



Law Council
OF AUSTRALIA

Office of the President

9 April 2019

Ms Anne Larkins
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By email: alarkins@dmcca.com.au

Dear Ms Larkins

REVIEW OF THE INTERGOVERNMENTAL AGREEMENT FOR AN ELECTRONIC CONVEYANCING NATIONAL LAW – ISSUES PAPER

1. The Law Council of Australia (**Law Council**) appreciates the opportunity to provide a submission in response to the Review of the Intergovernmental Agreement for an Electronic Conveyancing National Law (**IGA**) Issues Paper (**Issues Paper**).
2. The Law Council is grateful for the assistance of the Law Society of New South Wales (**LSNSW**), Queensland Law Society (**QLS**) and Law Institute of Victoria (**LIV**) in preparation of this submission. This submission is supported by the Law Council's National Electronic Conveyancing System Committee and the Australian Property Law Group of the Law Council's Legal Practice Section.
3. The Law Council is broadly supportive of the Issues Paper and notes that the relevant issues have been articulated and the need for change has been appropriately highlighted. The Law Council understands that the practical issues experienced by members of the legal profession currently participating in eConveyancing are adequately identified in the Issues Paper.

ARNECC – Regulatory and governance arrangements

4. The Law Council notes that one of the key considerations for the review of the IGA is the appropriateness of the current governance and regulatory framework, particularly whether the current arrangements are fit-for-purpose for the future.
5. Section 6 of the Issues Paper sets out three options for future governance arrangements, with Preliminary Option 1 being the continuation of existing governance arrangements. Although existing governance arrangements have worked reasonably well for the establishment of eConveyancing, the Law Council does not support the continuation of the existing governance arrangements with the maturity of the eConveyancing market. 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.

6. Preliminary Option 2, the creation of a new body to advise the Australian Registrars' National Electronic Conveyancing Council (**ARNECC**) is not supported. ARNECC is not a legal entity, and in the view of the Law Council, this is a necessity. The governing body must be a legal entity so that it can, for example, own the data standard. The Law Council also submits that merely appointing an advisory body to ARNECC will not provide the industry with the regulatory and governance arrangements required to meet the varied and important challenges this sector now faces.
7. It is noted at paragraph 6.3 of the Issues Paper that 'ARNECC recognises that it does not have all the skills necessary to regulate the wider business environment in which the ELNO operates'. The Law Council agrees with this statement and therefore strongly supports Preliminary Option 3, the creation of a new national regulator for eConveyancing within the current Electronic Conveyancing National Law framework (**ECNL**).
8. As is noted in the Issues Paper, there does not appear to be an existing regulator that is a good fit for all aspects of eConveyancing. While creating a suitable new regulator may require each jurisdiction within the ECNL framework to cede some of its existing authority, the Law Council suggests that this could occur while still maintaining the authority of the Registrars in relation to land titling in each jurisdiction, as is currently the case.
9. As mentioned above, the new regulator should be a legal entity. The new regulator should contain representatives from ARNECC. In the Law Council's 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 paragraph 6.5 of the Issues Paper, including the regulation of financial settlement. The new regulator needs to be independent, have sufficient regulatory powers and be appropriately resourced to ensure that there is a fair and equal competition between the ELNOs.

Funding a regulator

10. In response to the four funding models for a new regulator set out in paragraph 6.18 of the Issues Paper, the Law Council suggests that the most appropriate model is the user pays model. Although it may be preferable that the state and territory governments and participating ELNOs bear the cost of funding a regulator, it is likely that if any such model were chosen, the increased fee would ultimately be passed on to the end user.
11. 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.
12. The advantage of the user pays model is that it would likely be relatively simple to administer, it is transparent, and it will spread the financial contribution across the participating jurisdictions proportionately, in accordance with their level of use of the eConveyancing system. The LSNSW notes that 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.

13. The LIV notes that there is no reason that the licenses fees and efficiency dividends enjoyed by the beneficiaries of the ELNOs (such as the Land Registries, banks and Revenue Offices) should not be, in part, put towards funding the regulator. A model such as the Telecommunications Industry Ombudsman model could be used to fund complaint handling. Further revenue could also be raised from the amount gained by outsourcing registry operations.
14. The Law Council also agrees with the statement at paragraph 6.19 of the Issues Paper that costs should be recovered from participating ELNOs for the maintenance of the national data standards, particularly having regard to ongoing change management requirements.
15. The Law Council has had an opportunity to view the separate submission of the QLS and notes the concerns of the QLS that in Queensland there are already significant land registry fees on registration of a transfer and that there is already an element of 'user pays' which could be utilised to fund the regulator without further imposts on industry.

Multiple Electronic Networks and interoperability

16. The Law Council supports competition in the ELNO marketplace. In the Law Council's view, competition in this market will drive innovation for improved products and services for Electronic Lodgement Network (**ELN**) users and maintain pressure on prices (see comments on regulating pricing at paragraphs 28-29 below). At present, true competition is not available in the marketplace.
17. The Law Council considers interoperability to be a non-negotiable feature of the future of the eConveyancing market.
18. Paragraph 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.
19. Should any real competition between ELNOs eventuate, it would be a highly undesirable outcome for those ELNOs to remain stand-alone and non-interoperable as all industry participants would be required to register with, and use, each licensed service provider. The Law Council, therefore, does not support Option 2, multiple independent ELNs. This option is not practicable, places an undue compliance and training burden on users, and underestimates the work required to become a subscriber of an ELN.
20. The question of determining the ELN in which the transaction would take place in Option 2 is also problematic. 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.
21. The Law Council, subject to any further details that may be made available as part of the review process, supports Option 3a, multiple interoperable ELNs with data sharing directly between ELNs. In the Law Council's view, Option 3a has less risk of data corruption and provides industry participants with real choice.
22. Option 3a is preferred over both Option 3b (hub) and Option 4 (infrastructure ELN), because both of those options provide the new hub or infrastructure ELN with a

monopolistic position. Although the Law Council does not support Option 3b, should a hub model be chosen, the Law Council strongly recommends that the hub be owned by the regulator.

23. In relation to the issues that must be analysed in assessing how an operating framework may work, the Law Council agrees that the issues outlined in paragraphs 5.101 and 5.102 should be satisfactorily addressed by, at the very least, a majority of key stakeholders identified in Appendix I of the Issues Paper. However, these issues are not new or insurmountable. Banks regularly process transactions for large amounts of money between themselves and other entities, as do share registries and exchanges. The use of cybersecurity concerns or the supposed inability for ELNO's to interchange data as reasons against a data-sharing model is, in the Law Council's view, artificial and does not recognise that there is existing technology available to overcome these issues.
24. However, the Law Council recognises concerns with regard to identifying liability in multiple ELN environments where fraudulent activity is discovered. The regulator and governance framework must ensure stakeholders can easily identify who is liable for the losses occasioned by such fraudulent activity, when discovered in one or both environments.
25. The Law Council notes that paragraph 6.43 of the Issues Paper indicates that the interoperability models will be developed in more detail in the months ahead. The Law Council notes that stakeholder and industry consultation should be a key part of this process, and requests to be included in such consultation.
26. The Law Council also notes the position of the QLS to abstain from commenting on a preferred model until further detail is provided.

Regulation of financial settlement

27. As mentioned above, the Law Council regards 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.

Pricing

28. The significant effort and expense required to create and sufficiently resource an ELNO is likely to, at least in the short-to-medium term, result in a duopoly and a less than competitive marketplace. Therefore, a marketplace without price regulation will likely not regulate itself in terms of proper pricing for users. As noted by the QLS in its submission, at least until there is true competition of more than three viable full service ELNOs across the country, pricing regulation will be required.
29. The Law Council supports the regulation of the prices that can be set by ELNOs and notes that 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.

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

30. The Issues Paper in paragraphs 5.88 to 5.93, raises important issues that are beginning to emerge as different business models are being explored. The Law Council has concerns as to whether existing approaches, including those developed in version 5 of the ARNECC Model Operating Requirements, adequately deal with these issues through introducing the notion of separation. The Law Council supports the suggestion of seeking advice from an economic regulator as outlined in paragraph 5.93.

Contact

31. The Law Council and its Constituent Bodies would welcome the opportunity to participate in the upcoming options workshops.
32. Please contact [REDACTED], [REDACTED] on [REDACTED] or at [REDACTED], in the first instance if you require further information or clarification.

Yours sincerely



**Arthur Moses SC
President**