation Rules has recently been published on its website. Some amendments have been made to the VOI Standard. The VOI Standard now permits a subscriber or its agent to conduct VOI overseas.</p>

Issue	Land Victoria response
<p>Australian lawyers should be allowed to act as an authorised verifier of identity anywhere not just within Australia.</p> <p>Australia Post should be an authorised verifier (especially to cover people living in remote areas).</p> <p>A wider range of bank staff should be included in the list of authorised verifiers.</p> <p>Notary Publics should be able to verify identity of persons overseas, as often persons overseas cannot readily access an Australian Consulate.</p> <p>Non-ADI financiers who are regulated under commonwealth legislation should have the same ability to perform VOI as ADIs. Otherwise, non-ADI financiers and their customers will be discriminated against due to higher costs due to having more onerous requirements.</p> <p>Insurance Rules for agents engaged to perform VOI are too onerous and should be relaxed.</p>	
<p>VOI requirements should be nationally uniform. Elements of the Victorian proposals do not accord with ARNECC models or those currently used or proposed for Western Australia or South Australia.</p>	<p>The standard set out in ARNECC's Model Participation Rules, as amended from time to time, will be adopted by Victoria. This standard may require slight adjustment to accommodate paper conveyancing.</p>
<p>VOI requirements should only be introduced once a significant percentage of conveyancing transactions are performed electronically.</p>	<p>Land Victoria's view is that prudent conveyancing and mortgage practices should already entail verification of identity of parties.</p>
<p>In paper conveyancing, VOI should not be required for employees of law firms signing documents on behalf of clients.</p>	<p>Verification of staff only needs to be done once.</p>
<p>VOI requirements should not be necessary for lodging caveats using paper conveyancing.</p>	<p>Land Victoria believes it is necessary, given the time and expense it can take an innocent party to have a wrongly recorded caveat removed.</p> <p>Again, Land Victoria's view is that prudent conveyancing practices should already entail verification of identity of parties.</p>

Issue	Land Victoria response
Information provided to verifiers of identity may not be subject to sufficient privacy safeguards due to fact that many verifiers of identity may not be subject to privacy legislation (eg many small businesses are not covered by privacy legislation due to the exemption for small businesses). Land Victoria should impose additional requirements on verifiers to ensure there are appropriate privacy safeguards on information collected during verification of identity.	Land Victoria believes it is a matter for the Commonwealth Parliament the extent to which privacy requirements should apply to small businesses regulated under Commonwealth Privacy legislation.
Can any bank employee perform VOI?	This is a decision for each individual financial institution, in assessing what constitutes 'reasonable steps'.
Will it be possible for a VOI to be performed once and held on record?	The requirement is to take reasonable steps. It is for each financial institution/conveyancer/lawyer to assess whether relying on a previous VOI is reasonable in the circumstances.
Why are VOI requirements commencing on 1 January 2015, when PEXA proposes to deploy all functions in Victoria from October 2014? Why are these two dates not aligned? How will matters be processed during the period between October 2014 and January 2015?	<p>The proposed 1 January 2015 date is to allow stakeholders sufficient lead in time before new requirements commence. Individuals are free to commence using VOI requirements before 2015 if they wish (eg to align with PEXA start date).</p> <p>Land Victoria's view is that prudent conveyancing and mortgage practices should already entail verification of identity of parties.</p>
Why is VOI required if the Registrar will not be itself collecting VOI information?	<p>VOI is essential for probity and fraud mitigation.</p> <p>Land Victoria's view is that prudent conveyancing and mortgage practices should already entail verification of identity of parties.</p>
Whose responsibility will it be to ensure VOI and Client Authorisations have been completed?	The responsibility will rest with whoever provided the relevant certification.
The national VOI Standard should be based on the current NSW provision, under which compliance with Commonwealth Anti-Money Laundering and Counter Terrorism Financing requirements is deemed to constitute appropriate steps for undertaking verification of identity. This will also address concerns	Other jurisdictions are expected to replace any existing VOI requirements with those recently published by ARNECC.

Issue	Land Victoria response
that the proposed Victorian standard will not address desires for non-face to face means of identity verification.	
Why is a seven year document retention period required? Banks should be free to choose what and for how long they will retain documents as they see fit?	This aligns with the requirements in ARNECC's Model Participation Rules.
VOI should not be required for paper transactions, given the costs this will impose, until the majority of transactions are performed electronically.	Land Victoria's view is that prudent conveyancing and mortgage practices should already entail verification of identity of parties.
A document verification service should be used to enhance the reliability of VOI.	Stakeholders are welcome to use a document verification service if they wish.
Mortgagees should have the option of using either a defined safe harbour VOI standard or their own process.	This is what Land Victoria proposes. If mortgagees have their own processes it will need to meet the 'reasonable steps' requirement.

Client authorisations

Questions included in Consultation Paper

5.1: Is the introduction of client authorisation requirements appropriate for paper conveyancing transactions? If not, why not?

Overview of stakeholder response to proposed client authorisation requirements

13. Three submissions supported the proposals in the Consultation Paper relating to client authorisations. Four submissions, without necessarily opposing the concept of client authorisations, raised issues relating to how their use would be implemented. One submission opposed the use of client authorisations in paper conveyancing. Four submissions made no comment on this aspect of the Consultation Paper.

Overview of Land Victoria response to stakeholders

14. Land Victoria intends to proceed with the proposal that lawyers and conveyancers enter into a client authorisation with their client before undertaking a paper conveyancing transaction. As it will be uncertain at the onset whether a particular transaction will proceed in the electronic or paper medium, Land Victoria considers it desirable that the same requirements that apply to electronic conveyancing apply to paper conveyancing as far as practicable. The implementation issues raised by

stakeholders are addressed in the table below. Land Victoria will consult further with industry on these issues prior to implementation.

Key issues raised by stakeholders and Land Victoria's response to these issues

Issue	Land Victoria response
Client authorisations should only be required when a client uses a legal representative to execute documents on their behalf. No client authorisation should be required when a client executes documents themselves.	The use of client authorisations in paper conveyancing will be required because, at the onset of a transaction (when the client engages a professional), it may not be apparent which medium (electronic or paper) will be used for the transaction.
Which version of the client authorisation form is to be used?	The client authorisation contained in ARNECC's Model Participation Rules, as amended from time to time.
Why would client authorisation requirements commence on 1 January 2015, when PEXA proposes to deploy all functions in Victoria from October 2014. Why are these two dates not aligned? How will matters be processed during the period between October 2014 and January 2015?	Land Victoria proposes to introduce client authorisations sometime in 2015, to allow stakeholders sufficient lead time before new requirements commence. Stakeholders are free to commence using client authorisation forms before 2015 if they wish (eg to align with PEXA start date).
Will financial institutions and their agents need to use client authorisations?	Only conveyancers and lawyers will be required to use the client authorisation form when they represent a client. A financial institution may enter into one as the client of a conveyancer or lawyer.
How will the use of client authorisations affect self-represented parties?	Self-represented parties will not use client authorisations.
<p>Client authorisations are not needed for paper conveyancing.</p> <p>If introduced, they should mirror as far as possible, the client authorisations used for electronic conveyancing but with changes to reduce confusion between the two lodgement mediums.</p>	<p>The use of client authorisations in paper conveyancing will be required because, at the onset of a transaction (when the client engages a professional), it may not be apparent which medium (electronic or paper) will be used for the transaction.</p> <p>The same forms will be used for client authorisations irrespective of whether the transaction ultimately proceeds in paper or electronically.</p>

Certifications

Questions included in Consultation Paper

- 6.1: Is it reasonable to require certifications for paper conveyancing transactions? If not, why not?
- 6.2: Are the proposed persons who can give certifications appropriate? Are there any other categories of persons who should have the authority to give certifications?

Overview of stakeholder response to proposed certification requirements.

15. Three submissions supported the proposals in the Consultation Paper relating to certifications. Three submissions, without necessarily opposing the overall thrust of the proposals in the Consultation Paper, raised issues relating to how their use would be implemented. One submission opposed the introduction of certifications for paper conveyancing. Five submissions made no comment on this aspect of the Consultation Paper.

Overview of Land Victoria response to stakeholders

16. Land Victoria intends to proceed with the proposal that conveyancers, lawyers and mortgagees provide certifications when undertaking a paper conveyancing transaction. Land Victoria considers certifications an effective measure in aiding the integrity and probity of the conveyancing process. The implementation issues raised by stakeholders are addressed in the table below. Land Victoria will consult further with industry on these issues prior to implementation.

Key issues raised by stakeholders and Land Victoria's response to these issues

Issue	Land Victoria response
The proposed form of certifications should be amended to reflect the fact that in some situations, relevant documents referred to in the current proposed form of certifications may not exist.	Land Victoria believes the proposed wording in the Consultation Paper are sufficiently generic. Supporting documents are what the conveyancer, lawyer or mortgagee relied upon to satisfy themselves the transaction was legitimate.
Will a mortgage service provider be able to provide certifications on behalf of a financial institution?	Yes, if acting under a power of attorney from the financial institution.

Issue	Land Victoria response
Some of the proposed certifications that banks will be expected to provide are not appropriate and should be amended to more appropriately reflect the information that banks can attest to.	Land Victoria believes the proposed wording in the Consultation Paper are sufficiently generic. The financial institution needs to attest that it has sufficient documentation to satisfy itself the transaction is legitimate.
What is the impact of certifications on self-represented parties?	Certification requirements will not apply to self-represented parties.
Certifications should not be required for paper conveyancing transactions.	The use of certifications in paper conveyancing will align requirements across the two mediums, paper and electronic. This will eliminate the need for stakeholders and Land Victoria to use two processes, including using different instrument forms.
Non-ADI financial institutions should have the same ability to provide certifications as ADIs.	Non-ADI institutions can become subscribers to an electronic lodgement network and will thereby have the same ability to provide certifications as an ADI.

Priority notices

Questions included in Consultation Paper

- 7.1: Should priority notices be introduced? If not, why not?
- 7.2: Should priority notices be optional? If not, why not?
- 7.3: Should it be possible to lodge priority notices in paper? If so, what processes should be employed to ensure that the lodging party is known and verified as is the case for a subscriber to an electronic lodgement network?
- 7.4: Should priority notices extend to all dealing types or only to transfers and mortgages?
- 7.5: Is the list of exceptions to a priority notice outlined in this Consultation Paper sufficient, or should they be expanded?
- 7.6: Is 60 days the appropriate time period for a priority notice? If not, what should the period be?

Overview of stakeholder response to priority notices

- 17. Seven submissions supported the proposals in the Consultation Paper relating to priority notices. Five of these submissions raised issues relating to how their use would be implemented. Five submissions made no comment on this aspect of the Consultation Paper.

Overview of Land Victoria response to stakeholders

18. Land Victoria intends to proceed with the proposals relating to priority notices. The implementation issues raised by stakeholders are addressed in the table below. Land Victoria will consult further with industry on these issues prior to implementation.

Key issues raised by stakeholders and Land Victoria's response to these issues

Issue	Land Victoria response
There should be an administrative process enabling the Registrar to cancel a priority notice.	<p>Because a priority notice has a lifespan of only 60 days, in nearly all cases a priority notice will have expired prior to any administrative process running its course. It is likely that if removing a priority notice before its scheduled expiry is vital, parties would seek a court order.</p> <p>Priority notices will only be lodged electronically through an electronic lodgement network. This means there will be a clear record of who lodged a priority notice. This combined with the ability to recover damages for vexatious use of priority notices should provide a strong disincentive to their misuse.</p>
The Registrar should have the ability to correct minor mistakes (eg spelling) in a priority notice at the request of the party lodging a priority notice in order to facilitate a dealing.	As priority notices will be processed electronically, a correction facility is not viable. If a priority notice is lodged with incorrect information, it can be withdrawn and a priority notice with the correct information lodged.
Use of the Queensland system for dealing with inconsistent dealings (in order to provide more clarity over how inconsistent dealings will be treated) should be adopted.	Land Victoria considers the proposed Victorian procedures provide sufficient clarity. Following registration of any dealings protected by a priority notice, any unregistered dealings will be processed.
There should be an ability for an intending transferee who has lodged a priority notice to subsequently consent to dealings not specified in the priority notice prior to transfer when this suits all parties.	A party wishing to consent to subsequent dealings can withdraw the priority notice and then resubmit a priority notice after the dealing has been registered.
Priority notices should be mandatory.	It would not be possible to enforce a policy of mandatory priority notices.

Issue	Land Victoria response
It should be possible to lodge priority notices in paper.	The costs involved in establishing new processes in both paper and electronic mediums cannot be justified given Victoria is moving towards electronic conveyancing.
VOI should not be required for lodging priority notices (ability to claim compensation for improper use of priority notices is adequate protection displacing need for VOI).	Land Victoria believes verification of a client's identity is essential before a conveyancer or a lawyer lodges any transaction on behalf of that client.
Because priority notices will have to be lodged electronically, legal practitioners that do not register for an electronic lodgement network will not be able to lodge them.	It is expected that given the benefits of electronic conveyancing, most if not all legal practitioners involved in conveyancing will register to use an electronic lodgement network.
Priority notices should block the recording of caveats.	Only one submission proposed this. Land Victoria considers it would be inappropriate for a priority notice to block the recording of caveats, as they are a necessary tool to protect a person's unregistered proprietary interest.
Lodgement of a priority notice over a lot in an unregistered plan of subdivision should not prevent registration of a mortgage over the parent title.	Land Victoria anticipates this will be a rare situation. A priority notice cannot be lodged against a child folio until a plan has been lodged. A priority notice will block the registration of a follower mortgage. However, the party lodging the priority notice will be able to withdraw the priority notice (and can re-lodge a further one after the mortgage is lodged).
There should be an option of 60, 90 or 120 days for the length of a priority notice.	It will be possible to lodge another priority notice if 60 days is not enough.

Non-represented parties

Questions included in Consultation Paper

- 8.1: Are the proposed requirements for non-represented parties reasonable? If not, why not?
- 8.2: Who should be authorised verifiers for the purpose of verifying the identity of non-represented parties?
- 8.3: Will the proposed requirements for non-represented parties assist conveyancers and lawyers in dealing with non-represented parties? If not, why not?

8.4: Are there any other requirements that should be placed on non-represented parties?
If so, what?

Overview of stakeholder response to proposals relating to non-represented parties

19. Five submissions supported the proposals in the Consultation Paper. Three of these raised implementation issues. Seven submissions made no comment on this aspect of the Consultation Paper.

Overview of Land Victoria response to stakeholders

20. Land Victoria intends to proceed with the proposals relating to non-represented parties. The implementation issues raised by stakeholders are addressed in the table below.

Key issues raised by stakeholders and Land Victoria's response to these issues

Issue	Land Victoria response
An authorised verifier should only be responsible for verifying the non-represented person's identity and execution of the document and should not be responsible for checking the contents of any documents.	An authorised verifier will not be responsible for checking the contents of any documents it witnesses the execution of.
Australia Post should be added to the list of verifiers.	Land Victoria will consider this when developing the list of authorised verifiers.
What is the impact on the certification of documents?	Non represented parties will not provide certifications.
All Commonwealth regulated financial institutions should be able to verify non-represented parties not just ADIs.	Non-ADI institutions can become subscribers to an electronic lodgement network and will thereby have the same ability to conduct VOI as an ADI.

Consents by mortgagees to conveyancing transactions

Questions included in Consultation Paper

9.1: Do you believe that the proposed changes simplify existing processes relating to consents? If not, why not?

9.2: Do mortgagees and annuitants continue to be adequately protected?

9.3: How should the administrative process operate? Why?

Overview of stakeholder response to proposed removal of consents

21. Four submissions supported the proposals in the Consultation Paper. Three raised implementation issues. One submission opposed the proposed removal of consents. Seven submissions made no comment on this aspect of the Consultation Paper.

Overview of Land Victoria response to stakeholders

22. Land Victoria intends to proceed with the proposals relating to consents. While one submission opposed their removal on the grounds it undermines the concept of indefeasibility, it is already the case that, for transfer by a mortgagee, encumbrances can be removed from the Register if consent was not granted. Land Victoria's responses to the issues raised are in the below table.

Key issues raised by stakeholders and Land Victoria's response to these issues

Issue	Land Victoria response
Mortgagee consent should only be established via a formal written notification to that effect. Mortgagee consent should not be able to be established via conduct, waivers, laches, verbal consents or informal correspondence.	Land Victoria agrees.
The value of mortgaged assets should not be adversely impacted by actions that occur without the mortgagee's consent.	This is a matter for the contracts between mortgagees and mortgagors.
Removal of the requirement to provide consents will undermine indefeasibility and thus reduce the confidence that parties can have in the information provided in the Register (for example, by making it possible for a registered easement to subsequently be removed due to lack of consent)	It is already the case that, for a transfer by a mortgagee, an encumbrance can be removed from the Register if the mortgagee failed to give consent.
If consents are not registered, they may be lost (as financial institutions may destroy documents after seven years) leaving affected parties with no evidence a consent was provided.	At present consents are neither registered nor retained by Land Victoria. Land Victoria believes parties should ensure they keep appropriate records relating to encumbrances.
The legislation could also be amended to provide that nomination of a title by a financial institution for a transaction will be deemed to constitute consent to the transaction.	Nominations will be phased out as part of the adoption of electronic processes.

Issue	Land Victoria response
What if a right of way that was entered into without the mortgagees consent was removed but the right of way was vital to the ability of the land owner to enter the property?	The onus is on the owner of the land benefitting to ensure that appropriate consents are provided.
The onus of proof should be on the party claiming consent was granted, not the mortgagee.	Land Victoria agrees.

Mortgage provisions

Questions included in Consultation Paper

- 10.1: Do you believe that it is reasonable for a mortgage to have no effect if the mortgagee failed to take reasonable steps when undertaking a verification of identity? If not, why not?
- 10.2: Do you believe that it is reasonable to limit the interest owing where a fraud has occurred? If not, why not?
- 10.3: Which rate is the most suitable rate, the Reserve Bank of Australia's official cash rate or the Bank Accepted Bills rate? And why? Would another rate be more suitable? If so, which rate and why?

Overview of stakeholder response to priority notices

23. Three submissions supported the proposed voiding of mortgages when verification of identification was not performed. Two submissions opposed this proposal while seven submissions made no comment. Two submissions supported the proposed restriction of the interest payable on fraudulent mortgages while four submissions opposed this proposal. Six submissions made no comment. Two submissions made comment on what was the most suitable rate for determining interest; one suggested the RBA cash rate, the other the rate set by the Attorney General under the *Penalty Interest Rates Act 1983*.

Overview of Land Victoria response to stakeholders

24. Land Victoria intends to proceed with proposals outlined in the Consultation Paper. Land Victoria considers it inappropriate that legitimate registered proprietors and the State (via compensation payments from public funds) should be expected to honour a fraudulent mortgage that was issued following a failure by a financial institution to follow prudent processes and properly verify identity. Similarly, in cases where appropriate verification of identity was performed prior to issuing a fraudulent mortgage, Land Victoria believes that the State should not have to pay compensation

from public funds for an interest rate that is greater than what is a reasonable market rate. Upon consideration, Land Victoria regards the Banks Accepted Bills rate as the best means of measuring an appropriate level of interest as this measure is already used in Victorian legislation.

Key issues raised by stakeholders and Land Victoria's response to these issues

Issue	Land Victoria response
Indefeasibility should apply for the full interest rate specified in the mortgage.	Land Victoria disagrees with this position and believes that the State should not have to pay compensation from public funds for an interest rate that is greater than what is a reasonable market rate.
The mere failure to verify identity should not of itself void a mortgage if the failure did not contribute to any fraud.	Land Victoria disagrees with this position and believes adequate verification of identity is a prerequisite.
What does voiding a mortgage mean?	A mortgage would only be void for the purposes of the <i>Transfer of Land Act</i> . This would mean the mortgagee could not seek to enforce the mortgage against the land and hence the legitimate registered proprietor. The proposals would not affect a mortgagee's ability to take action against the fraudster under other legislation or at common law.
All mortgages will be held to be void unless the mortgagee proves otherwise.	The proposals only apply to fraudulent mortgages. Financial institutions that perform adequate verification of identity and keep appropriate records will not be affected.
Why does a mortgagee need to undertake VOI for a mortgage variation, if VOI was already undertaken when the mortgage was first issued?	The financial institution should perform Verification of Identity to confirm the customer is who they claim to be. It may be that the financial institution considers that reliance on the original VOI constitutes taking 'reasonable steps'.
Interest payable on a fraudulent mortgage should not be limited when a bank has fulfilled its VOI obligations. Concerned this may have constitutional implications.	Interest would only be limited for the purposes of the <i>Transfer of Land Act</i> . This would mean the mortgagee could not claim interest above the market rate against the legitimate registered proprietor. The proposals would not affect a mortgagee's ability to take action against the fraudster under other legislation or at common law. Land Victoria does not see any constitutional implications.

Issue	Land Victoria response
The RBA official cash rate should be used.	Upon consideration, Land Victoria regards the Banks Accepted Bills rate as the best means of measuring an appropriate level of interest, as this measure is already used in Victorian legislation.
It is unreasonable to penalise a financier that has not contributed to a fraud.	Land Victoria disagrees with this position and believes that the State should not have to pay compensation from public funds when a mortgagee did not adequately verify identity or when the interest rate in a fraudulent mortgage is greater than a reasonable market rate.
Both the RBA and Bank Accepted Bill rates are not workable as means of setting a rate of interest. The rate fixed by the Victorian Attorney-General under the <i>Penalty Interest Rates Act 1983</i> should be used.	The rate fixed by the Victorian Attorney-General is used for legal proceedings and is not considered a suitable rate for mortgages. Land Victoria believes the Bank Accepted Bills rate is a workable measure as it is already used in Victorian legislation.

Conclusion

25. Based upon the comments received and further discussion at the national level, Land Victoria intends to proceed with the development of the proposals in the Consultation Paper.
26. Land Victoria will consult further with industry on implementation issues raised in the feedback prior to the proposals being implemented.