



THE LAW SOCIETY
OF NEW SOUTH WALES

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8 March 2019

Mr Jonathan Smithers
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: john.farrell@lawcouncil.asn.au

Dear Mr Smithers,

Review of the Intergovernmental Agreement for an Electronic Conveyancing National Law – Issues Paper (“Issues Paper”)

The Law Society of NSW appreciates the opportunity to provide comments for a Law Council submission responding to the Issues Paper. The Law Society’s Property Law Committee has contributed to this submission.

The Law Society is broadly supportive of the Issues Paper. In our view, the relevant issues have been articulated and the need for change has been appropriately highlighted. The practical issues experienced currently in eConveyancing as flagged in the Issue Paper also reflect the experiences of our members to date.

We set out below our comments in relation to a number of the areas raised in the Issues Paper.

1. ARNECC – regulatory and governance arrangements

We note that one of the key considerations for the review of the Intergovernmental Agreement for an Electronic Conveyancing National Law is the appropriateness of the current governance and regulatory framework, particularly whether the current arrangements are fit-for-purpose for the future.

Section 6 of the Issues Paper sets out three options for future governance arrangements, with Option 1 being the continuation of existing governance arrangements. We acknowledge that existing governance arrangements have worked reasonably well for the establishment of eConveyancing, but with the maturity of the eConveyancing market, we do not support the continuation of the existing governance arrangements. The commencement of new Electronic Lodgement Network Operators (“ELNOs”) and the value of conveyancing matters now being transacted electronically make it timely to refresh the governance arrangements for eConveyancing.

Preliminary option 2, the creation of a new body to advise ARNECC is not supported for several reasons. ARNECC is not a legal entity and in our view, it should be. The governing body needs to be a legal entity so that it can, for example, own the data standard. We also regard that merely appointing an advisory body to ARNECC will not provide the industry with

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the regulatory and governance arrangements required to meet the varied and important challenges this sector now faces.

We support preliminary option 3, the creation of a new national regulator for eConveyancing. We agree with the finding in the Issues Paper that there does not appear to be an existing regulator that is a good fit for all aspects of eConveyancing. We support the creation of a new national regulator, within the current Electronic Conveyancing National Law framework ("ECNL"). We acknowledge that this may require each State within the ECNL framework to cede some of its existing authority, but we suggest that this could occur while still maintaining the authority of the Registrars in relation to land titling in each State as is currently the case.

As mentioned above, we suggest that the new regulator should be a legal entity. The new regulator should contain representatives from ARNECC. In our view ARNECC should continue to develop appropriate policies and rules in relation to land titling, but the newly created body should regulate more broadly. In addition to representatives from ARNECC, the new body should also include appropriate experts to deal with the other matters set out in section 6.5, including the regulation of financial settlement. The new regulator needs to be independent and sufficiently resourced.

2. Funding a regulator

In response to the four funding models for a new regulator set out in section 6.18 of the Issues Paper, we suggest that the most appropriate model is the user pays model. We expect that if any of the other models are chosen, ultimately any increased fee would likely be passed on to the end user. We suggest that all participants in the conveyancing transaction, the vendor, the purchaser and any outgoing or incoming mortgagee should each be regarded as a user for the purposes of charging the fee.

The advantage of the user pays model is that it should be relatively easy to administer, it is transparent, and it will spread the financial contribution across the participating States proportionately, in accordance with their level of use of the eConveyancing system. In NSW, such a fee would parallel the current charging of a fee per transaction for the Torrens Assurance Fund, meaning that at least in NSW, industry has some familiarity with a transactional fee being collected to fund regulatory elements of the system.

We also agree with the statement at section 6.19 that costs should be recovered from participating ELNOs for the maintenance of the national data standards, particularly having regard to ongoing change management requirements.

3. Multiple Electronic Networks ("ELNs") and interoperability

Section 6.34 onwards of the Issues Paper identifies four operating models for a multiple ELN environment, with option 1 being the current single ELN model. We support model 3a, multiple interoperable ELNs with data sharing directly between ELNs. In our view model 3a has less risk of data corruption and provides industry participants with real choice.

We do not support model 2, multiple independent ELNs, that is, no interoperable solution. Under model 2, practitioners will be required to be a subscriber to, and familiar with, each of the different ELNs. Such an approach is not practicable and underestimates the work required to become a subscriber of an ELN.

The question of determining the ELN in which the transaction would take place in model 2 is also problematic. In our view this question cannot be resolved in the contract for sale as not all parties to the transaction are necessarily parties to the contract for sale, for example any

outgoing or incoming mortgagee. The same issue does not emerge in model 3a which allows each participant to the transaction to operate in the ELN of its own choosing.

We prefer model 3a over both model 3b (hub) and model 4 (infrastructure ELN), because model 3b and model 4 respectively, provide the new hub or infrastructure ELN with a monopolistic position. We do not support model 3b, but if the hub model was chosen, in our view the hub must be government owned.

In relation to the issues that must be analysed in assessing how an operating framework may work, we agree that the issues outlined in sections 5.101 and 5.102 should be addressed.

4. Regulation of financial settlement

As mentioned above, we regard the regulation of financial settlement as a key part of the new regulatory framework going forward. To date ARNECC has expressed unwillingness to regulate financial settlement. However, in moving to a multiple ELN environment, this important aspect of the eConveyancing system can no longer be overlooked.

5. Pricing

We support the regulation of the prices that can be set by ELNOs and in our view this should form part of the new regulatory framework. Consideration should also be given to the regulation of related services, for example access fees charged by service providers for access to an ELN.

6. Competition, vertical integration and the provision of conveyancing services by an ELNO or related company

The Issues Paper in sections 5.88 to 5.93 raises important issues that are beginning to emerge as different business models are being explored. We have concerns whether existing approaches, including those developed in version 5 of the MORs, adequately deal with these issues through introducing the notion of separation. We support seeking advice from an economic regulator as suggested in section 5.93.

If you have any further questions in relation to this submission, please contact Gabrielle Lea, Policy Lawyer on (02) 9926 0375 or email: gabrielle.lea@lawsociety.com.au.

Yours sincerely,



Elizabeth Espinosa
President