

**AICNSW Comments/Observation in response to
Dench McClean Carlson, Draft Final Report
Review of the Intergovernmental Agreement for an Electronic Conveyancing National
Law.**

KEY FINDINGS AGAINST SCOPE:

1.6 The IGA has met its objective of establishing a framework to facilitate the implementation of eConveyancing and has partially met its objective of ongoing management of the regulatory framework. Conveyancing practitioners and financial institutions have requested improvements in several areas. With the advent of a second operator, some matters that were left to the management of the sole operator may need to be co-ordinated or managed by government.

Comment:

We would suggest that with the advent of a second (or third) operator it is **essential** that an independent Government regulator be tasked to *“co-ordinate or manage those matters that had previously been left to the management of the sole operator”*.

1.8 In order to support a competitive electronic network lodgment operator (“ELNO”) market, the minimum conditions for safe and effective competition must first be established. The electronic lodgment networks (“ELNs”) provide the systems by which financial transactions deal with the major (and sometimes only) asset of many Australians. Failed transactions in this environment whether by accident or fraud have significant impact. The eConveyancing systems manage transactions for an Australian property market that has a capitalization value of approximately \$6-7T. It is very important that Australians have confidence in these systems that governments have either licensed or mandated for use.

Comment:

We would suggest that the words “safe and effective” and “competition” are not necessarily complimentary. The system needs to be 100% safe and effective irrespective of whether there is competition not.

If competition means any diminution in the integrity or sustainability of the system, then that cost is not acceptable. In NSW, with the current building certification and quality crisis, we have witnessed what can occur when regulation is diminished for the sake of business expediency.

The cost of the component of conveyancing that relates to eConveyancing is currently approx. \$120. This is a small fraction of the total cost of a property transaction in comparison to the real estate agent’s fee, mortgage broker’s fee, mortgage insurance, finance application fees, property searches and enquires etc.

To achieve a “competitive” market, competing over this fee (and realising a possible discount of between 10% - 50%) at the risk of introducing any systemic weakness is not tenable or sensible.

IMPLEMENTATION PROGRESS:

1.9 The introduction of eConveyancing was expected to help drive consistency in business practices across participating jurisdictions. While some improvements have been made e.g. in the rationalization of mortgage forms, there has not been significant progress. We believe this is difficult due to the significant cost and resources required to seek change in related legislation in all participating jurisdictions with no guarantee of success.

Comment:

National consistency whilst facilitating improved business practices is impractical for national operators/stakeholders given the lack of alignment of State-specific real property, revenue and practitioner regulatory legislation.

1.12 In relation to lessons learned, practitioners note that in the initial development of eConveyancing the stakeholder consultations were extensive and well regarded. They have requested more regular consultation as the environment changes and develops. Stakeholders have spoken of change fatigue as additional responsibilities imposed by the Australian Taxation Office have coincided with developments in conveyancing.

Comment:

Change fatigue in addition to the mandated change to digital in NSW has retired several firms and imposed significant stress on many businesses and business operators. The changes introduced by the ATO are just one example of the changes that have been introduced into conveyancing transactions in the last 2- 3 years. One of the strengths of the PEXA rollout has been the level of stakeholder engagement, and it is important that this continues as the eConveyancing ecosystem continues to develop.

1.14 The barriers to take up rated high or very high by practitioners included lack of skills, perceived lack of security, fees, insufficient training, and system complexity.

Comment:

Third party eConveyancing “agents” are active in NSW. This service has been created by various entities to meet the gap in the market created by practitioners who are not willing (for whatever reason) to become PEXA subscribers. We believe these third party “agents” are providing an important service to the market, not unlike traditional settlement agents. Third party “agents” are also operating without any regulatory guidance from ARNECC as to the correct methodology for completion of Client Authorisation Forms, Verification of Identity.

1.15 However, the feedback from individual practitioners in the survey conducted as part of the Review, indicates that the removal of the barriers will not necessarily drive take up in those jurisdictions that have not mandated. Some practitioners are ideologically opposed to eConveyancing, but many just do not want to learn the new system. In one jurisdiction the

peak body reported that members say they will not learn eConveyancing until they are compelled to. Practitioners in the two jurisdictions that have not mandated express frustration that others in their industry will not learn the new system.

Comment:

Any practitioner who wishes to operate in a jurisdiction that has mandated eConveyancing may be supported via a third-party agent operating in compliance with the MPR and in accordance with their professional standards i.e. trust account authorities/consents.

REGULATORY FRAMEWORK:

1.17 The regulatory framework under the existing ECNL includes the Model Operating Requirements (“MOR) which determine the requirements against which the ELNOs must deliver for connection to the land registries and acceptance of the subsequent lodgments that will lead to a change in land title details. Each registrar has an agreement/licence with each ELNO operating in its jurisdiction that encompasses the MOR and contains additional undisclosed conditions specific to individual jurisdictions. Those conditions that impact on conveyancing practitioners and their clients should be made public.

Comment:

Any condition imposed on an ELNO should be known to the practitioner and the public. Of importance is that any Residential Sellers Guarantees that are required (as per NSW Office of Register General condition) should be in conformity across all approved ELNO’s and have the same essential terms to ensure the public are not confused or required to undertake due diligence as to which guarantee is more robust.

1.22 ARNECC will need access to nationally focused skills and resources to work closely with other responsible regulators to guide the development of eConveyancing and its impact on the wider environment in a manner that best meets the needs of the Australian community.

Comment:

ARNECC’s lack of readily available, focussed skills and resources has been detrimental to timely and constructive actioning of issues that have arisen. Attendance at State level meetings such the NSW Interoperability Working Groups would help to resolve this.

1.23 We have recommended the establishment of a new corporate body to provide those nationally focused skills and resources, and we have recommended that funding be raised from property buyers and sellers, with state and territory governments continuing their contributions and with ELNOs and subscribers meeting the direct costs attributed to oversight of their operations.

Comment:

The recommendation of funding being raised from “*property buyers and sellers*” seems to be adding to the cost *of this initiative*. Some large stakeholders to the eConveyancing process are digitising components of their business and driving consequent cost savings as such those parties should be underwriting such investment not the consumer, although a consumer/transaction-based levy is most convenient.

The funding for the proposed new corporate body should be paid for by the State & Territory governments via ARNECC and the ELNOs. To have an extra cost levied on the buyers & sellers is unjust.

The new corporate body is a regulatory body needed to keep the national eConveyancing working smoothly with the appropriate skills and resources available to the users of the system.

DRAFT RECOMMENDATIONS:

1. We recommend that the appropriate national regulators i.e. the Council of Financial Regulators (“CFR”) and ACCC be requested to develop the minimum conditions for safe and effective competition for eConveyancing leveraging off the work done in relation to the ASX.

We recommend that any investigation by the national regulators involve consultation with the affected regulators. These are the registrars and revenue offices currently actively using eConveyancing, and others that may be likely to progress in the near future.

We recommend they consider the work done to date in this IGA Review, the work done by the Working Groups in the NSW interoperability process, and the outcome of the IPART pricing review regarding costs of achieving interoperability. Further consultation should occur with identified subscribers in all active jurisdictions and the financial institutions that facilitate payment and settlement.

We recommend that there be a two-year moratorium on the issue of any further approvals for ELNOs while the national regulators develop the minimum conditions and interoperability models are assessed against in accordance with those conditions. Paragraphs 5.72 to 5.80

Comment:

Whilst the NSW Interoperability Review was beneficial it lacked a National lens and was conducted on a compacted timeline creating difficulty in receiving appropriate consideration of the issues and participation of parties who had relevant expertise in the various topic being discussed and considered.

We consider that the “*minimum conditions for safe and effective competition*” and the interoperability question need to be addressed as a matter of priority and a 2-year timeframe is too long. In the meantime, conveyancing practitioners will be subject to marketing by competing ELNO’s wishing to develop their market presence and creating a further distraction to the efficient running of a conveyancing practitioner’s business.

2. We recommend the establishment of a new corporate body to provide nationally focused skills and resources, and that funding be raised from property buyers and sellers, with state and territory governments continuing their contributions and with ELNOs and perhaps subscribers meeting the direct costs attributed to oversight of their operations.
Paragraphs 1.23 and 7.0

Comment:

As per no 1.23 above

Recommendations 3 – 14

We agree and are supportive, although we would like to note that in No 11, we consider the application of a measure dependant on a specific number of ELNOS may be unworkable as the market may not attract more than 3 interested entities.

DRAFT OPTIONS FOR IMPROVEMENT:

1. Further attention is needed to address practitioner concerns regarding vertical competition. The national regulators could consider development of an oversight process. Paragraphs 3.11 and 5.237 – 5.245

Comment:

This is a major concern to conveyancing practitioners in NSW. We believe any move by an ELNO down the value chain to allow them to undertake the balance of the conveyancing process will provide a significant advantage to the operating ELNO and a significant misuse of their market position and power.

ARNECC is clearly aware of the conveyancing practitioners concerns around the potential for ELNO’s to enter this market and this ability of tis to occur Agreed. This point exposes the lack of care taken by ARNECC to acknowledge and act on concerns regarding an ELNO expanding its service offering beyond its original intentions.

Draft Options Nos 2 - 10

We agree and are supportive.

OTHER ISSUES/COMMENTS:

3.53 While the lack of competition was considered a moderate barrier to take up, we note that practitioners did not want to learn more than one ELNO system. We also note that stakeholders do not want an interoperability model that increases costs, risks, or liabilities”.

Comment:

Conveyancing practitioners specifically want any operational structure facilitating Interoperability between multiple ELNO’s to be **simple, easy and at no additional cost**.

Practitioners do not want to be required to Subscribe to multiple ELNOs and have to adjust and adapt from to file to file with potential disputes as to which ELNO is to be used for a particular transaction.

4.47 We believe that the use of unverified bank account numbers to authorise payments is too great a risk for the individual buyer or seller. It creates a risk that was not present in the paper environment when bank cheques were used. We know from experience to date that misapplied or unapplied payments occur daily. Although the probability of this occurring for any one payment is low, the consequence is severe for the homeowner if the value of the payment is the purchase/sale price of the property.

4.56 The MOR should require ELNOs to continually assess and improve their financial systems having regard to any aspects that allow losses or inefficiencies to occur. In relation to the use of bank account numbers we note the changes regulated in the United Kingdom to match names with account numbers to minimise losses. Other techniques such as micro deposit validation may be useful.

Comment:

We agree that ELNO’s should be encouraged to continually assess and improve the conveyancing system. 4.47 and 4.56 clearly identify an area for system improvements and any review of the payments/settlement options available should be encouraged by regulatory bodies.

4.131 The following should be considered

- Development of an adequate minimum mandatory residential guarantee to mitigate the risk to the most vulnerable homeowners/consumers
- Specify insurance provisions to ensure timely resolution for homeowners irrespective of any dispute process undertaken between ELNOs/Subscribers

- Develop and agree clear liability rules to protect consumers and incorporate into MOR
- Develop a dispute resolution framework in discussion with stakeholders to minimise unnecessary dispute resolution through litigation
- Develop and implement a risk management framework that includes:
 - Identification of consumer and subscriber risks
 - The regulatory rules in place to manage the risks
 - An annual review process managed by the relevant regulators

Comment:

We agree with this Option/Opportunity. A fundamental element of the conveyancing system is trust by the system subscriber and the public.

Trust from the public in the eConveyancing system and trust from conveyancers' practitioners who are still to see the "seasoning" of the conveyancing system.

We strongly support any measure or actions which will support or provide a foundation for trust in the system.

4.144 We have proposed the following objectives for cybersecurity management.

- Minimum standards set for land and financial information security that is fit- for-purpose for ELNOs and subscribers
- Achievement of a high rate of compliance by ELNOs and subscribers with standard
- Achievement of a higher level of cybersecurity for subscribers with additional professional training and certification in cybersecurity
- Security practices are adapted proactively in the face of emerging threats and opportunities to enhance protection

Comment:

We agree that cyber security is a fundamental element of the conveyancing ecosystem. However, it should be acknowledged in the design of a cyber security management framework that many Subscribers are small and often sole practitioners whose sophistication in cyber security and ability to invest in such measures may be limited. Ideally this should be considered in the design of the system.

5.91 From the investigations to date the benefits from implementing an interoperable system may not be certain and the costs, complexity, risks and liabilities are not yet defined. No cost/benefit analysis has been undertaken. If an interoperable solution is preferred then an in-depth analysis to better understand the costs, risks and likely outcomes is warranted.

Comment:

The accuracy of this statement is supported by the August 2019 Draft Report of the IPART Review of the Pricing Framework for Electronic Conveyancing Services in NSW, and the 25 July 2019 Final Report on Interoperability between ELNO's.