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Office of the President

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

Dear Ms Larkins

Australian Registrars National Electronic Conveyancing Council – Review of the InterGovernmental Agreement for an Electronic Conveyancing National Law

Thank you for the opportunity to provide comments on the review of the InterGovernmental Agreement for an Electronic Conveyancing National Law (**IGA**) and the Issues Paper published on 13 February 2019.

The Queensland Law Society (**QLS**) appreciates being consulted as part of this important process.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled by the QLS Property & Development Law Committee.

Key issues

With respect to the Issues Paper and the IGA we raise the following:

1. There is a need for clarity in the marketplace about the future of e-conveyancing. QLS considers that ARNECC needs to identify which of the following systems will be developed and supported – these options appear to be:
    - a truly competitive, contestable and interoperable market with more than one fully operational service provider where industry participants (including lawyers and conveyancers) are free to use their preferred standalone provider without influence or control by financial institutions, electronic lodgement network operators (**ELNO**) or other participants;

   - a model whereby one central agency operates the data and financial transfers (akin to a wholesaler / distributor role) and individual **ELNO** service providers "connect to" the central agency (akin to a retailer role) (also interoperable);
   - the regulated monopoly of a single platform.

2. If the first option is selected, a detailed interoperability model must be developed as a matter of urgency.
3. It is a completely unacceptable outcome to require all industry participants to register and use all service providers.
4. E-conveyancing cannot be mandated in the remaining jurisdictions until the issues in (1) and (2) above are resolved
5. ARNECC should have an increased regulatory role with appropriate and adequate funding provided to facilitate this role.

The Queensland context

The adoption of e-conveyancing in Queensland has been relatively slow compared to other States, even before mandating was introduced in some jurisdictions.

Some particular features of the Queensland context are:

- Conveyancing contracts are typically "time of the essence" contracts, meaning practitioners are particularly concerned about the risk of delayed settlement due to technical issues outside of their control, such as the e-conveyancing system being inoperable at the time of settlement
- In some regional areas, internet connection is extremely unreliable
- The Office of State Revenue requires transfer duty (stamp duty) to be assessed and paid separately to the e-conveyancing system
- Pricing for conveyancing services is extremely competitive, with sale contracts typically being entered into with the assistance of real estate agents and before consulting a lawyer. In this environment, it is difficult to recover the additional cost of using an e-conveyancing platform to settle the transaction
- the property conveyancing process has already been used by Governments to achieve a number of unrelated policy outcomes such as:
  - pool safety fencing compliance,
  - smoke alarm compliance,
  - electrical safety switch compliance
  - conformity with neighbourhood disputes legislation orders, and
  - GST withholding and collection compliance,

which have all contributed to increased operational cost and change fatigue.

The approach to competition

QLS generally supports competition in the marketplace. Competition generally ensures that service providers seek to continuously improve their services to the benefit of the consumer legal practitioner and avoids the risks associated with monopoly pricing.

At present, true competition is not available in the marketplace.

There is a need for clarity in the marketplace about the future of e-conveyancing and whether it will be a truly competitive market.

QLS considers that ARNECC needs to identify which of the systems outlined in paragraph 1 above will be developed and supported.

QLS also considers that ELNOs should be prohibited from offering conveyancing services as a matter of sound competition policy. Alternatively there should be a separation of services where related entities are not able to access the ELNO on terms different to third parties, to remove the risk of preferential terms being provided to related entities.

Until there is true competition of more than 3 viable full service operators across the country, QLS considers that pricing regulation will be required.

QLS also considers that mandating is not appropriate until such time as there is more than one viable operator in Queensland.

To mandate at this stage would mean that a government is forcing industry participants to subscribe to a private operator in order to undertake property transactions. Where the service being delivered is not a Government "monopoly" service, then market choice of provider is a legitimate expectation of any industry participant in a free market.

Interoperability

It is a completely unacceptable outcome to require all industry participants to register and use each licensed service provider, if those systems remain stand-alone. QLS considers that interoperability is a non-negotiable feature of the future of the e-conveyancing market.

The concern with an outcome of multiple non-interoperable platforms is that it is unreasonable to establish a system which requires financial institutions and subscribers to integrate with and maintain subscriptions to all available stand-alone non-interoperable platforms.

This places an undue compliance and training burden when e-conveyancing is mandated on subscribers and increases risk of negligence to users if using multiple platforms with differing approaches.

As such the model is not client and customer centric but driven by convenience of regulators and ELNOs. Further such a model lends itself to become a de facto monopoly if financial institutions do not integrate with all platforms and selectively integrate for certain reasons.

QLS agrees that liability and risk issues need to be resolved in an interoperable market. This also needs to happen before any further mandating is proposed across the country.

QLS notes that paragraph 6.43 of the Issues Paper indicates that the interoperability models will be developed in more detail in the months ahead.

QLS encourages consultation with all stakeholders in the industry on these more detailed models, once developed.

Until further information is available, QLS is not in a position to prefer one of the four models outlined in paragraph 6.34 of the paper.

QLS also notes that by encouraging private sector entities to enter the e-conveyancing market and seek approval as an ELNO, ARNECC has created an expectation on the part of new market entrants of government support for a truly competitive market. New market entrants have relied upon these representations to invest in developing new systems on the understanding that there will be a genuine opportunity for them to compete in the market place.

If ARNECC does not now support a genuinely interoperable system with true unfettered choice for all industry participants and no bias in favour of the incumbent or any other licensed operator, there is a risk that a new market participant will pursue ARNECC to recover its investment costs on the basis of misrepresentations or promissory estoppel with respect to their realistic chances of succeeding in the marketplace. The barrier to entry to the market for any new entrant is more than merely achieving licensing by ARNECC members.

Role of ARNECC

ARNECC should have an increased regulatory role with appropriate and adequate funding provided to facilitate this role, including dedicated staff and an associated advisory body with skills and qualifications ranging from property industry knowledge, financial services, law, economics, competition policy and market regulation. ARNECC's role should include regulation of the marketplace (including pricing regulation, until there are 3+ full service operators) with the ability to penalise where necessary

Other comments – Part 5.0 Analysis of Issues

1. Financial settlement processes: the need for name and account matching by the banks for destination accounts (para 5.63).

   From the comments based on the practical experience in the other jurisdictions this seems to be the greatest source of errors and therefore the greatest risk for practitioners and the industry.

   Paragraph 5.63 indicates that the banks "are not willing to match account names to account numbers entered to enable checking." QLS supports the comments from the review team that name and account matching warrants further investigation. The lack of matching is a major flaw in the system and would appear to be a highly effective way of reducing error and therefore risk.

2. The paper also highlights a key operational issue of the inconvenience and risk to practitioners regarding the need to continually monitor/re-sign due to last minute changes in the system . QLS recommends modification to the system so it sends an email or SMS alert to the responsible person if something is unsigned. At present, it is

understood that an unsigned element gives rise to a warning on the PEXA screen within the relevant workspace meaning you need to be constantly going into the workspace to check. This is particularly an issue in a time of the essence environment as in Queensland.

Other comments – Part 6.0 Preliminary Options

QLS supports:

- the elements of the regulatory and government framework outlined in paragraph 6.5 of the Issues Paper
- "option 2" – new body to advise ARNECC" as outlined in paragraphs 6.10-6.14 of the Issues Paper or "option 3" national regulator option. QLS agrees that there does not appear to be an existing regulator that is a good fit for all aspects of e-conveyancing. The advantage of option 3 appears to be that there will be a separate and independent legal entity with capacity to own the data standard. Whichever model is selected, it is critical that the regulator be properly funded and has access to the skillsets outlined above.
- The recommendation in paragraph 6.27 of the Issues Paper that the rules in the MOR for ELNOs be reviewed by a qualified economic regulator to ensure that they are clear and that there is no abuse of market power

QLS is concerned at the suggestion in paragraph 6.22 that the regulator should be funded by industry and end users because "Not all Australians are buyers and sellers or property so an argument for using general taxation revenues is not strong." QLS notes that:

- The level of PEXA fees has already been identified as a barrier to use by practitioners in Queensland. Any further increase will amplify this issue.
- We query the logic of the argument that not everyone buys and sells houses. Maintenance of the integrity of the titling system is a government function and a government decision to require the industry to use e-conveyancing should not necessarily result in the user paying for the compulsory use of the system. The tax system is predicated on the basis that all citizens pay taxes to generate funds for a wide range of services that not every citizen uses – eg welfare payments, childcare rebates, unemployment benefits and public transport subsidies.
- If governments are going to mandate the system because they will save money, they (ie the taxpayer) should pay to ensure it is adequately regulated.
- In Queensland, there are already significant land registry fees on registration of a transfer (approx. $1,500 on a $500,000 property with a release of mortgage). There is already an element of "user pays" which should be utilised to fund the regulator without further imposts on industry.

QLS also wishes to raise the risk of a privately operated ELNO becoming insolvent (or otherwise ceasing to operate) or failing to meet the standards prescribed by the Model Operating Requirements (or similar).

If use of the e-conveyancing system is mandated, and the offering of a paper system ends (including that the Registrars of each State no longer have staff skilled in this process), it is critical that there is capacity for the regulator to step in and operate the system.

It is noted that the ARNECC Model Operating Requirements currently address some of the practicalities of the ELNO becoming insolvent by requiring a Transition Plan facilitating the transfer of all records, licences and intellectual property to the Registrar.

In addition to these obligations continuing for all ELNOs in any new regulatory system, QLS is of the view that a government guarantee is required with respect to all ELNOs, similar to that made in the financial services sector.

If the paper system is to become unavailable, a functioning e-conveyancing system is a critical piece of social infrastructure and the community is entitled to be confident that all e-conveyancing systems will continue to be available and operate.

If only one ELNO operates in a jurisdiction (and the paper process is dismantled), the government guarantee of the continued operation is critical. However, even in a competitive market, the guarantee must extend to all licensed ELNOs (and not just the incumbent) otherwise the guaranteed ELNO will have a competitive advantage over others.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Principal Policy Solicitor Wendy Devine by phone on (07) 3842 5896 or by email to w.devine@qls.com.au.

Yours faithfully

Bill Potts
President