Identity Fraud and Land Registration Systems: An Australian Perspective

Lynden Griggs and Rouhshi Low*

Abstract: There is no doubt that fraud in relation to land transactions is a problem that resonates amongst land academics, practitioners, and stakeholders involved in conveyancing. As each land registration and conveyancing process increasingly moves towards a fully electronic environment, we need to make sure that we understand and guard against the frauds that can occur. What this paper does is examine the types of fraud that have occurred in paper-based conveyancing systems in Australia and considers how they might be undertaken in the National Electronic Conveyancing System (NECS) that is currently under development. Whilst no system can ever be infallible, it is suggested that by correctly imposing the responsibility for identity verification on the appropriate individual, the conveyancing system adopted can achieve the optimum level of fairness in terms of allocation of responsibility and loss. As we sit on the cusp of a new era of electronic conveyancing, the framework suggested here provides a model for minimising the risks of forged mortgages and appropriately allocating the loss. Importantly it also recognises that the electronic environment will see new opportunities for those with criminal intent to undermine the integrity of land transactions. An appreciation of this now, can see the appropriate measures put in place to minimise the risk.

Introduction

The verification of identity of the parties to land transactions stands as a bulwark against rampant abuse and an undermining of the integrity of the conveyancing system. After all, it is that connection between the conveyancing system, the need to identify the parties to the transaction and the all too easy theft of one’s soul (be it through credit card manipulation, the stealing of documents that verify identity, the openness of social networking sites, the possession of the certificate of title and the simple lack of knowledge and carelessness of the consumer in knowing how to protect their reputation) that provides the avenue by which one person can assume to be another. In the context of land transactions, this can easily lead mortgagees forwarding finance to a fraudster, the innocent registered proprietor unaware this is occurring. Because of this the more steps that can be put in place to ensure that the parties to the transaction are the people who they say they are, without compromising the efficiency of the system, can only lead to greater reliance, understanding and confidence – a confidence that we are now seeing questioned in the populist media in Australia and the Parliament of England.1 Furthermore, with a State guaranteed compensation scheme in place to compensate those who suffer

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1 For example in Australia on December 30, 2009, a story aired on Today Tonight, highlighting how land could be sold, or mortgaged to strangers, without the consent or knowledge of the true owner. Recently a scammer has been able to sell a property in Perth, Western
loss, the purse of the public is protected by a system that takes the necessary steps to minimise fraud. As noted by Matthews, it is ‘laughably simple’ the way in which frauds can occur. What this paper does is examine what steps are currently required for identity verification in the context of land transactions, particularly in the context of a mortgagee lending money based on a representation that the person seeking the finance is the fee simple owner of the property, and as we move inexorably towards a fully electronic system for conveyancing, what steps should be incorporated in this future model. The need for this examination cannot be doubted.

The intended move to an electronic business environment for conveyancing represents the most significant change in industry practices over the last 150 years...The most significant change from the land standing paper-based conveyancing arrangements...is the shift from transacting parties signing the instruments necessary to effect changes in each jurisdiction’s...Register to an appointed agent signing on the transacting party’s behalf. The signing, by a legal or conveyancing practice or practitioner, on the transacting party’s behalf will necessarily require the transacting party’s identity to be verified... (emphasis supplied).

Whilst the focus of this paper is on land, readers would be aware that any discussion of remedial responses for identity fraud arises in the wider context that this problem can equally occur outside the milieu of land transactions. However, there is also no doubt that a significant portion of the billion-dollar fraud that occurs relates to land transactions. As transactions are undertaken in cyberspace, ‘new opportunities arise for people within organisations as well as for external customers to misrepresent themselves and to manipulate electronic transactions for gain.’

[Website URL for Galaxy Research Identity Theft Report]

3 See generally <www.necs.gov.au> (National Electronic Conveyancing System) for an overview of the current process and timetable for implementation (at 25 March 2010).
4 NECS Request for Tender, CIV Standard and Application Procedures Development for NECS, 22 January 2010, 2.8-2.9.
5 The literature on identity fraud in Australia and overseas has used the terms ‘identity fraud’ and ‘identity theft’ interchangeably. There does not seem to be a standardised definition for these terms: see Susan Sprotle, & Norm Archer, ‘Defining Identity Theft’ (2007) Eighth World Congress on the Management of eBusiness and ACPR, Standardisation of definitions of identity crime terms: A step towards consistency, Report Series No 145.3, 2006, 5. This paper will use the definition from Model Criminal Law Officers’ Committee of the Standing Committee of the Attorneys-General (Final Report: Identity Crime, 2008) which define the terms ‘identity crime’, ‘identity fraud’ and ‘identity theft’ as follows: ‘Identity crime is a generic term to describe activities/offences in which a perpetrator uses a fabricated identity, a manipulated identity, or a stolen/assumed identity to facilitate the commission of crime. Identity fraud is the gaining of money, goods, services, or other benefits or the avoidance of obligations through the use of a fabricated identity, a manipulated identity, or a stolen/assumed identity. Identity theft is the theft or assumption of a pre-existing identity (or a significant part thereof), with or without consent, and whether, in the case of an individual, the person is living or deceased; at page 8.
7 Rouhshi Low, 'Maintaining the integrity of the Torrens system in a digital environment: a comparative overview of the safeguards used within the electronic land systems in Canada, New Zealand, United Kingdom and Singapore', (2005) 11 Australian Property Law Journal 155, 167 quoting from Graycar and Smith, above n 6. The Australian Government has also prepared a kit to prevent identity theft: Australian Government, National Crime Prevention, ‘A kit to prevent and respond to identity theft’, ISBN 0 642 21084 5. Losses in Australia are estimated to be $3.5bn/year: M. Rannard, “Identity Theft is increasing – survey”, Sydney Morning Herald, June 3, 2009, <http://news.smh.com.au> at 5 June 2009. The author was quoting from Identity Theft Report conducted by Galaxy Research, which found that 4.4ml Australians had been affected by identity theft in the last year. If these figures are accurate, the escalating cost of this...
How Can Identity Fraud in Land Transactions be Perpetrated?

As numerous Australian cases illustrate, the way in which identity fraud can occur in relation to land is all too simple. For example in *Grgic v ANZ Banking Group Ltd*, the father, the registered proprietor of land, had refused to provide a guarantee for his son’s business. The son, aggrieved by this, set about on a course of action whereby the son, his wife, and a person impersonating his father was introduced to the bank manager. They had possession of the certificate of title. The mortgage was prepared with imposter signing the relevant documents and appearing as if he was the father. The monies were then advanced, the fraud possible because of the bank failing to check the identity of the imposter, the reliance by the bank on the possession of the certificate of title as a safeguard against identity fraud, and the relationship between the parties allowing the son to have possession of the certificate of title. A very similar scenario occurred in *Ratliffe v Watters*, where the daughter of the registered proprietor, in possession of the certificate of title, saw a solicitor, accompanied by an imposter represented by the daughter, to be her father. The solicitor, in this instance, prepared to witness the contract of sale and memorandum of transfer - the possession of the certificate of title and the relationship between the parties critical to the committing of the fraud.

Whilst the above examples came about through the familial relationship and easy access to title documents, *Challenger Managed Investments Ltd and Anor v Direct Money Corporation Pty Ltd and Others* illustrates how fraud may occur without possession of a certificate of title, or a pre-existing relationship to the victim. The imposter in this instance made application for a new certificate of title, based on the loss of the previous certificate. A cyclone was alleged to be the cause of the loss of the certificate. This application was supported by statutory declarations. The Land Titles Office issued new certificates of title with these being used to obtain a loan.

What these cases highlight is the ease in which identity fraud can occur, and perhaps given this, it is surprising that more is not made of the lack of safeguards. However, with the impending dawn of a new era based on technology which few will technically understand, a failure to put in place nationally consistent safeguards for identity verification will, as noted, only serve to undermine a land registration process that serves the vast majority of transactions exceptionally well. In Australia total land sales yearly exceed $240bn, with this approximating 26% of gross domestic product, mortgages of some $790bn, and the total value of

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10 (1969) 89 WN (Pt 1) (NSW) 497.

real estate in this country estimated at $3.4 trillion, a failure to put in place the necessary measures to protect the revenue of the Crown and the underlying economics of demand and supply could have disastrous consequences for the wider economy.\(^\text{12}\) Furthermore, as Matthews’ notes, the public nature of the land registry and the opportunities it presents for fraud could potentially be seen as a violation of human rights.\(^\text{13}\) These factors, with the additional recognition that consumers (such as purchasers of real estate) overstate the probability of something tragic occurring, even when objectively of a low probability,\(^\text{14}\) and the comprehension that whilst the risk of identity fraud is of a low probability it is nonetheless material,\(^\text{15}\) the key question is what safeguards are available, and what should be available to protect what many see as an inherent part of the culture of many jurisdictions – that of home ownership. With this background in mind, this paper will be structured as follows. Part 1 will consider just how loss and risk should be allocated in consumer land transactions generally – where should the responsibility lie when one’s identity is taken. Three major principles inform this debate – how should the loss be spread, how should it be reduced and how should it be imposed. Part 2 will examine just what is identity fraud, its prevalence in land transactions and contrasting how it occurs in the traditional paper based environment, with what will likely happen in an electronic environment. Part 3 will assess the risk associated with the activity of land transactions and identity fraud and provide an overview of the current legislative and regulatory responses to prevent it occurring. Part 4 will use the elements discussed in Parts 1 to 3 to discuss loss allocation in an electronic environment for land transactions.

Part 1: Loss Allocation in Identity Fraud Cases

Cassio: “Reputation, reputation, reputation, O, I have lost my reputation! I have lost the immortal part of myself, and what remains is bestial.”

Iago: “Reputation is an idle and most false imposition: oft got without merit, and lost without deserving.”\(^\text{16}\)

There is no doubt that whilst many would see loss of reputation and identity as a modern phenomenon brought about by the rise of the Internet, the complexity of modern lives and ready access to the personal information of others, the lament by Cassio in Shakespeare’s Othello demonstrates the issue has a long lineage. Indeed, it must be remembered that the better-known quote of Iago was said in the context of this man seeking to destroy the reputation and identity of Othello. Today, we understandably value our reputation or identity, and with modern means allowing this to be destroyed silently, covertly, from afar, and from enemies close at hand, the necessity to guard against loss of identity is all the more apparent. However,

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\(^\text{12}\) These figures represent the estimates in 2005/06. NECS, above n 4, 2.2. Intuitively, today the sums may be considerably greater.

\(^\text{13}\) Mathews, above n 2, 351.


\(^\text{16}\) William Shakespeare, Othello Act 1, Scene 3, lines 256-265 (cited from The Complete Works of William Shakespeare, (Cambridge University Press, 1982), 912)
it cannot be overemphasised - no system exists which will eliminate fraud. With this in mind, the question is one of how to deal with and minimise the risk, and allocate the loss when something does go awry. The starting points for this analysis are the three major principles behind economic efficiency and the allocation of loss in cases of forgery. These are loss spreading, loss reduction and loss imposition.17

**Loss Spreading**

Consumers are traditionally regarded as loss averse. This is the reason we insure. Even though the loss of property through a bushfire may be small, the consequences are so catastrophic that we will take precautions to protect against this. In so doing, the premiums payable will exceed the expected claims – if they did not, insurance companies would quickly become insolvent. Loss spreading allows the consumer to pass that risk onto another person where that risk can be spread by the insurance company over a larger group of people. Both parties are then in a position to beneficially exchange from that arrangement. A common example will highlight this point. Assume a person has a 1% risk that they will be subject to identity fraud. A risk averse registered proprietor owning a property worth $1,000,000 will likely pay more than $10,000 (i.e. greater than 1%) to guard against that risk. By contrast, the financial institution or insurer is likely to be risk neutral. It can safely assume that risk at a price of $10,000, and then spread that risk over a large number of homeowners. Therefore, the guiding economics behind loss allocation and loss spreading is that the risk should be borne by the person who can achieve risk neutrality at the lowest level. ‘In general, the party that can achieve risk neutrality at the lowest cost is the one that has greater economic resources and is in a position to spread the loss most effectively.’18 This is most likely to be the financial institution.

**Loss Reduction**

The second guiding principle is that the party who can guard against the loss most easily should incur that cost – the lowest cost avoider. The legal system must put in place incentives for each party to achieve loss reduction. Whereas loss spreading was predicated on a loss already having occurred, the analysis here is far more complex and must incorporate, by necessity, the intangibles of human behaviour. What reasonably can we expect to do with respect to the owners of land? We currently expect and require owners of debit and credit cards to take precautions to guard against misuse, and provided this occurs, then liability is limited to a minimal amount. Should we impose obligations on owners of land to take steps to protect the certificate of title and minimise the potential for one’s identity to be stolen. Currently in Australia, we see the state jurisdictions of New South Wales and Queensland imposing obligations on mortgagees to verify identity, yet little is imposed on the owners of real estate. Should we? If responsibility and liability is solely imposed on financial institutions, then there is little incentive for homeowners to take steps to take precautions. For

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18 Ibid, 71.
example, as noted above in *Grgic and Ratcliffe* one reason the fraud was possible was the familial relationship that allowed a person who is not the registered proprietor to obtain access to the certificate of title with this then allowing that fraudster to misrepresent the truth. The question is, if we were to impose greater responsibility on homeowners to protect against misuse of the certificate of title and other identity documents, will their behaviour alter. ‘[T]he loss reduction principle is a useful guide for assigning liability only if the supply of precaution or innovation is elastic with respect to liability.’¹⁹ In other words, requiring homeowners to take precautions will only be of use if the behaviour of those people alters. If it does not, imposing liability makes little sense. For this reason, whereas loss spreading clearly favoured the imposition of liability on the bank in a land transaction, the result is not as clear for loss reduction. Both financial institution and consumer are in a position to take relatively easy steps to minimise the potential for identity fraud. The financial institution with its capacity to easily undertake identity checks and pass costs associated with this over a great number of people can remove many of the risks associated with this type of forgery. Similarly, the consumer can take greater measures to protect their own identity.

**Loss Imposition**

This principle asks who should enforce or have the loss imposed on them. The clearest solution is to let the loss lie where it occurs. Thus, if a registered proprietor has a mortgage attached to their land by an imposter, the mortgagee should be entitled to enforce that mortgage, even though they may have taken no steps to check identity. The lesson learnt by the landowner would be clear, protect identity. However, this fails to take into consideration that the consumer is less likely than the mortgagee to be in a position to enforce their rights. The financial institution, acting rationally, will take the necessary steps to assert their rights and has a legal incentive to do so given the vast array of like transactions in which they are involved. This is not the case for the registered proprietor, and even more so with consumers that may have limited financial resources to take legal action. Putting these elements together, we see the framework sitting as follows:

<table>
<thead>
<tr>
<th>Loss Spreading</th>
<th>Onus should be placed on mortgagee – they are risk neutral, whereas most homeowners would be risk averse. The financial institution can spread the loss over a large group of people at little expense to each.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Loss Reduction</td>
<td>This factor is neutral. Both parties are able to reduce the potential for loss. The bank by taking steps to verify identity, the homeowner utilising precautions to avoid loss of identity. This would suggest that not all liability should be placed on the mortgagee.</td>
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<tr>
<td>Loss Imposition</td>
<td>Financial Institutions will have greater access to enforcement mechanisms with it being rational for them to take action to recover loss. Consumers do not have the same opportunity either because of a lack of finance or ignorance of their rights – consumers have less incentive to be appraised of their legal actions.</td>
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¹⁹ Ibid, 75.
Putting the Elements Together

As noted by the framework, two of three principles favour responsibility on the mortgagee, the third is not clear, and no suggestion is being made that the solution is simply quantitative – that the mathematical formula favours responsibility and liability for loss being imposed on the bank. However, we believe that there is a further consideration that can help resolve the conundrum. Bearing in mind that in Australia, even if the mortgage is forged or would otherwise be invalid due to fraud, the mortgagee, provided it has acted without fraud, will get an indefeasible title, albeit subject to such estates and interests as are already noted on the register: the person who bears the cost of preventing identity fraud should also obtain the benefits of so doing. Accordingly, if costs are imposed on one party, they should receive the benefit of taking those measures. The legislative reforms in New South Wales and Queensland (discussed below) operate on this premise: imposing responsibility for verification on mortgagees. In Queensland and New South Wales, provided that mortgagees follow the legislative guidelines of identity verification, indefeasibility of title is theirs to enjoy. However, this leaves the pivotal question unanswered – what should be the legislative guidelines, that is, what steps should be taken to verify identity, and who should take them. In stating this, it is important to recall that imposing obligations merely on one party diminishes the incentive on another party to reduce the risk of loss – the problem of moral hazard. We suggest the answer from the perspective discussed in this Part 1 is as follows: first, the primary responsibility for loss caused by the identity fraud should lie with lender. This institution has the capacity to check identity – if they do not check, then the assumption can be made that they would rather bear the loss, than take the costs of additional checks. ‘Society should not pay for measures that cost more than the evil they are intended to avoid.’ However, this fails to reflect the importance and public confidence necessary for the correct operation of the land registers. For this reason, mandated client identification must be imposed. Second, mortgagees have a far greater capacity to spread the loss than do consumers. Presently, each of us could have our identity stolen, though for the vast majority, this will never occur. It is a type of ‘reverse lottery’. Identity fraud for the individual consumer is devastating – for the financial institution rarely so. The institution can achieve risk neutrality. This is not possible for the individual consumer. It is the mortgagee who should bear the responsibility and the loss associated with identity fraud. By so doing a raft of measures should be put in place to assist the mortgagee to guard against this. In the next section, we further this analysis by developing a taxonomy of identity frauds that can occur in a conveyancing transaction.

22 Ibid, 383.
23 Risk neutrality refers to the attitude that one has to risk.
Part 2: A Taxonomy of Identity Frauds in a Conveyancing System

As noted in the section above, the ease in which fraud can be perpetrated in relation to land is staggering. They usually, but not always, occur in ‘the demimonde of low finance, of high interest [and] short term loans granted by demanding lenders to desperate borrowers’.

The first two cases discussed above illustrate the situation where the fraudulent person had a pre-existing relationship with the victim and where the fraudulent person colluded with a third party to impersonate the registered owner to perpetrate the fraud. In both Grgic and Rattcliffe, as was noted above, the fraud occurred because the impostor had in his/her possession the certificate of title and it was assumed that this then meant that the impostor was the registered proprietor of the land and had a right to deal with the land. In both cases, if further identification had been required to be produced to substantiate the claim as to identity, the fraud may have been averted.

These two cases also show that the relationship with the victim of the fraud was key to enabling the fraud. The relationship in both cases made it possible for the fraudulent person to obtain possession of the certificate of title and other documents necessary to perpetrate the fraud. In Grgic for example, the son was able to obtain the certificate of title because the father had agreed to support an earlier loan application that was made to the Commonwealth Bank of Australia. The father had accompanied the son and his wife to the bank, taking with him the certificate of title and other documents relating to the property. The certificate of title and other documents, including the form of mortgage executed by the father were left with the bank pending application of the loan. The loan was not approved and the son and his wife then went to bank to collect the certificate of title and the other documents that were left with the bank.

Fraud can also occur without using a third party to impersonate the landowner. In Young v Hoger, for example, the parents of the fraudulent person were joint tenants of the subject property. Without the knowledge of the father, the daughter and the mother obtained a loan secured by a mortgage over the property, by forging the father’s signature on the memorandum of mortgage. Default occurred and the daughter and the mother sought to refinance the loan; in doing so, the daughter forged the signatures of both her mother and father on the mortgage. In both cases, the signatures on the mortgage were purportedly witnessed by a Justice of the Peace. However that Justice of the Peace died before the trial, hence there was no evidence on the circumstances of the execution. Similarly, in Sansum v Westpac Banking...
Corporation, a wife and her husband were the registered proprietors of certain properties, as well as joint holders of an overdraft account with Westpac Banking Corporation. The wife in Sansom had caused these properties to be mortgaged to the bank by forging the husband’s signature on the mortgage instruments.37

In both cases, the pre-existing relationship between the fraudulent person and the victim was a key factor in enabling the fraud. In these cases the fraudulent person is usually trusted and relied on by the victim of the fraud. In Young v Hoger for example, the father relied upon and trusted his wife and daughter. The wife attended to all of the family dealings, the books of account, chequebooks, and all money matters.39 Similarly in Sansom, the wife looked after the financial affairs; she controlled the chequebooks and did all the banking, signing most of the cheques drawn on their joint account.40 This relationship of trust between victim and fraudulent person can enable the fraudulent person access to various documentation, such as the certificate of title, which can be used to aid in the perpetration of the fraud. It may also be said to encourage the lender to believe that the fraudulent person was acting or speaking on behalf of the victim so that all correspondence and relevant documentation, particularly the mortgage instrument, were given to the fraudulent person for the purposes of procuring execution. It is this ability to obtain the necessary documentation, particularly the mortgage instruments from the lender, which then gives the fraudulent person the opportunity to forge the victim’s signature on the mortgage instrument. In Sansom for example, the wife had told the bank officer that her husband was ill with cancer and the bank officer had believed her and had given her mortgage documents to be signed by her husband. This gave her the opportunity to forge the husband’s signature on the mortgage and return it to the bank.41 It is no coincidence that the most common perpetrators of land title fraud in Australia are those who are known to the victim of the fraud, such as the victim’s family members.42

In both cases, fraud may have been averted if the lender had attempted to contact the victim of the fraud. In Young v Hoger, no contact was made with the victim, although the victim was a party to the transaction. All correspondence by the solicitor acting for the lender was addressed to the daughter and her mother, or just to the daughter.43 More importantly, the mortgage instrument was given to the daughter and the mother for procuring execution. The solicitor did not have any dealings, direct or indirect, with the father; had he attempted to contact the father, he might have discovered that the father was being defrauded by his wife and daughter.44 In Sansom, the bank did not get in contact with the husband before the mortgages were

37 Sansom v Westpac Banking Corporation, BC9600344, 7-8.
38 In Sansom, it was the wife and in Young v Hoger, the daughter in collusion with the mother.
39 Young v Hoger [2000] QSC 455, [8].
40 Westpac Banking Corporation v Sansom BC9403430, 4-5.
41 Westpac Banking Corporation v Sansom BC9403430, 36.
42 Low (2006) above n 8, 228.
43 Young v Hoger [2000] QSC 455, [20].
44 Young v Hoger [2000] QSC 455, [20] and [36].
signed nor did the bank attempt to verify the truth as to the husband’s illness. Perhaps if the bank had contacted the husband to verify the mortgage transactions, the fraud might have been uncovered.

Both cases also highlight the situation where witnessing procedures were either disregarded, such as in Sansom, or circumvented, such as by forging the signature of the witness (which could be of a genuine or a fictitious person), thereby enabling the fraud. In Sansom, the witness (the bank officer) attested to the husband’s signature on the mortgage instruments even though they were not signed in his/her presence.

Two recent fraud cases in Queensland show that the circumstances in which the fraud in Young v Hoger and Sansom were perpetrated are not unique, and that they continue to feature in fraud cases occurring today. In Hilton v Gray the fraudulent person was the stepdaughter. In that case, the lender believed he was lending money to Mr. Gray (the victim of the fraud); with the monies to be forwarded to Mr. Gray’s step daughter (Mrs. Lonergan). In fact, Mrs. Lonergan had forged Mr. Gray’s signature to the mortgage. Mr. Gray knew nothing of the loan. When the lender’s solicitors began to suspect fraud, they checked the witnessing of the documents and contacted the Justice of the Peace who had purportedly witnessed Mr. Gray’s signature. At trial, the Justice of the Peace confirmed that she did not witness signatures unless some form of photo identification was provided. Douglas J opined that perhaps Mrs. Lonergan may have used a third party to impersonate her step father and provided the impostor with identification documents in her step father’s name to assist her in the fraud. Mrs. Lonergan also forged the signature of a fictitious person to the independent solicitor’s advice when a second advance increasing the principal sum was sought, so that it appeared that a solicitor by the name of ‘Jacinta Rose’ had signed the independent solicitor’s advice. No solicitor of that name was admitted to practice in Queensland. Had the lender’s solicitors checked the name, they might have discovered the fraud. In Royalene Pty Ltd v Registrar of Titles, the fraudulent person was the victim’s son-in-law, who had forged both the victim’s signature on the mortgage as well as the signature of the witness to the mortgagor’s signature. The son-in-law had contacted a mortgage broker and informed the mortgage broker that he was the husband of the victim of the fraud, that he wanted to obtain a loan and that there was an unencumbered property in his wife’s name that could be used as security. The son-in-law was also able to fax a number of documents to the mortgage broker, including a copy of the victim’s driver’s licence and a rates notice of the property. The lender’s solicitors sent the mortgage and other documents to the mortgage broker who then forwarded the documents via email to the fraudulent person. This then enabled the fraudulent person to forge the signatures on the mortgage documents. No certified copy of the

45 Westpac Banking Corporation v Sansom BC9403430, 36.
46 Westpac Banking Corporation v Sansom BC9403430, 36 & 39.
54 Royalene v Registrar of Titles [2008] Q ConvR 54-689.
55 Royalene v Registrar of Titles [2008] Q ConvR 54-689, [2].
56 Royalene v Registrar of Titles [2008] Q ConvR 54-689, [10].
57 Royalene v Registrar of Titles [2008] Q ConvR 54-689, [12].
58 Royalene v Registrar of Titles [2008] Q ConvR 54-689, [46].
driver's licence was provided with the executed documents. Daubney J found that had the mortgage broker or the solicitor been more vigilant in obtaining a certified copy of the driver's licence, the fraud may not been uncovered.

The cases thus far highlight frauds perpetrated by those who have a pre-existing relationship with the fraud victim. However, as observed in the previous section, fraud can also be perpetrated by those without a pre-existing relationship with the victim of the fraud. For example, in 2003, it was reported that illegal finance brokers were manufacturing false identities to enable customers to obtain bank loans. These brokers created new identities using fake drivers’ licences, council rates notices, medicare cards, employers’ references, credit cards and bank statements. In 2007, Land and Property Information (LPI) New South Wales uncovered a mortgage fraud scheme involving counterfeit certificates of title. Nine counterfeit certificates of title were discovered by LPI. According to LPI, the counterfeit Certificates of Title used in the fraud scheme are produced by superimposing details from title searches of genuine titles on forged certificates in the format used prior to the introduction of certificates with enhanced security features in January 2004. The counterfeits were of reasonably high quality and were used in conjunction with forged identity documents as a means of proving ownership. Then in 2009, LPI uncovered a mortgage fraud scheme operating in Victoria affecting land in NSW, again using counterfeit titles. Two counterfeit certificates were identified by LPI affecting the same property. False identity documents were also used to perpetrate fraud in New Zealand in 2005, when false passports, bank statements and tax certificates were used by the fraudulent person to convince three lawyers to arrange mortgages over homes that the fraudulent person did not own. These frauds, the manner they are perpetrated and the factors enabling them are captured in the table below.

59 Royalene v Registrar of Titles [2008] Q ConvR 54-689, [46].
60 Royalene v Registrar of Titles [2008] Q ConvR 54-689, [48].
66 This table was adapted from the table in Low (2006) above n 8.
<table>
<thead>
<tr>
<th>Category</th>
<th>Mode of perpetration</th>
<th>Relationship with victim</th>
<th>Factors facilitating fraud</th>
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</thead>
<tbody>
<tr>
<td>Grgic type fraud cases</td>
<td>* Fraudulent person, with or without the aid of a third party, claiming that he/she has a right to deal with the land by producing the appropriate identity documents. * The identity documents may be genuine or falsified.</td>
<td>There is a pre-existing relationship</td>
<td>* Fraudulent person’s relationship with the victim provides the fraudulent person with access to the victim’s identity documents. * Lack of vigilance by the lender in verifying identity.</td>
</tr>
<tr>
<td>Young v Hoger type fraud cases</td>
<td>* Land title instrument given to the fraudulent person to procure execution by the victim of the fraud. * Fraudulent person forges the victim’s signature on the land title instrument * Witnessing requirements are circumvented, either by: - forging the signature of the witness. This can be of a real person or a fictitious person; or - persuading the witness to attest to the signature even though it was not signed in the presence of the witness.</td>
<td>There is a pre-existing relationship</td>
<td>* Relationship between victim &amp; fraudulent person – fraudulent person is trusted by the victim which provides the fraudulent person with easy access to the paper certificate of title and various other documents. * Lack of vigilance by the lender, for example: - all correspondences addressed to the fraudulent person as the fraudulent person is usually seen as speaking for or on behalf of the victim; - land title instrument provided to the fraudulent party to procure execution from the victim. - the victim is not contacted or dealt with even though the victim is a party to the transaction. (eg: Young v Hoger) * The witness to the signature(s) on the instrument attests to the signature(s) even though the signature was not signed in front of the witness (eg: Sansom v Westpac Banking Corporation).</td>
</tr>
<tr>
<td>LPI type fraud cases</td>
<td>* Fraudulent person, with or without the aid of a third party, claiming that he/she has a right to deal with the land by producing the appropriate identity documents. * The identity documents may be genuine or falsified.</td>
<td>No pre-existing relationship</td>
<td>* Ability to falsify identity documents or to obtain genuine identity documents. * Lack of vigilance by the lender in verifying identity * Lack of vigilance by the entity responsible for issuing identity documents in incorrectly issuing the identity documents (such as the NSW Land Titles Office issuing certificates of title in Challenger’s case).</td>
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</tbody>
</table>

How will these frauds translate to an electronic environment, such as the NECS, where users of the system log in to the system, prepare land title documents online, which are then digitally signed and electronically lodged for registration? It has been found that all the paper-based frauds described here can continue to occur in an electronic environment.\(^67\) Using a conveyance under the National Electronic Conveyancing System (NECS) as a case study,\(^68\) the facts in Young v Hager, Sansom v Westpac Banking Corporation and Grgic v ANZ Banking Group Ltd, may be used hypothetically as an illustration (though if these facts are transposed to

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\(^{68}\) An overview of property conveyancing and how it will operate under the National Electronic Conveyancing System can be found in Clatyon Utz, ‘NECS Legal Framework Development Volume 2’, 27 May 2009, updated 15 February 2010, [4.1]. For present purposes, it is relevant to note that a legal practitioner or financial institution would be a subscriber to the system, within these organisations there would be designated users and certifiers – certifiers having the authority to sign transactions digitally. A client purchasing land would go to a solicitor and the solicitor (subscriber) would then verify that person’s identity. The subscriber will need to keep records that the identity checks have been done and performed. Once the normal title and associated checks have been done, the instruments will be prepared by the NECS for certification. The certifier will then review the instruments and use their private key to sign the documents. The NECS will verify that the certifier does in fact have the accreditation to sign. For more on these roles, see National Electronic Conveyancing Office, NECS Draft Operations Description V6, 2007 [4.3].
an English context, the power of rectification available via the *Land Registration Act, 2002, Schedule 4, para 2(I)* may lead to a different result):69:

- The daughter in *Young v Hoger* could perpetrate fraud if the mortgagee’s solicitor, who is a NECS Subscriber, provides her with the authorisation form70 to procure execution on behalf of the father and mother. The daughter then forges her father’s signature on the authorisation form, as well as the signature of the witness, so that it appears that the father’s signature has been properly witnessed. The form is brought back to the solicitor, who acts upon the form as the authorised user and proceeds with the transaction.

- The wife in *Sansom v Westpac Banking Corporation* approaches a bank, who is a NECS Subscriber, stating that she wishes to mortgage the property owned by her and her husband. The bank officer prepares an authorisation form. The wife then tells the bank officer that her husband is too ill with cancer to attend at the bank, requesting that she be allowed to take the form back to procure execution from him. The bank officer allows her to do this. She forges the husband’s signature on the authorisation form and it is witnessed by the bank officer, even though it was not signed in his or her presence. The authorization form is then acted on - the property is mortgaged with the proceeds going to the wife.

- The son in *Grgic* finds a person willing to impersonate his father. The son has in his possession a rates notice of the property in question. If certificates of title are used in the NECS71, the son could obtain the paper certificate of title. The son and the impostor visit a bank, who is a NECS Subscriber. The son introduces the impostor to the bank officer as his father and produces the rates notice and certificate of title. The bank officer prepares an authorization form, which is signed by the impostor. The property is mortgaged and the monies advanced to the son.

In addition, an automated system, such as the NECS, may even provide different opportunities for fraudulent conduct.72 For example, a certifier employed by a subscriber of the NECS could be careless in the way he/she stores his/her private key which is used to digitally sign land title instruments.73 The certifier may store the private key in a USB device but leave the USB device at work on the office desk. The certifier may have written down both the user-id and password required to log in to NECS.74 Another employee of

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69 Relevant English authorities to consider include *Argyle Building Society v Hammond* (1984) 49 P. & C.R. 148; *Barclays Bank v Guy* [2008] EWCA Civ 452 (this case is presently under appeal).

70 The authorisation form is the document used in NECS by the Subscriber to obtain authorisation from the client so that the Subscriber can represent the client in a transaction, digitally sign registry instruments and electronically lodge the instruments on behalf of the client: NECS Draft Operations Description above n 67, [9.2.3.3].

71 At the time of writing, the question of whether certificates of title will be used in the NECS is still the subject of national uniform consultations: NECS Draft Operations Description above n 67, [9.2.6.15].


74 To access the NECS, a user-id and password is required to log in to the NECS: see NECS Draft Operations Description above n 67, [9.2.4]. The case that occurred at the Fairfax County Public School in Falls Church, Virginia show how easy it is for someone to make use
the subscriber could then use the certifier's user-id and password and private key to access NECS and perpetrate fraud. Alternatively, a fraudulent person could apply to be registered with the NECS as a subscriber and certifier of the NECS. For example, the fraudulent person could compile a set of identity documents that identify him/her as a legal practitioner, apply to a Gatekeeper Certification Authority/Registration Authority (CA/RA) for a digital signature certificate and lodge an application to be listed as a subscriber and certifier. If successful, the fraudulent person would be listed on NECS as a subscriber and certifier, will be given a user-id and password to access NECS and will also have a digital signature certificate to sign instruments. The fraudulent person could then access NECS and perpetrate fraud.

The point is that in the paper system, it is the registered proprietor of the property in question who is the target of the fraud and its victim because in the paper system, it is this person who must execute the appropriate land title instruments. So they are targeted for fraud purposes, such as by forging the person's signature on the land title instrument or impersonating the person – the Young v Hoger, Grgic type fraud cases or preparing a set of false identity documents, including false certificates of title to assume ownership (the LPI type fraud cases).

However, if an automated system, such as NECS, alters this process by allowing only an authorised user of the system to prepare land title instruments and to sign them on behalf of clients, then these authorised users may be targeted instead, raising a new opportunity for perpetrating fraud. In these frauds, there may be no connection between the fraudulent person and the registered proprietor of the land - the fraud is of a password that has been written down to access a system. In that case, a nine year old student at the school had taken a teacher’s password from a desk and used it to access the school’s system to change enrolment lists and other teachers’ passwords: Robert McMillan, ‘Nine-Year-Old Steals Password to School System’ at 17 June 2010.

To be able to use NECS, industry participants must first become registered with the NECS as a user. This can be done in one of two ways: (1) apply to the NECS to be registered as a Subscriber and User or (2) have an existing Subscriber sponsor the application to be a User supervised by that Subscriber: NECS Draft Operations Description above n 67, [7.3].

The NECS application process requires the applicant to obtain an approved type of digital signature certificate to sign the application: NECS Draft Operations Description above n 67, [7.3]. Clayton Utz, NECS Legal Framework Development Volume 1, above n 72, Attachment 3 [1]. The term Registration Authority (RA) refers to the entity responsible for verifying the identity of applicants and the term Certification Authority refers to the entity responsible for issuing digital signature certificates to those applicants whose identity have been verified. Gatekeeper is a Federal Government initiative to increase confidence in the online economy providing a Government endorsed online trust framework using public key technology: see Verisign, ‘Gatekeeper Digital Certificates Overview’, at 16 April 2010; Verisign, ‘Gatekeeper Services Whitepaper’ (2003) at 8 October 2010 and Low & Foo, ‘above n 71. Given that users of the Victorian EC System obtain the required Gatekeeper Australian Business Number - Digital Signature Certificate (ABN-DSC) from Verisign, it is likely that Verisign, which is Gatekeeper accredited, will also be used by NECS: Verisign, Verisign Gatekeeper: Electronic Conveyancing at 8 October 2010.

For more on this see Low & Foo above n 71 ‘and NECS Risk Analysis of DSC Types for Authorised Officers and Certifiers, above n 72. A recent example occurred in New Zealand where a lawyer had, when acting for clients in the sale of their farm through the Landonline system, withdrawn a caveat placed over the farm by third parties. The lawyer had no authority to act for the third parties, did not have their consent to withdraw the caveat and did not hold a Landonline Authority and Instruction from the third parties authorising him to withdraw the caveat: The New Zealand Standards Committee commented that “unauthorised actions of this kind imperil the e-dealing system.” The Committee said that certified practitioners have a responsibility “to ensure that all relevant matters are in order before instruments are submitted and the Land Register altered” and that this responsibility is “fundamental to the integrity of the system”. In that case, the lawyer was censured and required to pay $1300 by way of penalty, plus $12,000 in respect of the costs of the inquiry: New Zealand Law Society, ‘Lawyers Complaints Service Decisions – Bringing the Profession into Disrepute: Withdrawal of caveat placed by third parties’ at 8 October 2010. This case confirms the concern voiced by Rod Thomas regarding the New Zealand Landonline system of its potential for abuse by solicitors entrusted with its use: Rod Thomas, ‘Fraud, Risk and the Automated Register’ in David Grinlinton (ed), Torrens in the Twenty-first Century (2003), 349.
perpetrated because the fraudulent person has or is able to gain access and has the ability to sign instruments digitally or is able to acquire this ability. It is not the relationship between the victim and the fraudulent person that is the facilitative factor in the fraud, this type of fraud simply depends on whether or not the fraudulent person is able to obtain access, digitally sign the instruments and lodge for registration.79

The various frauds that can potentially be perpetrated in an electronic environment are represented in the table below.80 This is then followed by consideration of the current steps taken to prevent identity fraud in land transactions.

<table>
<thead>
<tr>
<th>Category</th>
<th>Mode of perpetration</th>
<th>Relationship with victim</th>
<th>Factors facilitating fraud</th>
</tr>
</thead>
<tbody>
<tr>
<td>Grgic type fraud cases</td>
<td>* Fraudulent person, with or without the aid of a third party, claiming that he/she has a right to deal with the land by producing the appropriate identity documents. * The identity documents may be genuine or falsified.</td>
<td>There is a pre-existing relationship</td>
<td>* Fraudulent person’s relationship with the victim provides the fraudulent person with access to the victim's identity documents. * Lack of vigilance by the Subscriber acting for the lender in verifying identity</td>
</tr>
<tr>
<td>Young v Hoger type fraud cases</td>
<td>* Authorisation form given to the fraudulent person to procure execution by the victim of the fraud. *Fraudulent person forges the victim's signature on the authorisation form *Witnessing requirements are circumvented, either by: - forging the signature of the witness. This can be of a real person or a fictitious person; or - persuading the witness to attest to the signature even though it was not signed in the presence of the witness.</td>
<td>There is a pre-existing relationship</td>
<td>* Relationship between victim &amp; fraudulent person – fraudulent person is trusted by the victim which provides the fraudulent person with easy access to various documents such as rates notice. * Lack of vigilance by the lender, for example: - all correspondences addressed to the fraudulent person as the fraudulent person is usually seen as speaking for or on behalf of the victim; - authorisation form provided to the fraudulent party to procure execution from the victim. - the victim is not contacted or dealt with even though the victim is a party to the transaction. (eg: Young v Hoger) * The witness to the signature(s) on the authorisation attests to the signature(s) even though the signature was not signed in front of the witness (eg. Sansom).</td>
</tr>
<tr>
<td>LPI type fraud cases</td>
<td>* Fraudulent person, with or without the aid of a third party, claiming that he/she has a right to deal with the land by producing the appropriate identity documents. * The identity documents may be genuine or falsified.</td>
<td>No pre-existing relationship</td>
<td>*Ability to falsify identity documents or to obtain genuine identity documents * Lack of vigilance by the Subscriber in verifying identity * Lack of vigilance by the entity responsible for issuing identity documents (such as the NSW Land Titles Office issuing certificates of title in Challenger's case)</td>
</tr>
<tr>
<td>New category of fraud</td>
<td>Unauthorised use of an existing Certifier's user-id/password and digital signature certificate to access NECS and perpetrate fraud</td>
<td>Relationship with victim not relevant to the fraud</td>
<td>* Certifier was careless in storing login and password details and careless in storing the private key for digital signing.</td>
</tr>
<tr>
<td>New category of fraud</td>
<td>Falsely registering with NECS as a Subscriber and Certifier</td>
<td>Relationship with victim not relevant to the fraud</td>
<td>*Ability to falsify identity documents or to obtain genuine identity documents *Gatekeeper CA/RA careless in verifying identity</td>
</tr>
</tbody>
</table>

79 Low, (unpublished PhD thesis) above n 8, [6.5].
80 This table was adapted from the table in Low (2006) above n 8.
Part 3: Assessment of the Risk and Legislative and Regulatory Responses

As noted in the request for tender for the client identification protocols of the national electronic conveyancing system:

‘Acceptance of [the] new arrangements by industry participants generally and by key industry and
government stakeholders in particular is dependent on their confidence that all significant risks are
known, have been fairly allocated and will be effectively managed…It is critical to the operation of
the [land registration] system in each jurisdiction that there is a fair allocation of residual risk to the
assurance funds.’

Indeed, and with a recognition that whilst any one individual being subject to identity fraud and losing their
property is of low probability, there is conversely no doubt that some people will lose their property because
of identity fraud. The risk to the individual small, the risk to the system, certain. The goal of any risk
minimisation and allocation of loss strategy must therefore be to highlight who is the most appropriate
individual(s) to apportion loss to, and what practical risk reduction strategies can be put in place. Indeed
Clayton Utz suggest that the more rigorous responsibilities imposed under an electronic conveyancing
system will involve a threat that a participant may fail to meet those more onerous burdens, the ‘overall
effect…should be a net reduction in conveyancing risk and a safer and more robust conveyancing system.’

Connected to the thesis of this article is a requirement that certifier or the subscriber under the national
electronic conveyancing protocols undertake and maintain adequate records of client identification with this
mandated by land registry offices. The goals of this obvious:

1. Ensuring that the public has confidence with the system;
2. Maintenance of the integrity of the land registration system;
3. Achieve highest practical and functional accuracy within the Register;
4. Ensure that the electronic system is efficient, viable, attractive and cost effective when compare
with paper processes and
5. Be cost neutral in terms of the potential liability upon the assurance funds.

The importance of meeting the previously mentioned goals is obvious from a policy perspective. However
there is a far more basal reason for why subscribers to the system would seek to mandate a high standard.

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81 NECS Request for Tender, above n 4, [2.10].
82 See generally Celia Hammond, ‘The abolition of the duplicate certificate of title and its potential effect on fraudulent claims over Torrens
land’ (2000) 8 Australian Property Law Journal 115 for a discussion of the potential for fraud to arise in an electronic environment. See also
Low (unpublished PhD thesis) above n 8.
83 Clayton Utz Risk Assessment, above n 15, [1-12]
84 See also, National Electronic Conveyancing Office, Memo to National Project Team, 23 December 2008, ‘Standard for Client Identity
Verification’, 2.
This arises from the operation and implementation of the Federal Government’s responsibilities under various international law instruments including the United Nations Convention against Corruption 2003, the United Nations Convention against Transnational Organised Crime 2000 and the International Convention for the Suppression of the Financing of Terrorism 1999, with these soft-law instruments leading to the enactment of the Anti-Money Laundering and Counter Terrorism Act 2006. Before considering these Federal initiatives which understandably have a focus and reach far beyond conveyancing, it is necessary to consider the specific measures to address identity fraud within the land registration systems in Australia and describe how two jurisdictions, New South Wales and Queensland, have sought to respond to these concerns.

**New South Wales Legislation**

Section 56C of the Real Property and Conveyancing Legislation Amendment Act 2009 provides that the mortgagee must take reasonable steps to ensure that the person who executed the mortgage, or on whose behalf it has been executed as mortgagor, is indeed the same person as the registered proprietor of the land. Subsection 2 indicates that these requirements will be met if the mortgagee has taken the steps as prescribed in the regulations. A failure to do this provides a reason by which the Registrar-General may cancel a recording in respect of a mortgage (s 56(6)). In the absence of promulgated regulations at the time of writing, we see in late 2009, a consultation paper was released by the Land and Property Management Authority of New South Wales seeking discussion on the level of identity verification that should be imposed on mortgagees. The concluded view of this paper was that the verification regime should contain the following elements:

1. a face to face interview with the mortgagor(s);
2. document based verification rather than verification by electronic data;
3. a minimum of two and preferably three identification documents (one of which should contain a photograph); and
4. original documents must be sighted, rather than certified copies.

**Queensland Legislation**

This legislation has a like objective to that of New South Wales – impose greater obligations on the mortgagees. Section 11A of the Land Title Act 1994 is in similar terms to its southern neighbour with the

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85 Land and Property Management Authority NSW, Consultation Paper Confirmation of Identity – Sections 56C and 117 of the Real Property Act 1900, 21 December 2009.
86 Satisfactory documents to meet the requirements of the photographic ID are stated to be an Australian passport (current or expired in last two years); an Australian driver’s licence; a NSW photo card or an Overseas passport. Land and Property Management Authority NSW, Consultation Paper Confirmation of Identity – Sections 56C and 117 of the Real Property Act 1900, 21 December 2009, 3.
87 Land and Property Management Authority NSW, Consultation Paper Confirmation of Identity – Sections 56C and 117 of the Real Property Act 1900, 21 December 2009, 4.
reference in s 3 to compliance with the manual of land title practice. A point of difference between the jurisdictions is that rather than provide a discretion to the Registrar-General to cancel the mortgage, this legislation expressly provides that a failure to undertake the verification steps will see a mortgagee unable to rely on indefeasibility (s 185(1A)).

**Anti-Money Laundering and Counter Terrorism Act 2006**

Under s 35 of this legislation a reporting entity must carry out and verify the identity of those with whom it deals. A reporting entity is one that carries out designated services, with this latter phrase (s 6) including the making of a loan where that loan is made in the course of carrying on a loans business. In short, the financial institutions associated with the housing and commercial mortgage market in Australia would undoubtedly come within the province of this legislation. Relevant for instant purposes is that the legislation prescriptively mandates certain requirements vis-à-vis client identification. The Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1) then puts the flesh to the skeleton outlined in the establishing legislation. Part 4.2 of the Rules provides that a reporting entity must collect at a minimum, the following information in respect of an individual:

1. **the customer's full name;**
2. **the customer's date of birth; and**
3. **the customer's residential address.**

This information must then be verified either by

1. **reliable and independent documentation;**
2. **reliable and independent electronic data; or**
3. **a combination of reliable and independent documentation and electronic data.**

Paragraph 4.2.8 also requires the reporting entity to establish risk-based systems and controls for the reporting to know whether any additional information should be sought to enable the recording entity to know their customer.

It is the view of the authors the safe harbour as established by this legislation is inadequate in the context of land transactions and the application of indefeasibility to the title of the non-fraudulent owner. The objects of the anti-money laundering legislation are very much different from the more mundane focus of land transactions. As noted, the Federal Government introduced this legislation to meet its international obligations with a focus on combating the pernicious activities as outlined in the legislation’s title. Further, this legislation allows the reporting entity to establish its own level of risk for each transaction and to embed

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88 At the moment this refers to the Commonwealth Financial Transactions Reports Regulations 1990. This subordinate legislation refers to the 100 point identity check whereby certain documents must be produced before, for example, a bank account can be opened. Documents are given a different value (e.g. a photographic driver’s licence is worth 40 points, a land record 35 points, public utility bill 25 points).
the level of verification dependant on the perception of risk attached to that transaction. As can be seen from the examples highlighted above, the contemporary capacity to produce documents that can easily pass the standards required for client identification mandate a higher onus. Similarly, it is considered that the options of New South Wales and Queensland, whilst superior to the vacuum that exists in other states still falls far short of what is required.

The Australian Government's Gold Standard

The view of the authors is that the recommended level of identity verification for land transactions should be that of the Australian Government’s gold standard on client identification. This view is supported by the land registrars. Principle 2 of this standard states:

‘The Gold Standard should be applied in circumstances where the consequences flowing from registering a false identity are high and a high level of confidence in establishing a person’s identity is required. It should be used when issuing key POI (Proof of Identity) credentials or for national security checking purposes.’

Adopting these principles sees three levels of evidence required:

1. Evidence of commencement of identity in Australia (such as a birth certificate);
2. Evidence of a person’s identity in the community - that is the verification of a person’s social footprint (e.g. local government rates information); and
3. A linkage between the claimed identity and the applicant. Most commonly this would require photographic or biometric evidence.

This evidence would then need to be verified by face-to-face interview and for future reference, bind the applicant through additional photographic evidence or biometric evidence of the applicant. The recommendation of us is that this standard should be the safe harbour for Subscribers to the National Electronic Conveyancing System, with additional obligations imposed on Subscribers to the NECS where there is a reason to believe that the person is not whom they appear to be. This gold standard must be adopted and utilised in Australia – not only because it is consistent with the policy behind certainty of title in a land registration system, and with most fraudulent transactions involving mortgagors acting as imposters, the extra costs associated with verifying identity will be merely the burden of gaining the benefits of immediate indefeasibility.

Part 4: What the adoption of this Gold Standard should mean for the future in reducing risk and allocating loss in land transactions

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90 NECS Office, above n 84, 3.
To date the prevailing argument from Parts 1 and 2 is that the mortgagee should primarily bear the risks associated with identity fraud. We then suggested that in meeting that obligation the Federal Government’s Gold Standard on identity verification should be adopted. It is the view of the authors that, for the reasons listed in above, the mortgagee in the NECS should continue to bear the responsibility for the paper type identity frauds identified in Part 2 that can continue to occur in the NECS; that is:

- The *Young v Hoger* type frauds
- The *Grgic* type frauds; and
- The LPI type frauds

These frauds occur at the point where the fraudulent person approaches the mortgagee for a loan. As can be seen from the discussion in Part 2, in these frauds, whether they occur in the paper system or in NECS, the registered proprietor is the victim of the fraud and it is the registered proprietor’s identity that is used to perpetrate fraud. Whilst the registered proprietor may, in some cases, bear some responsibility for facilitating identity fraud, the entity best able to prevent fraud in these cases, as can be seen from the discussion above, is the mortgagee, by verifying identity. The mortgagee is therefore the most appropriate entity for assuming the responsibility of verifying identity in these types of fraud and in both Queensland and New South Wales, the regulatory response has been to pass legislation mandating mortgagees to take on this role.

However for the frauds unique to NECS, the position is less clear. In these cases, because of the nature of the fraud, the entity best able to prevent identity fraud via identity verification techniques may not be the mortgagee. Take for example the situation where a fraudulent person is incorrectly registered as a Certifier and Subscriber of the NECS, giving the fraudulent person full access to the NECS and the opportunity to perpetrate fraud. It can be argued that the entity best able to prevent this type of fraud is the Gatekeeper CA/RA, by verifying identity, because it is the entity responsible for issuing digital signing certificates to applicants and its designated role in NECS is to verify identity. Therefore it should be responsible for ensuring that the identity documents are in order. Contrast this to the situation where fraud occurs because the Certifier is careless in storing his/her private key and NECS user-id and password. Who should bear the responsibility then? The Certifier, or the Subscriber (if the Certifier is an employee of that Subscriber)? In all of this, it is likely that some homeowner would have his/her house fraudulently mortgaged or sold. Thus the issue of allocation of liability within the NECS for these new types of frauds is more complex than for the traditional types of frauds because there are new entities involved in the NECS and therefore new relationships to consider that is not present in the current conveyancing system.

This issue of liability allocation within the NECS and its participants was examined extensively in a consultation package in 2009. Prior to that consultation package, three other consultation packages were

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92 These entities are NECS stakeholders. The NECS stakeholders discussed in this paper are the NECS users, including subscribers and certifiers, Land Registries, the Gatekeeper CA/RA and the ELNO. However, the range of NECS stakeholders extend far beyond that, including stakeholders such as participating governments, regulators of industry professionals who conduct conveyancing the NECS, insurers of stakeholder liability in relation to NECS and Revenue Offices: Clayton Utz, NECS Legal Framework Development Volume 1, above n 72, [3].
commissioned. The culmination of these four consultation packages is a report titled the NECS Legal Framework Development Final Report. It is beyond the scope of this paper to discuss in detail the recommendations proposed by the final report. Generally, the report recommended using contract and service charters to govern the relationships between the various NECS stakeholders. The report suggested that a contract, known as a Participation Agreement and Participation Rules, would be mandated to govern the relationship between the electronic lodgment network operator (ELNO) and each Subscriber. This Participation Agreement would take effect as a bilateral contract between each Subscriber and the ELNO. The Participation Agreement and Participation Rules would contain requirements with regard to other aspects of the NECS legal framework. For example, provisions setting out the Subscribers obligations under NECS, such as ensuring that all of its Users nominated as Certifiers comply with their rules and obligations under the Participation Rules could be contained in the Participation Agreement and Participation Rules. Obligations to perform client identity verification requirements would also be included in the Participation Rules.

With regards to the Subscriber and the Certifiers used by the Subscriber, the Report recommended that legal liability arrangement between these two parties be left to commercial negotiation and agreement. The Report noted that because Subscribers control the choice of and terms of service of the Certifier, Subscribers should be responsible to other parties in the NECS for the Certifiers used by the Subscriber and that Subscribers can cover the risk of the Certifier’s acts and omissions (including fraud) by taking out insurance and appropriate contractual arrangements with the certifier. However, the report also suggested that Certifiers could enter into a subset of the Participation Agreement and Participation Rules (called the certifier agreement) with the ELNO under which they agree to certain obligations such as the safeguarding and use of their private key and use of the NECS system. So it would appear that where the Certifier has been careless in keeping the private key safe and fraud occurs, the Subscriber and Certifier will be held responsible.

At the time of writing this paper, the Report has the status of independent advice and is currently being considered by all NECS stakeholders. Victoria, which has developed its own electronic conveyancing

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93 Ibid. Details of the four consultation packages and stakeholders who responded can be found in this report.
94 Ibid, [6.3].
95 It is currently envisaged that there will be one national ELNO, operated by a company owned by all of the jurisdictions and the ELNO will be authorised to operate an electronic lodgement network for land in each of the jurisdictions. Thus the ELNO is the entity that will be responsible for operating the system NECS: Ibid, [1.1].
96 Ibid, [5.6], [10].
97 Ibid, [5.2] and Attachment 3 [4].
98 Ibid, [14].
99 Ibid, [16.2] and [17.1].
100 Ibid, [5.6], [11].
101 Email from Ann Kinnear (National Electronic Conveyancing Office) to Rouhshi Low, 16 April 2010. Thus for frauds resulting from incorrect registration of applicants to NECS, it was argued in this paper that Verisign should bear responsibility for these frauds as its role as Gatekeeper RA is to verify identity. However, it may be that this responsibility should be shared with the ELNO if the ELNO also has the responsibility of verifying identity, such as subscriber credentials and insurance and financial capacities of the subscriber: Email from Simon Libbis (National Electronic Conveyancing Office) to Rouhshi Low, 24 June 2010.
system (Victorian ECV system), also use contractual rules (called the EC System Rules)\textsuperscript{102} to govern the relationship between the various participants of ECV. However, the manner in which the EC System Rules allocate liability has been a source of discontent for some ECV stakeholders, namely the Law Institute and the Legal Practitioners Liability Committee, arguing that the EC Rules result in one-sided liability arrangements.\textsuperscript{103}

Thus effective liability allocation arrangements can be a contentious issue and the successful uptake of NECS may ultimately depend on its stakeholders agreeing on the manner in which liability is divvied up in the NECS. Further research into this area is therefore timely and, in the authors’ opinion, necessary. To that end, the loss allocation principles and framework discussed in this paper and adopted in the Report\textsuperscript{104} provide a good starting point for analyzing effective liability allocation arrangements in the NECS.

**Conclusion**

Over the past few years, studies have shown that identity fraud has grown to become a significant problem.\textsuperscript{105} It is therefore unsurprising that many Australians are becoming more concerned about identity fraud. In a survey conducted in 2007 by the Wallis Consulting Group on behalf of the Office of the Privacy Commissioner, one of the issues examined in the survey was a series of questions concerning awareness and experience of identity fraud. More than 1500 respondents took part in this survey. Nine percent of those surveyed claimed they had been a victim of identity fraud whilst 17% said they knew of someone who had been the victim. The survey also found that people aged between 35 and 49 were the most likely to have been the victim or know someone who has been a victim, with 60% of Australians concerned that they may become a victim.\textsuperscript{106} Within the arena of land transactions, the impact of identity fraud is no less devastating because its occurrence strikes at the very heart land registration system – security of title. The case examples used in this paper have shown that identity fraud in land transactions can occur in many different ways, with the effect of the victim of the fraud either losing title or finding his/her title being encumbered with a mortgage.

This paper has examined the processes that can be put in place by stakeholders within the land registration system to verify identity so as to prevent the occurrence of identity fraud in land transactions without compromising the efficiency of the system. The approach taken by this paper is to say that it is through the adoption of these identity verification processes that there will be greater reliance and increased confidence in the system, and this is critical for its future when it moves to an electronic environment. To this end, this paper examined the three major principles behind economic efficiency and the allocation of loss in cases of identity fraud.


\textsuperscript{103} Clayton Utz, NECS Legal Framework Development Volume 1, above n 72, [15.2]. Also see Law Institute Victoria Submissions, ‘Electronic Conveyancing Victoria’ (10 September 2007) <http://www.liv.asn.au/Membership/Practice-Sections/Submissions> at 18 April 2010.

\textsuperscript{104} Ibid, [4.2].

\textsuperscript{105} Discussed in this paper in footnote 7.

forgery to develop a framework to determine the most appropriate individual(s) on whom to apportion loss. Our finding from this examination is that the mortgagee should primarily bear the risks associated with identity fraud. In terms of the level of identity verification required to meet this obligation, this paper examined various State and Federal initiatives for the verification of identity and found that the Australian Government’s Gold Standard on identity verification should be adopted as the standard for identity verification as it is consistent with the policy rationale of certainty of title and meets the allocation of loss principles examined in this paper. Should the NECS be implemented, it is suggested that mortgagees continue to bear the loss for the types of identity frauds that currently occur in the land registration system and that the Federal Government’s Gold Standard should be used in the NECS. However, what this paper highlights is that it is entirely possible that under an electronic system the allocation of risk and liability will fall on the stakeholders involved in consummating the transaction, rather than the landowner. The tension between these stakeholders (including conveyancers, lawyers, registry offices, issuers of identity and the government) as to this allocation of risk is palpable and will demand sensitive negotiation and much introspection and examination as we embrace the efficiency, advantages, and complexity of the national electronic conveyancing system.