



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Prop:EEgl1775738

26 August 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 – Draft Report (“Draft Report”)

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

The Law Society is broadly supportive of many of the findings of the Draft Report. However, we set out our comments in relation to several of the Draft recommendations and Draft options below.

Draft Recommendations

1. Draft recommendation 1

We support the involvement of appropriate national regulators in developing minimum conditions for safe and effective competition, while minimising the costs of eConveyancing. However, any regulator for eConveyancing itself must be in a position to coordinate, implement and monitor compliance with the amalgamated regulatory framework and have the resources to effectively carry out this role.

We are also concerned that proceeding with the recommendation that national regulators such as the ACCC be tasked with developing the minimum conditions for safe and effective competition for eConveyancing may delay the necessary work to achieve interoperability. In the mandated eConveyancing environment that operates now in NSW, especially with a second Electronic Lodgment Network Operator (“ELNO”) intending to complete a transfer later this year, any work done by the national regulators as suggested must be done concurrently.

We agree that the findings of the current review, the NSW Interoperability Working Groups, and the IPART pricing review regarding costs of achieving interoperability, need to be brought together in moving forward with a national approach.

We also suggest that the last paragraph of draft recommendation 1 should clarify whether the proposed moratorium will apply to all categories of approvals, including State land registries or ARNECC approvals categories One and Two, and whether it applies to the two current applicants.

2. Draft recommendation 2

The Draft Report explores a number of new options for organisational models or future governance arrangements. Draft recommendation 2 adopts Option 2, a new body corporate as further detailed on page 110 of the Draft Report.

We do not support recommendation 2. We prefer Option 3, a new national regulator, as further detailed on page 111 of the Draft Report.

We are concerned that the new body corporate, as suggested by recommendation 2, appears to envisage a board of Directors consisting only of the current Registrars. While the Registrars should continue to be part of the new governing body, the decision-making body needs to be broader in its skill set and expertise to deal with such matters as the regulation of financial settlement. Option 2 flags subcontracting expert resources in matters other than titling. In our view this would not adequately refresh and equip the new body with the wider skill set and resources needed to face the current regulatory challenges of eConveyancing.

In our view, a new national regulator is required to properly regulate eConveyancing in the future. This could be a statutory corporation and could draw skills (for a skills-based Board) from a wider area than currently, including board members nominated by ARNECC, a similar revenue office group, the ACCC, financial regulators and stakeholder groups. This new body would need to be able to draw in and implement regulatory concerns across a wider area than just registry business.

A new regulator would also need to be independent to balance regulatory concerns across different registry models and governance arrangements applying to privatised registries, as well as differing approaches to mandating. It would also be important for the new governing entity to be a legal entity so that it can, for example, own the data standard.

With more than half the volume of conveyancing transactions nationally already mandated, it is vital that the future regulation of eConveyancing is adequately addressed as a result of this review.

As to the funding of a new regulator, in our view, the majority of funding should come from the State governments and the ELNOs. The importance of the Australian property market to the economy and the value of annual transactions, noted at paragraph 2.1 of the Draft Report, makes it clear that government has a responsibility to resource proper regulation of eConveyancing, especially having regard to the mandating of electronic lodgment in NSW, Victoria, Western Australia and to a lesser extent South Australia.

3. Draft recommendation 3

We support recommendation 3. We note that the inclusion of the implementation costs in the business plan required to be lodged with in the approval process should not be an issue as each prospective ELNO will of course need to take them into account in its business planning. Including this information will be of limited value if the regulator does not have the expertise to evaluate the costs. Cost considerations should include costs to provide for interoperability and for a wider and more complex network of testing, particularly regression testing for all participants when another participant makes changes.

4. Draft recommendation 4

The matters raised in recommendation 4 are important and are supported. We note there may be some difficulties in addressing all of these matters in the Category Two approval process, prior to commencing operation, but in our view, they should be addressed as far as possible. The introduction of a new regulator that could bring all the required approvals together will also assist.

5. Draft recommendation 5

We support the development of a new enforcement regime that includes penalties. In our view this will require a new national regulator with powers granted by the Electronic Conveyancing National Law ("ECNL"), such powers effectively handed up by the States to the regulator and jurisdiction given to the Federal Court. If not done this way, any penalty regime would be fragmented across both jurisdiction borders and, depending on the nature of the breach, different regulators. The distribution of any penalties collected would also be problematic if not centralised through the national regulator.

6. Draft recommendation 6

We support the development of a national agenda and roadmap. This would more easily be facilitated by a new independent regulator which could draw on, and influence across, a wider range of areas relevant to the future of eConveyancing. Coordinating efforts to bring about more consistency will have benefits for eConveyancing by simplifying system requirements.

7. Draft recommendation 7

We support the expansion of the regulatory framework for eConveyancing to deal with financial payments and settlement.

8. Draft recommendation 8

The matters listed as gaps in the current regulatory framework in paragraph 2.22 of the Draft Report cannot be satisfactorily dealt with by merely consulting with other regulators, if this is what recommendation 8 envisages. Participation and coordination with other relevant regulators should be entrenched in the involvement/representation of all stakeholders (including the ACCC and financial regulators) on the Council/Board/ Advisory Committee of a new regulator, with the power to implement and monitor all aspects of eConveyancing.

9. Draft recommendation 9

We support recommendation 9 and the development of change control processes. Coordinating change and adoption of new documents, as well as updating the Data Standard, will become more complicated with more than one ELNO. Regression testing can be automated to a large degree but will need to be coordinated as will adoption of data standard upgrades. At present, different jurisdictions often operate on different versions of the Data Standard, updating at different times and sometimes not implementing a version but moving to the next version.

Interoperability will likely require Electronic Lodgment Networks ("ELNs") to implement the same version of the Data Standard at the same time in each jurisdiction where more than one ELN operates.

10. Draft recommendation 10

We support recommendation 10 and suggest the regulator conducting that review should also look at emerging practices and business models for related services in eConveyancing.

11. Draft recommendation 11

We note that the Independent Pricing & Regulatory Tribunal NSW (“IPART”) has also released its draft report (“IPART Draft Report”). In relation to pricing, IPART’s draft recommendation 8 states:

Maximum prices for all ELNOs be set at PEXA’s current (real) prices from 1 July 2020 and CPI indexed annually (as defined by the MORs) for two years, before being reviewed again, ideally by a national regulator such as the ACCC (or on a state-by-state basis by regulators including IPART).

We note that both the Draft Report and the IPART Draft Report recommend the continuation of capped pricing in the short term.

12. Draft recommendation 12

We suggest the contracts between ELNOs and Revenue Offices should similarly be made public. There may be issues with those States that have installed private operators to run their land registries. Agreements between ELNOs and private registry operators may not be able to be made public.

We note that in NSW the licence conditions for ELNOs are publicly available on the website for the Office of the Registrar General.

Draft options for improvement

13. Draft option for improvement 1

We support draft option for improvement 1 - investigation of vertical competition. Such an investigation should look broadly into emerging new business models for ancillary services.

14. Draft option for improvement 2

We strongly support the establishment of a Stakeholder Committee and would welcome future involvement in ongoing consultation. With the proposed changes contemplated by the Draft Report and the significant changes in the eConveyancing industry it is vital that industry consultation improve.

15. Draft option for improvement 3

We support the establishment of stakeholder consultative processes and would be pleased to participate.

16. Draft option for improvement 4

The development of a system wide risk management framework is supported, particularly with new risks emerging with multiple ELNOs and interoperability.

17. Draft option for improvement 5

Harmonisation of jurisdictional variations is supported, though in relation to variation amongst land registries this may be more difficult with several registries having been privatised or moving towards privatisation.

18. Draft option for improvement 6

Forming a risk and compliance committee is supported and best undertaken by a new and properly funded regulator with wider skills.

19. Draft option for improvement 7

Certification of practitioners as to competence in operating in an electronic environment and a good understanding of cybersecurity is likely to be difficult to implement. We note that cybersecurity has been a topic of practitioner education in NSW by the Law Society and Lawcover. The Law Society of NSW also has a Scam Watch page on its website. We consider that promoting education and awareness is a more practical approach than certification.

Accordingly, although cyber security is a general issue for legal practitioners and is not just relevant to conveyancing practitioners, in our view it should be an essential function of an eConveyancing regulator to promote cyber security and to collect and share information on current threats with all stakeholder groups.

20. Draft option for improvement 8

Single registration for subscribers would certainly create efficiencies for subscribers, but we note, as identified in the Draft Report, issues arise as to reliance by the non-registering ELNO on the registration completed by the registering ELNO. Other issues arise in relation to who holds the database, how access is governed and which ELNO is responsible for renewal and compliance checking.

21. Draft option for improvement 9

We do not oppose draft option for improvement 9 in relation to identifying privacy requirements.

22. Draft option for improvement 10

We support ARNECC considering a requirement that all ELNOs provide a standardised set of APIs that allow third parties the ability to populate the ELNOs' workspace as part of broader considerations to achieve interoperability.

23. Minor correction

In paragraph 1.18 under the Executive Summary, the Model Participation Rules have been incorrectly referred to as the "Model Participation Requirements".

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,

A handwritten signature in blue ink, appearing to read "Elizabeth Espinosa".

Elizabeth Espinosa
President