

South Australian Office of the Registrar- General
submission on the
Draft Final Report Review of the
Intergovernmental Agreement for an Electronic
Conveyancing National Law

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Government of South Australia
Department of Planning,
Transport and Infrastructure

Summary

The South Australian Office of the Registrar-General (SA ORG) supports measures to strengthen national electronic conveyancing and provides this submission in response to the draft final report of the Review of the Intergovernmental Agreement for an Electronic Conveyancing National Law (IGA review).

The IGA review was commissioned as a requirement under the IGA for an independent review of the national agreement and framework, following seven years of operation. It was felt that, once the new industry had experienced some years of operation, an independent review would identify strengths and weaknesses in the system that are only apparent following a period of practical experience. The SA ORG saw great value in the independent review and has been waiting for its release to inform future steps in South Australia, including the mandating of electronic conveyancing.¹

The draft report has considered a wide range of contemporary issues to the electronic conveyancing industry that did not exist when the original IGA was drafted. These have resulted mainly from the evolution of PEXA, introduction of competition in the market and advancements in technology. The report has covered many important topics, which can now be easily accessed in one document by all stakeholders. This is a positive and beneficial step and the SA ORG commends the reviewers in this regard.

In particular, the SA ORG believes strongly in the merit of recommendations that promote ongoing stakeholder consultation to shape the future of electronic conveyancing, undertaking national work to streamline business practices and enhance ICT security, and developing processes that enable subscribers to only need to complete the registration process once in the electronic conveyancing environment.

However, despite the good work of the independent review, SA ORG also believes there are limitations to the report. These result mainly from a lack of detail attached to the recommendations and options for improvement. While they provide guidance on how emerging issues could be tackled under a reformed governance framework, they do not provide immediately actionable options. In order for implementation of the recommendations to occur at a minimum, the SA ORG hopes that the IGA Reviewer's implementation plan, referred to at paragraph 1.26 of the draft report, considers the essential elements of any required change-management framework. These include financial costs, resources required, specific necessary legislative reform, timeframes, and the impact on and support from the industry, amongst various other considerations specific to individual topics.

To support this general proposition, the SA ORG provides comments against each of the recommendations and options for improvement below. Provided that the final report and implementation plan addresses these concerns, it will be a useful document for regulators and stakeholders.

The SA ORG looks forward to the final report and collaborating with all participating jurisdictions to take positive action for the future of electronic conveyancing.

¹ As per Registrar-General's Customer Information Bulletin 329:
https://www.landservices.com.au/data/assets/pdf_file/0011/4610/CIB-329-Ministerial-decision-regarding-further-mandating-of-e-conveyancing.pdf

SA ORG comments to recommendations

Recommendation 1

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.

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.

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.

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.

The SA ORG requests that the IGA Reviewers consider in their implementation plan how the Registrars and Revenue Offices and other national regulators could work together in respect to this recommendation and, whether changes to the IGA and the legal framework would be required.

SA ORG queries which legislative framework will include the conditions for safe and effective competition for e-conveyancing. Is it proposed that they are included in the MOR? How will compliance be monitored and enforced (especially if it is under the MOR)?

In terms of the NSW interoperability working groups, SA ORG would like a stronger recommendation about the viability and desirability of interoperability. The NSW working groups raise many issues, however, to implement a road map towards achievement or abandonment of interoperability, a recommendation is required. To consider options for work at the national level on interoperability, some detail about the following would be beneficial:

- scope, timeframe and costs of a national review on interoperability; and
- advice on short and medium-term options for coping with multiple ELNOs that currently fail to interoperate.

The proposed two-year moratorium is unnecessary if the current conditions of entry and status of interoperability are transparent to the industry, particularly new entrants. We also question whether there is a legislative power to enable a moratorium to be introduced at this stage. If there is, on what basis would ARNECC be able to refuse to assess applications for two years?

Recommendation 2

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.

The body of the report states that ARNECC does not monitor financial payments and settlement, or collection of duties and taxes, because it lacks skills and resources. This seems to be a misunderstanding about the structure, legal basis, and powers of ARNECC. While it may or may

not be accurate to state that the Registrars who comprise ARNECC lack these skills, it is not for this reason that they fail to regulate in these areas. This is attributable to the composition and legal basis of ARNECC which, while a national body, lacks a legal basis to regulate these areas, or direct a Registrar of another jurisdiction to take any form of action.

While a new corporate body may be able to monitor and regulate these areas, it would need to be empowered as a national body with sufficient regulatory powers under the ECNL, or some other appropriate law. It may also be expeditious to investigate the feasibility of corporatising ARNECC, rather than establish an additional parallel regulatory body. ARNECC already has the power to inform itself about specific issues through experts outside of ARNECC, and this existing power could perhaps be made more robust.

In relation to funding sources for this proposed body, an indication of costs to those who use electronic conveyancing should first be canvassed. The original intention was to create a system that does not impose additional/undue costs on industry and clients. A more specific recommendation about the proposed corporate body, the extent of its membership, jurisdictional scope, and ongoing operating costs would be needed before this recommendation could be properly considered.

Recommendation 3

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. 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.

Further detail is required.

Recommendation 4

The approval process includes further requirements for Category Two approval including:

- i) Approval from RBA that financial settlement system proposed meets RBA requirements
- ii) Approval from ASIC for the proposed payments system including remedies for high value mistaken/fraudulent payments
- iii) Approval from all appropriate revenue offices
- iv) Approval from the ACCC that the market approach including any vertical integration components and any consumer protection arrangements accord with national competition law
- v) Confirmation from financial institutions that appropriate payment connections are in place
- vi) It may be appropriate that these are separated into a new Category Two (A).

The SA ORG agrees that approvals from these bodies would be worthwhile, however, would like to understand how this can be implemented. For example, can state legislation require approval from national bodies and are those bodies able and willing to approve these matters? Alternatively, do they step in and regulate as a matter of practice if an entity operates in a manner which contravenes their existing legislation and requirements? If so, how would this come to their attention?

Recommendation 5

An enforcement regime should be developed that includes penalties rather than only the existing suspension or termination in the case of a breach.

It is noted that such a regime would require amendment to the ECNL and, as such, would be subject to legal advice but SA ORG supports the recommendation.

The statement at para 4.15 that the requirements of national regulators need to have their requirements recognised in the approval process and Operating Agreements is not supported. Neither ARNECC nor state Registrars have the jurisdiction to issue an approval against matters regulated under other laws, or to enforce the requirements of those laws. This proposal requires some reconsideration and reframing. There are similar concerns about para 4.46.

Recommendation 6

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.

Further detail is required to cover, at a minimum, the following:

- Who will manage the necessary processes?
- What are the recommended processes and governance structure?
- What role should ELNO's and private LRS operators play?

Recommendation 7

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.

While the SA ORG sees merit in this recommendation, given its complexity, further analysis is required before implementation can be seriously considered. At a minimum, a high-level framework for actioning this recommendation would be beneficial. This could include:

- Scope, timeframe and cost of consultation process
- Form of any legislative amendment required
- Any governance framework contemplated to support regulators outside of ARNECC to participate in the monitoring and audit process, including any enforcement action and how that may fit with ARNECC processes

Recommendation 8

ARNECC should facilitate engagement with other regulators to ensure an efficient regulatory process for ELNOs and other regulators.

SA ORG notes that this recommendation is similar to others in this report. To action 'an efficient regulatory process' that encompasses 'other regulators', it would be helpful to know:

- Which other specific regulators?
- The envisaged scope of the regulatory process
- Governance and legislative arrangements
- Proposed cost of both the engagement process and any resulting regulatory process.

Recommendation 9

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.

It is noted that suggestions included at para 4.164 provide some guidance about what this process should entail. It would enable better consideration of this recommendation, however, if this guidance were more detailed. Issues to consider include:

- Scope of potential change control process
- Who should run the processes and act as custodian of the change registry?
- How will priorities be determined?
- Given the broad nature of this recommendation, what specific issues should fall within it?
- A draft timeline for undertaking this work

Recommendation 10

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.

This recommendation appears largely based on the reported concerns of conveyancers that ELNOs may compete with them, and the unqualified statement that the separation conditions in MOR 5 are insufficient. It is not necessarily true that the separation rules are insufficient, however, an independent review by an economic regulator can help to clarify this issue.

It is noted that ACCC was consulted in respect to the changes introduced in MOR 5. Changes that go further than those already introduced may require changes to the ECNL.

Recommendation 11

eConveyancing pricing remain capped until there are three or more fully operational ELNOs and competition is assessed as effective.

This recommendation appears to conflict with recommendation 2, which suggests that the increased costs of enhanced industry oversight should be borne by both ELNOs and users of the system. Additionally, SA ORG queries the basis/evidence for determining that three ELNOs, rather than two, would be sufficient competition to ensure competitive pricing.

Recommendation 12

Conditions in contracts between ELNOs and governments should be made public if they impact on conveyancing practitioners and their clients.

SA intends to publish the standard ELNO approvals and terms.

SA ORG comments to options for improvement

Option 1

Further attention is needed to address practitioner concerns regarding vertical competition. The national regulators could consider development of an oversight process.

It is noted that while the requirement is included in MOR 5, an enhanced national oversight process would support better monitoring and enforcement of compliance.

Option 2 and 3

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.
3. Establish stakeholder consultative processes for coordination of industry wide changes and for industry input into the implementation plan for those changes.

Support and note that stakeholder groups have worked well in the past.

Option 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.

It would be useful if the final report fleshes out this suggestion due to its complexity and the various parties that would be affected. A suggested framework with sufficient operational detail would enable better consideration of this suggestion.

Option 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.

There are limitations to implementing national consistency, because a truly national system would require referral of powers from the jurisdictions.

Option 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.

Would like to see those points touched on at paragraph 4.179 fleshed out in the final report to enable better consideration.

Option 7

Consider developing formal consultative arrangements with federal government cybersecurity experts to enable development of strategies to counter threats. 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.

More detail required:

- Who will do this and coordinate all jurisdictions?
- The training of practitioners could be facilitated with the use of an online learning tool but who is going to undertake the work, how much effort is involved, and who will pay?
- Will 'reasonable competence' be a policy or regulatory requirement?
- If it is a regulatory requirement, what legislative changes will be required and how will monitoring and enforcement be achieved?

Option 8

Consider developing a process that allows subscribers to register once in the eConveyancing environment.

SA ORG agrees that, if possible, it would be beneficial to create a trusted credential for use across all systems in the e-conveyancing environment. Paragraph 5.191 discusses the on-boarding and SA ORG supports re-registration rather than re-use. The concept of a 'digital wallet' may be useful here in that each system can have their own credentials, with storage and management in a master user account or digital wallet. Any options here would need to be subject to national consideration and legal advice.

Option 9

Consider developing a privacy regime for eConveyancing that clearly identifies requirements, identifies a complaint process and provides for penalties for privacy breaches.

Concerned this may overlap with existing privacy legislation and principles, including existing resolution processes.

Option 10

ARNECC could consider requiring all ELNOs to provide a standardised set of APIs that allow third-parties the ability to populate the ELNOs workspace.

Agree that uniformity would assist up, down and cross stream integrations within the entire ecosystem. This could incorporate practice management systems, financial institutions, land registry systems as well as ELNs. Any standards should be driven by the further work being done on interoperability and work done ahead of that is likely to be premature.