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Chair,
Australian Registrars' National Electronic
Conveyancing Council

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Dear Chair,

COMMENTS ON 'DRAFT FINAL REPORT: REVIEW OF THE INTERGOVERNMENTAL AGREEMENT FOR AN ELECTRONIC CONVEYANCING NATIONAL LAW'

This letter is the response of the Australian Institute of Conveyancers (SA Division) Inc. (AICSA) to the *Draft Final Report: Review of the Intergovernmental Agreement for an Electronic Conveyancing National Law* prepared by DENCH MCLEAN CARLSON.

AICSA acknowledges and commends DENCH MCLEAN CARLSON on the thoroughness of this Report. The report addresses major concerns expressed by the AICSA previously and the AICSA is grateful for the opportunity to comment on the report.

AICSA Comments

Regulatory Framework

4.18 The regulatory requirements for legal practitioners and conveyancers are identified in the MPR and do not require specific changes. However, we do suggest that future certification of practitioners should require a reasonable level of competence in operating in an electronic environment and a good understanding of cyber security.

The AICSA supports the suggestion that certification of conveyancing practitioners should require a reasonable level of competence in an electronic environment and a good understanding of cyber security. There are a number of options for introducing this requirement. The national qualification for conveyancing the *BSB61115 Advanced Diploma of Conveyancing* could be modified to include a subject(s) that cover these competencies. Alternatively, professional development programs offered by professional bodies could address these competencies.

The attainment of competencies in working in the electronic environment and in understanding cyber security could be linked to the provision of professional indemnity insurance. It could be a requirement of obtaining professional indemnity insurance for these competencies to be obtained and maintained on an annual or biennial basis.

The regulator, in this state Consumer and Business Services would need to support and impose such an initiative.

4.20 The three national financial regulators (RBA, ASIC and APRA) and the ACCC carefully considered all of the issues associated with competition and developed the Minimum Conditions for Safe and Effective Competition. The regulations for competition in the eConveyancing environment similarly need to be agreed by the national regulators before any models of competition including interoperability are determined.

This proposal provides clarity as to the measures RBA, ASIC, APRA and ACCC will require to be undertaken before they will advise in favour of an ELNO licence. Approval will be given to those applicants who can provide a viable service in a market in a manner consistent with minimum conditions. ACCC could play an important role as an arbitrator of disputes if provided with appropriate power.

Financial payments and settlements

4.67 ARNECC stakeholder engagement policy and procedures provide a clear statement of ARNECC's commitments, policy and procedures for including the conveyancing industry stakeholders and the participants in developing and maintaining the regulatory framework for completing conveyancing transactions electronically and driving take up of the electronic conveyancing environment.

The AICSA disagrees with this claim. AICSA's experience is that consultation and engagement with peak bodies such as ours has become progressively worse and at times non-existent. Regular consultation with key stakeholders is essential.

A formal mechanism and process for consultation need to be established and maintained as a priority.

Risk and Liability

4.117 Previously PEXA was responsible for risk management, but with the shift in the environment from one ELNO to two, there is no regulator charged with managing system-wide/overall risk.

AICSA regards this as a major risk that must be addressed urgently. Property underpins the entire Australian economy and this must be adequately protected.

4.118 The known risks to titles registers are well covered in the regulatory and governance framework in the MOR and the guidance notes, and obligations to manage risk are identified in the MPR. This is good governance. However, there are no requirements in the governance documents to manage the risks in the financial payment and settlement systems.

The AICSA agrees that known risks to title registers are well covered but that the lack of requirements to manage risks in the financial payment and settlement systems is a serious concern. The AICSA supports the establishment of an independent statutory body to oversee management of the financial payment and settlement systems with ARNECC acting in an advisory capacity.

4.147 There is a lack of system wide focus on cybersecurity and no skilled national resources to address the issue. While there are security obligations identified in the MPR, there are no identified security improvement programs for subscribers. We understand there is a significant gap in ongoing education in cyber security for smaller practitioners.

AICSA has developed a free online course on cyber-security on its Learning Management System, Moodle. This course addresses specific cyber-security threats that conveyancers who operate small and medium sized businesses face. The AICSA supports compulsory, ongoing training in this area. The AICSA would also support that training being linked to licensing, subscriber registration or PI Insurance requirements (or all of them). The AICSA also supports a minimum IT system requirement being imposed on subscribers.

Auditing and monitoring

4.179 The following should be considered.

Form a risk and compliance committee comprising ARNECC and external experts including:

- An expert from the finance sector ideally from a financial regulator
- An expert from the practitioner sector such as the Legal Practitioners' Liability Committee ("LPLC")

AICSA supports a conveyancer representative in addition to a legal practitioner. In South Australia it is very confidently estimated that AICSA members are involved in more than 90% of all conveyancing transactions other than single mortgages, discharges and re-finances. Similar statistics would apply to other state and territory jurisdictions (other than Queensland and the ACT). As such, it would be negligent to not include an appropriately qualified representative for the conveyancing profession on a risk and compliance committee.

Objectives for a risk and compliance committee may include:

- Advising ARNECC (and other identified regulators) on the effectiveness of the risk management framework.
- Developing a national annual audit program and receiving the audit reports
- Developing a risk management, identification and mitigation strategy that is refreshed annually
- Supporting provision of accurate, relevant and timely information about risk
- Examining previous decisions to see how risk was managed as part of making those decisions
- Oversight of insurance programs to ensure appropriate coverage
- Monitoring the business continuity processes
- Developing and maintaining an appropriate risk culture that is embedded through the environment
- Contributing to the development of a performance improvement plan
- Developing agreed metrics and thresholds for regulator action for ELNOs and subscribers
- Providing advice on industry education requirements

AICSA agrees with the establishment of and the objective for a risk management committee. It must be recognised that professional indemnity schemes for conveyancers are different from those providing coverage to legal practitioners. For this reason a conveyancer should be a committee member. It may be an option to include as members a representative from regulatory bodies at a state and territory level such as Consumer and Business Services SA.

Competition Model

5.162 Based on the above conceptual analysis we believe that, if interoperability is to be pursued, then the shallowest version of interoperability should be investigated first because it will more likely address the target problems in the simplest way with fewer issues. We think this will potentially lead to a quicker, lower cost and more sustainable implementation than is likely with deeper integration.

AISCA supports an interoperability model that is simple, efficient, cost effective and sustainable. Essential to any model is security of the register and of the payment system from cyber or any other modes of vulnerability. A clear dispute resolution process must form an integral component of the system and the end customer (ie. Vendor and purchaser) must be quickly compensated for any actual loss.

5.196 Several third party (typically practice) software vendors already integrate with both ELNs to varying degrees in the current market. Vendors which offer complete integration with both ELNs (subject to the completeness of ELN third party APIs offered) are able to provide their customers with a common user interface across ELNs.

Not all conveyancers use this software. Some conveyancers use a number of different software packages including some bespoke software. The AICSA does not support this proposal on the basis that a third party will be brought into the risk/liability scheme. The AICSA would also query the appetite of software providers to undertake this role.

5.220 Therefore, we suggest that consideration be given to establishing a regulatory backed access regime for financial payments and settlement infrastructure. In its response to the IGA Review Issues Paper the ACCC indicates why regulation for access may be required and outlines the models generally applied:

The AICSA does not support this proposal. The AICSA argues that the regulatory systems that ACCC currently control are of national infrastructure e.g. roads, rail, electricity and telecommunications. We do not believe or agree that the PEXA platform or the platform created by any other ELNO is infrastructure in the same way as those affected by existing ACCC regimes.

The AICSA makes the following comments regarding the Draft Recommendations and Draft Options for Improvement:

Draft Recommendations

No	Recommendation	Comment
1	<p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p>	<p>We support this recommendation and suggest that it be implemented as a priority.</p> <p>Agree.</p> <p>Agree and acknowledge the significant body work of other reviews and groups.</p> <p>Agree and this should include regulatory arrangements for vertical competition.</p>

2	<p>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.</p>	<p>This recommendation is supported with a preference for Option 2 – a new Corporations Law company with skills and resources to ensure cooperation with the national regulators. AICSA acknowledges that specific legislation would need to be enacted to facilitate this recommendation.</p> <p>AICSA has concerns regarding Board membership and how members will be appointed to the Board. Membership needs to reflect the interests of all stakeholders and Boards members should possess a range of experience and knowledge.</p> <p>What will be the term of appointment for Board members?</p> <p>AICSA is in favour of ARNECC acting as an Advisory Council to the regulator and that a Federal Minister have responsibility for and oversight of the new company specifying minimum terms and conditions of Directors.</p> <p>The AICSA has some concerns regarding passing the costs of the establishment of the regulator on to both subscribers and consumers but recognises that this is inevitable.</p>
3	<p>We recommend changes to the category One approval process for applicant ELNOs so that business plan requirements include evidence that costs are understood, and adequate finances are in place, including those costs to meet all regulatory requirements and payment connections to financial institutions.</p> <p>It may be sensible to provide the information to the identified national regulators and the appropriate revenue office(s) to get their assessment on whether the financial allowance made is adequate.</p>	<p>We support this recommendation. New ELNO's must have a realistic understanding of costs and appropriate finances in place.</p> <p>Agree</p>

4	<p>We recommend that the approval process include further requirements for Category Two approval including:</p> <ul style="list-style-type: none"> • Approval from RBA that financial settlement system proposed meets RBA requirements • Approval from ASIC for the proposed payments system including remedies for high value mistaken/fraudulent payments • Approval from all appropriate revenue offices • Approval from the ACCC that the market approach including any vertical integration components and any consumer protection arrangements accord with national competition law • Confirmation from financial institutions that appropriate payment connections are in place <p>It may be appropriate that these are separated into a new Category Two (A)</p>	<p>We support this recommendation. ELNO's should be directed to comply with other appropriate existing regulatory requirements.</p> <p>This would make the ELNO approval process much more rigorous but AICSA supports this.</p> <p>Agree</p>
5	<p>An enforcement regime should be developed that includes penalties rather than only the existing suspension or termination in the case of a breach.</p>	<p>We strongly support this recommendation provided that penalties are appropriately structured to act as a deterrent to a breach of the requirements. Existing penalty options of suspension and termination should be retained. Penalties relating to downstream services must be harsh enough to deter this practice, especially if no legislative provisions are put in place to minimise or remove it as an option.</p>
6	<p>A national agenda and roadmap should be developed through consultation with stakeholders to identify and prioritise issues for examination to improve efficiency and national consistency where possible.</p>	<p>Agree</p>
7	<p>The regulatory framework for financial payments and settlement should be documented and the governance processes for annual audit and monitoring established in consultation with the national regulators, RBA and ASIC.</p>	<p>Agree</p>
8	<p>ARNECC should facilitate engagement with other regulators to ensure an efficient regulatory process for ELNOs and other regulators.</p>	<p>Agree</p>
9	<p>A system-wide change control process should be developed to coordinate system change and manage priorities and risks between ELNOs, registrars, revenue offices, financial institutions and any other connected entities.</p>	<p>Agree</p>
10	<p>We recommend that the rules in the MOR for ELNOs operating in the wider market be reviewed by a qualified economic regulator (e.g. ACCC) in the near future to ensure they are clear and there is no abuse of market power.</p>	<p>Agree</p>

11	We recommend that eConveyancing pricing remain capped until there are three or more fully operational ELNOs and competition is assessed as effective.	Agree. Price capping is an obvious solution but does not prevent ELNO's reducing their fees with potential for one to undercut another. The issue for smaller conveyancing practices will be potential scaling of fees making them less competitive with larger firms.
12	Conditions in contracts between ELNOs and governments should be made public if they impact on conveyancing practitioners and their clients.	Agree.

Draft options for improvement

No	Options for improvement	Comment
1	Further attention is needed to address practitioner concerns regarding vertical competition. The national regulators could consider development of an oversight process.	AICSA continues to regard the matter of vertical competition being of the gravest concern and is a matter that should be addressed as a priority.
2	Consider establishment of a Stakeholder Committee with ARNECC members, stakeholder representatives nominated by industry including financial institutions and other regulators as appropriate, and agree an ongoing consultation process to develop a proactive agenda for eConveyancing improvement.	Agree
3	Establish stakeholder consultative processes for coordination of industry wide changes and for industry input into the implementation plan for those changes.	Agree
4	Consider developing a system wide risk management framework including risk mitigation strategies such as minimum mandatory residential guarantees, insurance provisions to ensure timely resolution for homeowners, clear liability rules to protect consumers, a dispute resolution framework.	The AICSA believes it is essential that a system wide risk management framework be established.
5	Stakeholders operating nationally want jurisdictional variations that drive high operational complexity, risk (including missed settlements) and cost for no consumer benefit, to be considered and harmonized where possible.	Agree although the majority of AICSA members only operate in one jurisdiction – South Australia.
6	Consider forming a risk and compliance committee comprising ARNECC and external experts to review audit results on a national basis and to develop improvement programs – the committee could also consider regulator action for ELNOs or subscribers that fail agreed thresholds.	Agree. Membership of the compliance committee should include a conveyancer representative.

7	<p>Consider developing formal consultative arrangements with federal government cybersecurity experts to enable development of strategies to counter threats</p> <p>Consider whether future certification of practitioners should require a reasonable level of competence in operating in an electronic environment and a good understanding of cybersecurity.</p>	<p>Agree. AICSA supports making it compulsory for all conveyancers to undertake cyber-security training. However, the regulator, Consumer and Business Service (CBS) would need to impose this requirement.</p> <p>AICSA believes CBS would be open to discussions regarding this matter.</p> <p>As stated above, AICSA would support training being linked to licensing, subscriber registration or PI Insurance requirements (or all of them).</p> <p>The AICSA also supports a minimum IT system requirement being imposed on subscribers.</p> <p>AICSA runs professional development programs that attract Certified Practising Conveyancer points. A course on cyber-security could be designated as compulsory by CBS.</p>
8	<p>Consider developing a process that allows subscribers to register once in the eConveyancing environment.</p>	<p>Agree</p>
9	<p>Consider developing a privacy regime for eConveyancing that clearly identifies requirements, identifies a complaint process and provides for penalties for privacy breaches.</p>	<p>Agree. The model adopted by the <i>Privacy Act 1988</i> (Cwth) with the underpinning <i>Australian Privacy Principles</i> would be appropriate. The <i>OECD Privacy Principles</i> would also be a suitable model.</p>
10	<p>ARNECC could consider requiring all ELNOs to provide a standardised set of APIs that allow third-parties the ability to populate the ELNOs workspace.</p>	<p>Agree.</p>

We thank you for the opportunity to provide a submission on the Draft Final Report and look forward to working with ARNECC on these important issues.

Yours sincerely



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