



Law Council
OF AUSTRALIA

Review of the Intergovernmental Agreement for an Electronic Conveyancing National Law – Draft Report

Dench McClean Carlson

23 September 2019

Table of Contents

About the Law Council of Australia	3
Acknowledgement	4
Introduction	5
Responses to the Draft Recommendations	5
Draft Recommendation 1	5
Draft Recommendation 2	6
Draft Recommendation 3	7
Draft Recommendation 4	7
Draft Recommendation 5	7
Draft Recommendation 6	8
Draft Recommendation 7	8
Draft Recommendation 8	8
Draft Recommendation 9	8
Draft Recommendation 10	8
Draft Recommendations 6 to 10 generally	9
Draft Recommendation 11	9
Draft Recommendation 12	9
Responses to the Draft Options for Improvement	9
Draft Option for Improvement 1.....	9
Draft Option for Improvement 2.....	9
Draft Option for Improvement 3.....	10
Draft Option for Improvement 4.....	10
Draft Option for Improvement 5.....	10
Draft Option for Improvement 6.....	10
Draft Option for Improvement 7.....	10
Draft Option for Improvement 8.....	11
Draft Option for Improvement 9.....	11
Draft Option for Improvement 10.....	11
Minor correction	11

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2019 Executive as at 14 September 2019 are:

- Mr Arthur Moses SC, President
- Ms Pauline Wright, President-elect
- Dr Jacoba Brasch QC, Treasurer
- Mr Tass Liveris, Executive Member
- Mr Ross Drinnan, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council acknowledges the assistance of its National Electronic Conveyancing System Committee, the Law Society of New South Wales, the Queensland Law Society and the Law Society of South Australia.

Introduction

1. The Law Council of Australia (**Law Council**) appreciates the opportunity to provide a submission to Dench McClean Carlson (**the Reviewer**) in response to the *Review of the Intergovernmental Agreement for an Electronic Conveyancing National Law Draft Final Report (Draft Report)*.
2. The Law Council is grateful for the assistance of its National Electronic Conveyancing System Committee, the Law Society of New South Wales (**LSNSW**), the Queensland Law Society (**QLS**) and the Law Society of South Australia in the preparation of this submission.
3. At the outset of this submission, the Law Council wishes to emphasise its position that interoperability is a non-negotiable feature of the future of the eConveyancing market. In the Law Council's view, competition in this market will drive innovation for improved products and services for users (particularly consumers) and maintain pressure on prices.
4. The Law Council generally supports many of the Draft Recommendations and provides the below comments for assistance to the Reviewer.

Responses to the Draft Recommendations

Draft Recommendation 1

5. The Law Council supports 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.
6. The Law Council is concerned that proceeding with the recommendation that national regulators, such as the Australian Competition and Consumer Commission (**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 New South Wales (**NSW**) and Victoria, especially with a second Electronic Lodgment Network Operator (**ELNO**) growing in capability (including having already completed a transfer in Queensland), any work done by the national regulators, as suggested, must be done concurrently.
7. The legal profession is concerned that this delay will cause a lengthy period of uncertainty for practitioners about the future of the market, the potential for choice of other service providers and future business decisions generally about their conveyancing practices.
8. There is a need to determine sooner rather than later whether the Australian Registrars' National Electronic Conveyancing Council (**ARNECC**):
 - (a) continues to support an efficient and effective market with competing ELNOs, as indicated in its [position statement of April 2019](#); and
 - (b) if so, whether ARNECC considers that interoperability between ELNOs should be required.

9. The legal profession calls on ARNECC, with the support of relevant State governments, to make a decision on these two key issues as a matter of priority, for the benefit of all industry participants.
10. A decision on these issues is also important for existing ELNOs and potential new market entrants. Knowing the market landscape will influence their decisions on investment and innovation, which will ultimately also benefit legal and conveyancing practitioners as the end users of these services.
11. The lack of clarity around interoperability and competition in the eConveyancing market means that there should be no further discussion of mandates in any other states until these issues are resolved. Anecdotal feedback from practitioners in other States indicates that they are postponing decisions on investing in eConveyancing until the issue of interoperability is resolved.
12. The Law Council agrees with the view expressed in the Draft Report that fragmented efforts to achieve interoperability need to be consolidated in moving forward with a national approach. The Law Council notes that this finding has also been recognised in the Report of the Independent Chair of the Interoperability Working Groups, and the Draft Report of the Independent Pricing and Regulatory Tribunal's (**IPART**) *Review of the Pricing Framework for Electronic Conveyancing Services in New South Wales (Draft IPART Report)*
13. The Law Council suggests 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.

Draft Recommendation 2

14. 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.
15. The Law Council does not support Draft Recommendation 2. The Law Council strongly prefers Option 3, a new national regulator, as further detailed on page 111 of the Draft Report.
16. The Law Council is concerned that the new body corporate, as suggested by Draft 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 must be broader in its skill set and expertise in order to properly deal with matters such as the regulation of financial settlement. Option 2 anticipates subcontracting expert resources in matters other than titling. In the Law Council's 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.
17. 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 base, 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.

18. A new regulator must also 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.
19. 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.
20. As to the funding of a new regulator, in the Law Council's view, the majority of funding should come from the state/territory governments and the ELNOs.
21. 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. The Law Council understands that a wider shift to mandatory use of eConveyancing across Australian jurisdictions is contingent on the establishment of a viable regulatory regime.
22. State and territory governments and titles registries also benefit financially from the increased roll out of eConveyancing as it reduces the cost of maintaining paper titling systems and processes. It is also noted that the current model in the market, as endorsed by governments, obliges end users in the conveyancing market to subscribe to a private operator for these services. It is therefore appropriate for governments and those private operators to substantially fund the regulator. End users (the clients of lawyers and conveyancers) already contribute financially by virtue of paying registration fees at titles registries and subscription fees to ELNOs.

Draft Recommendation 3

23. The Law Council supports Draft Recommendation 3. 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 need to take this 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.

Draft Recommendation 4

24. The matters raised in Draft Recommendation 4 are important and are supported. The Law Council notes that there may be some difficulties in addressing all of these matters in the Category Two approval process prior to commencing operation. However, these issues should be addressed as far as is possible. The introduction of a new regulator that could bring all the required approvals together will also assist.

Draft Recommendation 5

25. The Law Council supports the development of a new enforcement regime that includes penalties. 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.

Draft Recommendation 6

26. The Law Council supports 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.

Draft Recommendation 7

27. The Law Council supports the expansion of the regulatory framework for eConveyancing to deal with financial payments and settlement. It is vital that the regulatory framework have jurisdiction over all facets of a land dealing from inception to financial settlement. Both state and federal laws and institutions must accommodate and facilitate eConveyancing including financial settlement, participant identity verification and cybersecurity.

Draft Recommendation 8

28. 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 Draft 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.

Draft Recommendation 9

29. The Law Council supports Draft Recommendation 9 and the development of change control processes.
30. 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.
31. 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.

Draft Recommendation 10

32. The Law Council supports Draft Recommendation 10 and suggests that the regulator conducting that review should also look at emerging practices and business models for related services in eConveyancing.

Draft Recommendations 6 to 10 generally

33. In relation to Draft Recommendations 6 to 10, the Law Council recommends greater stakeholder consultation during the development and implementation of these revised frameworks and processes. Poor stakeholder consultation was identified during the review (particularly discussed in paragraphs 4.61 to 4.95). Stakeholder consultation is invaluable when reviewing processes which directly impact the day to day practice of participants in the market, to ensure that proposed solutions are workable. Consultation could be undertaken by way of the Stakeholder Committee envisaged in 'Draft Option for Improvement 2'.

Draft Recommendation 11

34. In relation to pricing, Draft Recommendation 8 of the Draft IPART Report 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).

35. The Law Council notes that both the Draft Report and the Draft IPART Report recommend the continuation of capped pricing in the short term.
36. The Law Council supports continued price capping until the appropriate regulatory settings, including with respect to competition and interoperability, are resolved by the new regulator.

Draft Recommendation 12

37. Contracts between ELNOs and Revenue Offices should similarly be made public. However, the Law Council notes that 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 in full, but consideration should be given to publishing such agreements with the redaction of particularly sensitive commercial in confidence information.
38. The Law Council notes that in NSW the licence conditions for ELNOs are publicly available on the website for the Office of the Registrar-General.

Responses to the Draft Options for Improvement

Draft Option for Improvement 1

39. The Law Council supports Draft Option for Improvement 1 investigation of vertical competition. Such an investigation should look broadly into emerging new business models for ancillary services with a view to assessing horizontal competition as well.

Draft Option for Improvement 2

40. The Law Council strongly supports 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.

Draft Option for Improvement 3

41. The Law Council supports the establishment of stakeholder consultative processes and would be pleased to participate.

Draft Option for Improvement 4

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

Draft Option for Improvement 5

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

Draft Option for Improvement 6

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

Draft Option for Improvement 7

45. 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. However, cybersecurity has been an issue of focus for the Law Council and its constituent bodies (the law societies and bar associations across Australia).
46. The Law Council has launched the Cyber Precedent website to provide lawyers with practical advice in dealing with the potential cybersecurity issues.¹ In NSW, cybersecurity has been a particular topic of practitioner education by the LSNSW and Lawcover. The LSNSW has also launched a 'Scam alerts' page on its website.² The QLS has also delivered significant training and materials to its members in recent times,³ and in addition, has recently convened a Property Industry Security Forum involving representatives from across the property industry with a view to enhancing security and reducing vulnerabilities in transaction chains. QLS also works closely with Lexon Insurance (professional indemnity insurance provider in Queensland) to provide ongoing training and support to its members.
47. The Law Council considers that promoting education and awareness is a more practical response than a compulsory certification process. Legal and conveyancing practices must already deal with this issue on a day to day basis in all of their business dealings, not just in relation to eConveyancing. It is important for firms and practitioners to be in a position to adopt and implement solutions that are appropriate for their individual businesses.
48. Accordingly, although cyber security is a general issue for legal practitioners and is not just relevant to conveyancing practitioners, in the Law Council's view it should be

¹ Law Council of Australia, *Cyber Precedent* (Web Page) <<http://lca.lawcouncil.asn.au/lawcouncil/cyber-precedent-home>>.

² Law Society of New South Wales, *Scam alerts* (Web Page) <<https://www.lawsociety.com.au/practising-law-in-NSW/trust-money-and-fidelity-funds/scam-alerts>>.

³ Queensland Law Society, *Cyber security* (Web Page) <http://www.qls.com.au/Knowledge_centre/Ethics/Resources/Cyber_security>.

an essential function of an eConveyancing regulator to promote cyber security and to collect and share information on current threats with all stakeholder groups.

Draft Option for Improvement 8

49. Single registration for subscribers would certainly create efficiencies for subscribers. Although the Draft Report refers to issues about reliance by the non-registering ELNO on the registration completed by the registering ELNO, in the Law Council's view, integrity and trustworthiness of shared/interchanged workspace data is the only essential element, with each ELNO remaining responsible for its own subscribers and their compliance and renewal.

Draft Option for Improvement 9

50. The Law Council does not oppose Draft Option for Improvement 9 in relation to identifying privacy requirements.

Draft Option for Improvement 10

51. The Law Council supports ARNECC considering a requirement that all ELNOs provide a standardised set of application programming interfaces that allow third parties the ability to populate the ELNOs' workspace as part of broader considerations to achieve interoperability.

Minor correction

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