



AUSTRALIAN REGISTRARS NATIONAL ELECTRONIC CONVEYANCING COUNCIL

**Proposed
Electronic Conveyancing
National Law**

Discussion Paper

ARNECC Discussion Paper

Proposed Electronic Conveyancing National Law

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1. Introduction

This paper discusses the Legal Framework for National Electronic Conveyancing that is being developed by the States and Territories. It is important to note that the documents discussed below are currently in draft form only. They have been prepared by State and Territory land registry representatives meeting as the State Project Team (SPT) and require endorsement by government in each jurisdiction.

National Electronic Conveyancing is one of the initiatives contained in the Council of Australian Governments (COAG) National Partnership Agreement to Deliver a Seamless National Economy¹ signed in late 2008. The project has a long history of discussion and work by the Australian land registries in consultation with conveyancing industry stakeholders going back prior to the COAG involvement. As conveyancing is subject to State rather than Federal laws, the Commonwealth is not directly involved in the project.

While all State and Territory land registries have operated under the Torrens system for around 150 years, there are many variations in the detail of both Torrens legislation and conveyancing laws and practice that have developed over that time. These detail differences make the development of a single national electronic conveyancing system, as required by the National Partnership Agreement and the legal framework to support the national system, a complex undertaking. However, in developing National Electronic Conveyancing the States and Territories are endeavouring to make new procedures for electronic conveyancing as consistent as possible.

Notwithstanding the complexities, significant progress has been made and the States and Territories are working towards finalising and implementing the legal framework.

National Electronic Conveyancing in Australia will be an online business platform for conducting property transactions. To build and operate the National Electronic Conveyancing platform, a company called National E-Conveyancing Development Limited (NECDL)² was set up in early 2010. New South Wales, Queensland and Victoria were the original members of the company and Western Australia has subsequently become a member. The role of the NECDL member States as shareholders is separate from their involvement as a land registry. States that are not members of NECDL can still participate in National Electronic Conveyancing by authorising NECDL (and other potential operators in the future) to operate an Electronic Lodgment Network (ELN) in that jurisdiction.

The NECDL ELN will essentially be a web-based "hub" for parties to a conveyancing transaction to electronically prepare and settle the transaction and to electronically lodge the

¹ http://www.federalfinancialrelations.gov.au/content/national_partnership_agreements/other.aspx

² See <http://www.nationaleconveyancing.com.au>

documents for registration at the appropriate land registry. The NECDL platform will not directly alter or update the data held by a land registry, nor create a national land registry. It is a gateway or channel for documents to be presented for lodgment with the existing land registries.

Because of security requirements, only registered "Subscribers" (generally lawyers, conveyancers and lenders) will be entitled to use the system on behalf of their clients or on their own behalf. It is not intended that the electronic conveyancing system be available for use by members of the general public unless they are represented by a Subscriber.

The legal framework is substantially based on recommendations in a Report completed by law firm Clayton Utz. The Clayton Utz Legal Framework Development Final Report has been a valuable resource contributing to the development of the legal framework upon which National Electronic Conveyancing will be based. The Report, as well as a supplementary clarification sought by the Land Registries, is published and available at: <http://www.necs.gov.au/Redesign---Legal-Framework-2/default.aspx>.

The Report recommends a legal framework made up of the following principal components:

1. **nationally consistent legislation** in each State and Territory validating digital Registry Instruments and allowing the Registrar in each jurisdiction to authorise an Electronic Lodgment Network Operator (ELNO) to lodge Registry Instruments electronically provided the ELNO satisfies requirements imposed by the Registrar;
2. **model operating agreements** entered into between the Registrars and each ELNO;
3. **model operating requirements** the Registrars will require each ELNO to comply with before being authorised to lodge Registry Instruments electronically, including eligibility requirements and use of the model participation agreement and rules;
4. **participation agreements** between each operator of an ELN and every Subscriber using the system which, inter alia, would require compliance with the Registrars' participation rules; and
5. **model participation rules** with which the Registrars will require all Subscribers of an ELN to comply.

While Clayton Utz's recommendations in the Report relied heavily upon contractual arrangements, the model being proposed relies on statutory provisions in a few key areas to provide the additional certainty required for confidence by all parties in National Electronic Conveyancing.

2. Legal Framework for National Electronic Conveyancing

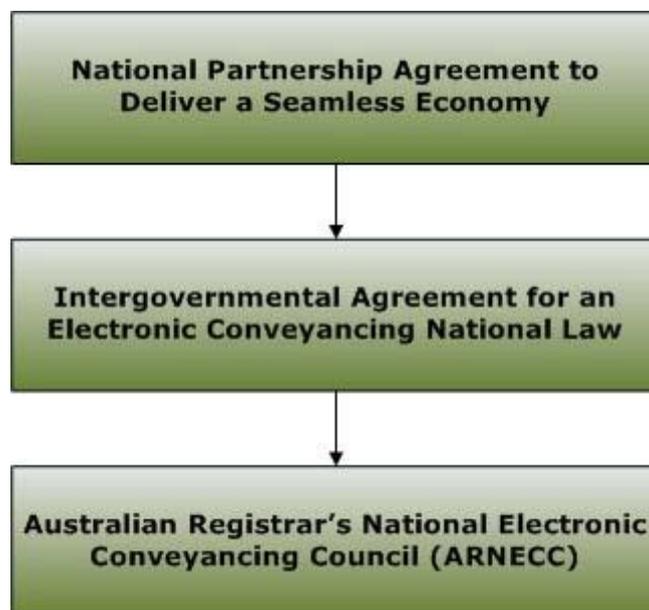
The proposed model for the legal framework governing National Electronic Conveyancing in Australia consists of:

- An Intergovernmental Agreement between the States and Territories;

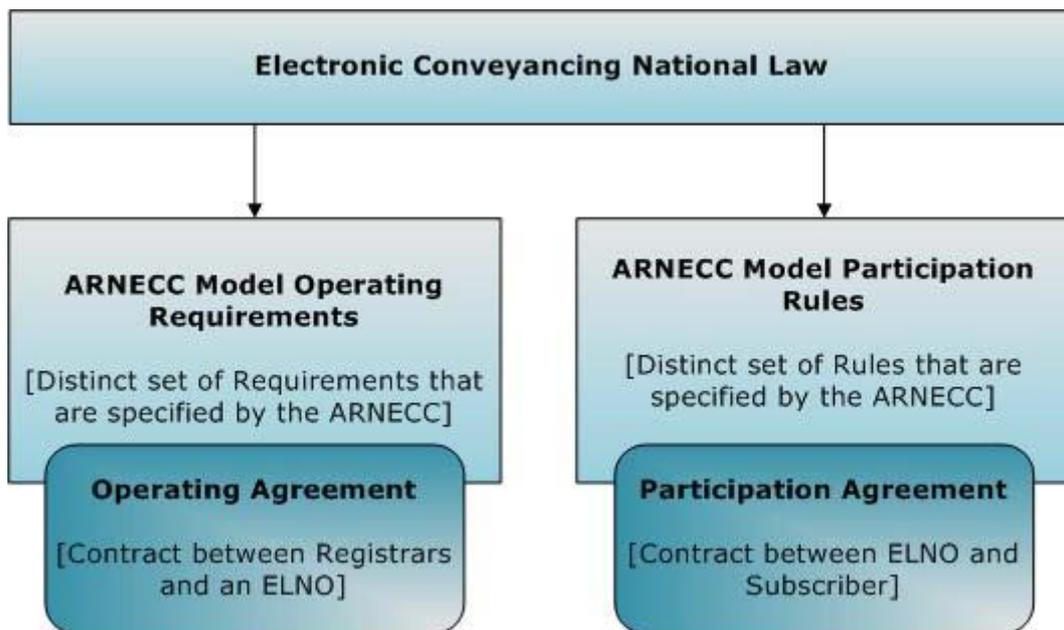
- The Australian Registrars' National Electronic Conveyancing Council, to be formally established by the Intergovernmental Agreement;
- Nationally consistent legislation providing high level powers to Registrars in each jurisdiction to be established by a national applied law scheme;
- Operating Requirements imposed by the Registrars and with which an ELNO must comply;
- Operating Agreements which are the agreements entered into by the Registrars with an ELNO allowing operation of the ELN within the Registrar's jurisdiction.
- Participation Rules with which users of an ELN must comply.
- Participation Agreements which are the agreements entered into by each Subscriber with an ELNO allowing use and access of its ELN.

In addition any ELNO will also have contracts and/or service agreements, for example, with a Financial Settlement Manager to provide the facility for the transfer of funds, with a supplier and certifier of Digital Signature Certificates and most likely with an IT partner or supplier. These are not discussed here as they will be negotiated between the ELNO and the relevant organisation, although the need to satisfy aspects of the Operating Requirements may well impact on aspects of those agreements. The relationship of the different instruments in the governance and legal frameworks is outlined in the following diagrams.

The governance framework for National E-Conveyancing



The legal framework for National E-Conveyancing



2.1 Intergovernmental Agreement and Australian Registrars' National Electronic Conveyancing Council

Sitting under the National Partnership Agreement for a Seamless National Economy (2008) is the Intergovernmental Agreement for an Electronic Conveyancing National Law (IGA), currently in draft, which will provide governance for the development, implementation and management of the regulatory framework including the establishment of the Australian Registrars' National Electronic Conveyancing Council (ARNECC), the Council established by the IGA to facilitate the ongoing management of the regulatory framework for National E-Conveyancing.

The IGA will be an agreement between the eight Australian States and Territories. The IGA facilitates the implementation and ongoing management of the regulatory framework for National E-Conveyancing.

The draft IGA states that it will come into operation on the date on which the first two parties execute the Agreement. Subsequent signatories to the agreement will only become bound by the Agreement from the date they sign.

Under the IGA, signatories will agree to cooperate on the implementation and management of National Electronic Conveyancing to minimise inconsistencies between jurisdictions, and commit to implementation as soon as practicable in their jurisdiction.

The key provisions in the IGA are:

- An obligation on the parties to cooperate in the implementation of national E-Conveyancing;
- A provision formally establishing the Australian Registrars' National Electronic Conveyancing Council (ARNECC) comprising the Registrars-General (or equivalent) from each jurisdiction or their nominee;
- An obligation, subject to normal government and parliamentary procedures in each jurisdiction, to pass nationally consistent legislation (either by way of an applied law scheme, or as a corresponding law);
- A mechanism for the parties to agree to amendments to the national law;
- An obligation on each party to adopt the Model Operating Requirements and Model Participation Rules developed by ARNECC as the requirements and rules applicable in that jurisdiction under the national law.

The IGA provides that the role of ARNECC is to:

- Ensure that as far as possible, land registry business practices are consistent nationally;
- Develop (and review and amend where necessary) a nationally agreed set of Model Operating Requirements and Model Participation Rules;
- Provide advice in relation to proposed amendments to the national law.

2.2 National Law

National Electronic Conveyancing will be facilitated by an Electronic Conveyancing National Law (ECNL). The draft ECNL will be introduced in New South Wales as the host jurisdiction for the Law by early 2012 (meaning that NSW will introduce a Bill into Parliament (which includes as a schedule the "Electronic Conveyancing National Law").

During 2012, the remaining States and Territories will then enact application bills (that is, legislation in their jurisdictions adopting the ECNL as a law of those jurisdictions) or enact legislation closely corresponding to the ECNL.

While a final decision on whether to apply or mirror the ECNL has not been made in a few jurisdictions, an application law scheme is preferred as it leads to a higher level of consistency. The applying jurisdictions enact application laws which apply the National Law (set out in the host jurisdiction's Act) as a law of that jurisdiction (with necessary changes to local references included in the application law). Amendments of the National Law in the host jurisdiction are automatically applied in all participating jurisdictions.

The States and Territories may also amend other legislation to ensure it is consistent with the ECNL.

The ECNL is discussed in more detail in Part 3 and draft provisions of the ECNL are set out in Annexure A.

2.3 Operating Requirements

Under the draft ECNL, the Registrar may determine requirements relating to the operation of an ELN, known as Operating Requirements.

The draft ECNL provides that in determining the Operating Requirements, the Registrar must have regard to any nationally agreed Model Operating Requirements. In practice, the nationally agreed Model Operating Requirements will be determined by ARNECC.

The States and Territories are currently drafting Model Operating Requirements to be used in consultation with stakeholders.

The Operating Requirements may deal with a variety of matters, including:

- financial standing and corporate status of the ELNO;
- compliance with the Participation Rules, including (without limitation):
 - (i) requiring an ELNO to use a Participation Agreement when authorising persons to use an ELN, and
 - (ii) requiring participation agreements to incorporate the Participation Rules;
- technical and operational capabilities of the ELN;
- the insurance cover to be held by an ELNO;
- the circumstances in which the Registrar may suspend or revoke the approval of a person as an ELNO; and
- the giving of directions to an ELNO by the Registrar, for example a direction to restrict, suspend or terminate a Subscriber's or other person's use of an ELN.

2.4 Operating Agreement

An **Operating Agreement** is the agreement entered into by the Registrars with an ELNO allowing operation of the ELN within the Registrar's jurisdiction. The States and Territories are working on a standard Operating Agreement and application procedures for discussion later this year.

2.5 Participation Rules

Under the draft ECNL, the Registrar may determine rules relating to the use of an ELN, known as Participation Rules.

The draft ECNL provides that in determining the Participation Rules, the Registrar must have regard to any nationally agreed participation rules. In practice, the nationally agreed participation rules will be determined by ARNECC.

The SPT is currently drafting Model Participation Rules for consultation with stakeholders.

The draft ECNL provides that, without limitation, the Participation Rules may deal with a variety of matters, including:

- eligibility criteria for Subscribers;
- the obligations of Subscribers, including (without limitation) any representations or warranties they are required to give;
- the circumstances in which a Subscriber's authority to use the ELN may be suspended or terminated;
- Client Authorisations;
- the obligations of Subscribers to verify the identity of their clients;
- the certification of Registry Instruments and other documents for use in connection with the ELN;
- Digital Signatures;
- the retention of documents created or obtained in connection with a Subscriber's use of an ELN; and
- compliance by Subscribers with the Participation Rules, including (without limitation) how Subscribers demonstrate compliance with the rules, the procedures for notifying non-compliance and how non-compliance may be remedied.

2.6 Participation Agreement

The **Participation Agreement** is the agreement entered into by each Subscriber with an ELNO as a condition of registration with the ELNO. The Participation Agreement may contain provisions that Operating Requirements require the ELNO to include, but otherwise it is for the ELNO to draft and negotiate the Participation Agreement with Subscribers.

3. Draft Electronic Conveyancing National Law

The provisions of the current draft of the ECNL are set out as an annexure to this paper.

The object of the ECNL is to promote efficiency throughout Australia in property conveyancing by providing a common legal framework that enables documents in electronic form to be lodged and dealt with under the land titles legislation of each jurisdiction.

The draft ECNL provides authority to the Registrar in respect of electronic transactions to supplement the existing powers in each jurisdiction's land titles legislation.

The key provisions of the draft ECNL are summarised below. The draft ECNL has not yet been finalised.

Electronic Lodgment

The Electronic Transactions Acts (ETAs)³ in each State and Territory are part of a model law scheme providing for electronic transactions generally. The ETAs provide that a transaction that might otherwise be invalid if conducted electronically, for example because of a requirement under a law of the jurisdiction for it to be in writing or to be executed in a particular way, is not invalid for the purposes of that law merely because it took place by electronic communication.

However, the ETAs do not expressly validate or permit transactions in an electronic form. Also, in some jurisdictions conveyancing transactions are specifically excepted from the operation of the ETA.

While real property transactions become indefeasible once registered in the Torrens Register of the respective jurisdiction, the validity of electronically conducted land transactions must be put beyond doubt in view of the significance of a stable and secure land titling system to land owners and the holders of other interests in land and of the national land market to the national economy.

Accordingly, in order to authorise electronic conveyancing in general, and lodgment and registration of electronic instruments specifically, it is considered necessary that the ECNL include provisions to supplement the Electronic Transactions Act (ETA) and support the status and legal efficacy of electronic conveyancing.

The draft ECNL includes provisions to supplement the ETAs in providing a legal foundation for electronic conveyancing and authorising lodgment and registration of electronic instruments.

³ Electronic Transactions Act 2001(ACT); Electronic Transactions Act 2000(NT); Electronic Transactions Act 2000(NSW); Electronic Transactions Act 2001(QLD); Electronic Transactions Act 2000(SA); Electronic Transactions Act 2000(Tas); Electronic Transactions Act 2000(Vic); Electronic Transactions Act 2003(WA).

The Bill provides that:

- documents may be lodged electronically (in a form and by a means approved by the Registrar);
- the Registrar must receive and deal with documents lodged electronically;
- electronic documents have the same status as the equivalent paper documents; and
- documents signed digitally (by a Subscriber) have the same effect as if they had been executed by the relevant party.

Client Authorisations

In National Electronic Conveyancing vendors and purchasers will not themselves sign Registry Instruments but will engage a Subscriber (a solicitor or conveyancer) to represent them. The Subscriber will digitally sign Registry Instruments (and other Electronic Documents) on behalf of the Client.

Where a Subscriber is engaged to represent a Client, an unequivocal form of Client Authorisation is necessary to complete digital signing of Registry Instruments on their behalf and to enable legal compliance with requirements in order for the Land Registry to register Registry Instruments digitally signed on behalf of the Client.

The Client Authorisation will have some similarities to a power of attorney, though for specific purposes. As a result it may be possible to argue that the Client Authorisation will be subject to various State or Territory provisions setting requirements for powers of attorney. For example, in some jurisdictions a power of attorney must be registered before being used to authorise a land transaction. Accordingly, the legislation should provide that a Client Authorisation is not subject to any jurisdiction legislation setting requirements for powers of attorney.

The draft ECNL provides that by entering into an approved form of Client Authorisation, a Transacting Party may authorise a Subscriber to:

- digitally sign electronic Registry Instruments and other electronic documents on that Transacting Party's behalf;
- lodge electronic Registry Instruments and other electronic documents with the relevant Land Registry;
- authorise any financial settlement involved in the transaction; and
- do anything necessary to complete the transaction electronically.

A Subscriber is not subject to the normal laws of the jurisdiction regarding powers of attorney when properly completed, it has effect according to its terms.

Reliance on Digital Signatures

Digital Signatures are an important part of National E-Conveyancing's in-built technical and legal measures to provide confidence in electronic conveyancing, and in particular the integrity of digitally signed electronic documents.

A strong, reliable and trusted structure for Digital Signatures mitigates the risk of a Subscriber, and any Client represented by the Subscriber repudiating all or part of a signed electronic document by claiming that the:

- Subscriber did not sign the document; or
- document was altered after the Subscriber signed it.

The Registrars require that strong attribution be retained to ensure Subscriber accountability for use of Digital Signatures. Strong attribution of Digital Signatures to a Subscriber also supports the attribution of the Digital Signature to a Client on whose behalf a representative Subscriber purports to sign.

Without this strong attribution feature of Digital Signatures the Land Registry would not rely on signatures and certifications made by Certifiers for a Subscriber in electronic instruments in accepting digitally signed instruments for lodgment and examining for registration.

The draft ECNL will provide that as between the signing Subscriber and any Relier who relies on the Digital Signature the apparent signing Subscriber is liable in all circumstances for the Digital Signature except where they can prove that:

- the Digital Signature was created by a person who is not the Subscriber, nor a certifier nominated by the Subscriber, nor an employee, agent or officer of the Subscriber; and
- the person acted without the express or implied authority of the Subscriber; and
- the person obtained the private key by compromising the IT system of the Subscriber where the private key was stored; and
- the Subscriber and its employees, agents and officers complied fully with the Participation Rules and any requirement under their agreement with the Certification Authority which issued the relevant DSC, in relation to protecting the key and reporting any possible compromise of the key, and took reasonable care to protect the IT system and its security where the private key was stored.

(A **Relier** is a person who relies on the Digital Signature and includes other Subscribers in the ELN Workspace, Transacting Parties; and the land registry upon lodgment of the Registry Instruments giving effect to the transaction.)

Electronic Lodgment Networks and Electronic Lodgment Network Operators

In each jurisdiction it is the Registrar who has responsibility for the administration of the Torrens Title Register and the registration of Registry Instruments in the jurisdiction. The Registrars will collectively set conditions for authorisation of an Electronic Lodgment Network Operator (ELNO) and conditions for access and use of an ELN.

The Registrar is to be empowered to either operate themselves or to authorise one or more persons to operate an Electronic Lodgment Network for the purposes of electronic conveyancing or lodgment.

The draft ECNL empowers the Registrar to operate or to authorise one or more persons to operate an ELN in respect of land in the jurisdiction. An ELN is an electronic system or platform that enables the preparation and lodging of Registry Instruments in electronic form. NECDL's platform will be an ELN when built. While the legal framework does not preclude other organisations from applying to become an ELNO, the development cost and nature of electronic conveyancing makes it unlikely that there will be others, especially in the short to medium term.

In managing electronic conveyancing the Registrar may:

- renew the approval of an ELNO if the ELNO continues to comply with the Operating Requirements, or revoke or suspend the approval of an ELNO in certain circumstances to be set out in the Operating Requirements.
- monitor activities in an ELN for any purpose, including to maintain the integrity of the Torrens register.

Operating Requirements and Participation Rules

The Bill empowers the Registrar to determine requirements relating to the operation of an ELN, known as Operating Requirements and requires that an ELNO must comply with the Operating Requirements.

The Operating Requirements may cover topics such as the financial standing of an ELNO, operational and technical standards, insurance cover to be held by an ELNO, the suspension or revocation of an ELNO's approval and directions to an ELNO to restrict, suspend or terminate a Subscriber's use of an ELN.

Similarly, the Registrar may determine rules relating to access to and use of an ELN, known as Participation Rules, and the draft ECNL requires that Subscribers comply with.

The Participation Rules may cover topics such as the eligibility criteria for Subscribers, representations or warranties to be given by Subscribers, suspension or termination of a Subscriber's access, form of Subscribers, obligations of Subscribers to verify the identity of

their client, certification of Registry Instruments, Digital Signatures and the retention of documents by Subscribers.

If a Subscriber fails to comply with the Participation Rules relating to the Subscriber's use of an ELN, the Registrar may restrict, suspend or terminate the Subscriber's use of an ELN provided by the Registrar or ELN in respect of an ELN operated by an ELNO, or direct the ELNO to restrict, suspend or terminate the Subscriber's use of the ELN.

ARNECC will determine Model Operating Requirements and Model Participation Rules that are intended to be adopted by each Registrar so that they are nationally uniform (although the models may include jurisdiction specific provisions).

The Registrar must make publicly available the current and superseded versions of the Operating Requirements and Participation Rules and any changes to the Operating Requirements or Participation Rules usually must be published at least 20 business days before the changes take effect.

Appeal Rights

The draft ECNL provides a right of appeal to a responsible court (to be nominated in each jurisdiction's application law) against the decision of a Registrar to:

- refuse to approve the person as an ELNO;
- refuse to renew the person's approval as an ELNO;
- suspend the person's approval as an ELNO;
- revoke the person's approval as an ELNO;
- restrict, suspend or terminate the person's use, as a Subscriber, of an ELN operated by the Registrar; or
- direct an ELNO to restrict, suspend or terminate the person's use, as a Subscriber, of the ELN operated by the ELNO.

Compliance Examination

The Registrars operate State guaranteed land title systems, the efficacy and accuracy of which will be reliant upon the certifications given by Subscribers, the accuracy of the electronic instruments they prepare, and on the supporting evidence that Subscribers will be required to retain.

Consequently, it will be necessary for the Registrar to have the ability to check compliance with the Operating Requirements and Participation Rules, either on a random compliance assurance basis or as part of an investigation into alleged or suspected misconduct. Compliance examinations may be made by attendance at the party's premises, after reasonable notice, to inspect the required documents or, more commonly, by requiring those

documents to be produced to the Registrar within a specified period, or as otherwise required by the Registrar.

These reviews will not be conducted in person by the Registrar and it may also be the case that such reviews may be included in or conducted in tandem with other professional compliance inspections by or on behalf of regulatory bodies such as Law Societies, conveyancing regulators or revenue offices. Accordingly, the Registrar will require the ability to delegate to an appropriate officer or to appoint an agent, and this should not be limited to public servants.

The draft ECNL empowers the Registrar (or his or her delegate) to conduct an examination of compliance with any conditions for operation, access and use of an ELN. The Registrar may conduct a compliance examination in relation to:

- an ELNO, to determine whether the Operating Requirements are being complied with or to investigate suspected or alleged misconduct in the operation of an ELN; or
- a Subscriber, to determine whether the Participation Rules are being complied with or to investigate suspected or alleged misconduct with respect to the Subscriber's use of an ELN.

An ELNO or a Subscriber must cooperate with any compliance investigation in that they must comply with any reasonable request by the person conducting the compliance examination:

- to furnish specified information or to produce specified documents, or
- to take specified action for the purposes of the compliance examination.

Instead of conducting a compliance examination in relation to any matter, or at any time during a compliance examination or after the completion of a compliance examination in relation to any matter, the Registrar may refer the matter to an appropriate authority.

An appropriate authority includes a law enforcement agency, and a regulatory or disciplinary body for persons engaged in any profession, occupation, calling or business.

The Registrar is not obliged to conduct any compliance examination or monitor activities in an ELN.

No Compensation for matters arising out of Compliance Examination

While the Bill does not affect or change any existing compensation rights under the States and Territories Torrens legislation⁴, it does provide that no person is entitled to receive compensation for any loss or damage arising out of anything done or omitted in good faith in,

⁴ See also section 4 of this paper - Liability Framework for National Electronic Conveyancing

or in connection with, the new discretion of a Registrar with respect to the monitoring of activities in an ELN or the conduct of a compliance examination under Part 3 Division 5, including (without limitation) any decision made, in good faith:

- not to monitor activities in an ELN or not to conduct a compliance examination, and
- as to how activities in an ELN are to be monitored or how a compliance examination is to be conducted.

Inconsistent Legislation

The enabling legislation is intended to be uniform across all jurisdictions and will need to be expressed in general language, without making specific reference or specific textual amendments to the specific laws of any jurisdiction. It can do this by setting out its effect and stating that the provisions of the enabling legislation apply notwithstanding anything to the contrary in the law of the enacting jurisdiction (i.e. it will override any contrary rule of statute or common law in the jurisdiction).

To the extent that it is possible to do so, the proposed ECNL should be expressed to apply despite any inconsistent provision in any other legislation to the extent of the inconsistency. ECNL is to be supplemental of existing Registrars powers under State and Territory legislation. Also, any provision of the proposed ECNL is to be interpreted as being an enhancement to and not restriction of any similar provision of State or Territory legislation.

The draft ECNL is expressed to prevail to the extent of any inconsistency with another law of the jurisdiction.

Interpretation

To ensure consistency in interpretation nationally, the draft ECNL excludes the operation of each jurisdiction's usual interpretation laws and instead includes a standard schedule of interpretation provisions to ensure consistent interpretation in all jurisdictions applying the draft ECNL. This approach has been used in a number of other national law schemes.

4. Liability Framework for National Electronic Conveyancing

One of the most frequently raised issues concerning National Electronic Conveyancing relates to the liability framework and whether the Torrens Assurance Fund (TAF)⁵ provisions of the States and Territories will apply or be excluded from electronic conveyancing.

⁵ In many jurisdictions there is a separate fund styled the Torrens Assurance Fund or the Assurance Fund. In other jurisdictions the state guarantee of title is funded out of Consolidated Revenue and there is no separate fund. As shorthand all state guarantee of title arrangements are referred to as Torrens Assurance Funds or TAFs.

The TAFs in each jurisdiction compensate persons who are wrongly deprived of interests in land through registration. These differ in detail and some of their differences are canvassed in the Environment Review for the Legal Framework⁶. In some jurisdictions the TAFs are avenues of last recourse in the sense that the person seeking compensation from the TAF must bring an action against the individual responsible for the loss before making a claim against the Assurance Fund, or show that such action is incapable of instigation. In others, compensation may be claimed concurrently with actions against other liable parties, and in some jurisdictions may be made administratively without the need to institute an action.

The Legal Framework Development Report recommended that the risk management framework for National Electronic Conveyancing should have as far as possible a neutral effect on the exposure of the TAFs to compensation payouts. This exposure should not be either materially increased or decreased. This recommendation has been accepted and as part of the implementation of the Legal Framework there is no intention to make any legislative amendment that would:

- make it any more difficult for any person to make a claim on the TAF in respect of a National Electronic Conveyancing transaction; or
- disqualify a claim because an ELNO has contributed to the loss.

5. What Next

A Consultation Regulation Impact Statement (RIS) is being prepared and, as National Electronic Conveyancing is a COAG initiative, the RIS will be prepared using the COAG Best Practice Regulation, A Guide for Ministerial Councils and National Standard Setting Bodies better regulation requirements. The RIS will be released through ARNECC once approved by the Office of Best Practice Regulation (OBPR) and the State and Territory governments.

The RIS is being prepared to support the introduction of the draft ECNL in each State and Territory and to ensure that the impacts of the proposed legislation are communicated clearly and readily identifiable for decision makers. The RIS will build on a considerable amount of stakeholder consultation that has already taken place through the National Electronic Conveyancing Office (NECO), including consultation conducted by Clayton Utz while preparing the Legal Framework Development Final Report on NECO's behalf, and by land registries within their own jurisdictions.

In assessing the impact of the draft ECNL, regard will be had to the impacts of the introduction of a National Electronic Conveyancing scheme as a whole rather than the specific impacts of the legislation. This is based on OBPR advice and because National Electronic

⁶See Legal Framework Report Vol 2 at <http://www.necs.gov.au/NECS-Independent-Expert-Advice-Reports/default.aspx>

Conveyancing will not be mandatory and stakeholders will have to “opt in” to the system or can decide to continue to use paper conveyancing for the foreseeable future. Of course, there will be a number of different factors that will influence the decision whether to opt in or not that will be identified in the RIS.

Following the consultation period the State and Territory governments will consider all stakeholder feedback and develop recommendations on the final form of the ECNL. A decision Regulatory Impact Statement will then be prepared and will need to be approved by the OBPR before being released.

6. Further Information

Comments or questions on this paper should be addressed to:

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Draft Electronic Conveyancing National Law

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Part 1 — Preliminary

1. Short title

This Law may be cited as the Electronic Conveyancing National Law.

2. Commencement

This Law commences in a participating jurisdiction as provided by the application law of that jurisdiction.

3. Definitions

(1) In this Law:

application law means a law of a participating jurisdiction that applies this Law, either with or without modifications, as a law of the participating jurisdiction.

ARNECC means the Australian Registrars' National Electronic Conveyancing Council established by the Intergovernmental Agreement.

associated financial transaction means a transaction of a financial nature that is associated with a conveyancing transaction, of which (without limitation) the following are examples:

- (a) the payment of the settlement price for the sale and purchase of an interest in land,
- (b) the advancing of money in return for the granting of a mortgage or charge over an interest in land,
- (c) the payment of any tax, duty (for example, stamp duty), fee or charge payable in respect of the conveyancing transaction.

client authorisation has the meaning given in section 9.

compliance examination has the meaning given in section 29.

conveyancing transaction means a transaction that involves one or more parties and the purpose of which is:

- (a) to create, transfer, dispose of, mortgage, charge, lease or deal with in any other way an estate or interest in land, or
- (b) to get something registered, noted or recorded in the titles register, or
- (c) to get the registration, note or record of something in the titles register changed, withdrawn or removed.

digital signature means encrypted electronic data intended for the exclusive use of a particular person as a means of identifying that person as the sender of an electronic communication or the signer of a document.

ELN means Electronic Lodgment Network — see section 12.

ELNO means Electronic Lodgment Network Operator — see section 14.

Intergovernmental Agreement means the Intergovernmental Agreement for a National Electronic Conveyancing Law made on [00 00 2011] between the State of New South Wales, the State of Victoria, the State of Queensland, the State of Western Australia, the State of South Australia, the State of Tasmania, the Australian Capital Territory and the Northern Territory of Australia, as in force for the time being.

jurisdiction means State.

land titles legislation, for the purposes of the application of this Law as a law of a jurisdiction, has the meaning given by the application law of the jurisdiction.

law, in relation to a Territory, means a law of, or in force in, that Territory.

law of this jurisdiction includes the principles and rules of common law and equity to the extent that they have effect in this jurisdiction from time to time.

lodge includes deposit, present and file.

operating requirements means the requirements determined under section 20.

participating jurisdiction means a jurisdiction that is a party to the Intergovernmental Agreement and applies this Law as a law of the jurisdiction, either with or without modifications.

participation agreement, in relation to an ELN, means:

- (a) if an ELNO provides and operates the ELN, an agreement between the ELNO and another person under which the other person is authorised to have access to and use that ELN, or
- (b) if the Registrar provides and operates the ELN, an agreement between the Registrar and another person under which the other person is authorised to have access to and use that ELN.

participation rules means the rules determined under section 21.

Registrar, for the purposes of the application of this Law as a law of a jurisdiction, has the meaning given by the application law of the jurisdiction.

registry instrument, for the purposes of the application of this Law as a law of a jurisdiction, has the meaning given by the application law of the jurisdiction.

responsible tribunal, for the purposes of the application of this Law as a law of a jurisdiction, has the meaning given by the application law of the jurisdiction.

State includes a Territory.

subscriber means a person who is authorised under a participation agreement to use an ELN to complete conveyancing transactions on behalf of another person or on their own behalf.

Territory means the Australian Capital Territory or the Northern Territory of Australia.

titles register, for the purposes of the application of this Law as a law of a jurisdiction, has the meaning given by the application law of the jurisdiction.

- (2) For the purposes of this Law:
 - (a) a jurisdiction is taken to have applied this Law as a law of the jurisdiction if a law of the jurisdiction substantially corresponds to the provisions of this Law, as in force from time to time, and
 - (b) the corresponding law is taken to be an application law.
- (3) A term used in this Law or a statutory instrument and also in the land titles legislation has the same meaning in this Law or the statutory instrument as it has in that legislation, unless the term is defined in this Law or the statutory instrument or the context requires otherwise.

4. Interpretation generally

Schedule 1 applies in relation to this Law.

[Note: Schedule 1 will include a list of standard interpretation provisions that will apply to the Law. This is required as the application law in each jurisdiction will exclude the operation of the jurisdictions Interpretation Act in respect of the ECNL so that its provisions are interpreted consistently in all jurisdictions.]

5. Object of this Law

- (1) The object of this Law is to promote efficiency throughout Australia in property conveyancing by providing a common legal framework that enables documents in electronic form to be lodged and dealt with under the land titles legislation of each jurisdiction that applies this Law.
- (2) In order to achieve this object, this Law, among other things, authorises the Registrar in each jurisdiction that applies this Law to operate or authorise the operation of an Electronic Lodgment Network, and provides for the making of rules relating to the operation of the Electronic Lodgment Network.

Part 2 — Electronic Conveyancing

Division 1 — Electronic lodgment

6. Documents may be lodged electronically

- (1) A document may be lodged electronically for the purposes of the land titles legislation if the document is lodged:
 - (a) in a form approved by the Registrar, and
 - (b) by means of an ELN provided and operated under this Law.
- (2) An approval for the purposes of subsection (1)(a) may be given under the land titles legislation or in some other way that the Registrar considers appropriate.

7. Registrar to process documents lodged electronically

The Registrar must receive and deal with a document in accordance with the land titles legislation if:

- (a) the document is lodged electronically in accordance with section 6, and
- (b) the document otherwise complies with the requirements of the land titles legislation, this Law, and any other law of this jurisdiction.

8. Status of electronic registry instruments

- (1) A registry instrument that is in a form in which it can be lodged electronically under section 6 has the same effect as if that instrument were in the form of a paper document.
- (2) A registry instrument that is digitally signed by a subscriber in accordance with the participation rules applicable to that instrument has the same effect as if a paper document having the equivalent effect had been executed by:
 - (a) if the subscriber signs under a client authorisation, each person for whom the subscriber signs in accordance with the client authorisation, or
 - (b) the subscriber in any other case.
- (3) If a registry instrument is digitally signed in accordance with the participation rules applicable to that instrument:
 - (a) the instrument is to be taken to be in writing for the purposes of every other law of this jurisdiction, and
 - (b) the requirements of any other law of this jurisdiction relating to the execution, signing, witnessing, attestation or sealing of documents must be regarded as having been fully satisfied.

Division 2 — Client authorisations and digital signatures

Subdivision 1 — Client authorisations

9. Client authorisations

- (1) A *client authorisation* is a document by which a party to a conveyancing transaction authorises a subscriber to do one or more things on that party's behalf in connection with the transaction so that the transaction, or part of the transaction, can be completed electronically.
- (2) The following are examples of the things that a client authorisation may authorise a subscriber to do:
 - (a) to digitally sign registry instruments or other documents,
 - (b) to present registry instruments or other documents for lodgment electronically,
 - (c) to authorise or complete any associated financial transaction.

10. Effect of client authorisation

- (1) A properly completed client authorisation that is in the form required by the participation rules:
 - (a) has effect according to its terms, and
 - (b) is not a power of attorney for the purposes of any other law of this jurisdiction relating to powers of attorney.
- (2) Nothing in any other law of this jurisdiction relating to the execution, signing, witnessing, attestation or sealing of documents applies to a properly completed client authorisation that is in the form required by the participation rules.
- (3) Subsection (2) does not exclude the application of any law of this jurisdiction relating to powers of attorney in relation to:
 - (a) the execution of a client authorisation under a power of attorney, or
 - (b) a client authorisation executed under a power of attorney.

Subdivision 2 — Digital signatures

11. Reliance on digital signatures

Note: This provision was initially to be contained in the Model Participation Rules. After a review by the Parliamentary Counsels' Committee it has been decided that it is more appropriately contained in the Law. Drafting of the provision has not been finalised. However, the intention is to draft an attribution rule that is much like the rule recommended in the Legal Framework Development Report.

This rule was as follows:

“As between the signing Subscriber and any Relier who relies on the digital signature, the apparent signing Subscriber is liable in all circumstances for the digital signature except where they can prove that:

- the digital signature was created by a person who is not the Subscriber, nor an employee, agent or officer of the Subscriber; and
- the person acted without the express or implied authority of the Subscriber; and

- the person obtained the private key by compromising the IT system of the Subscriber where the private key was stored; and
- the Subscriber and its employees, agents and officers complied fully with the Participation Rules and any requirement under their agreement with the Certification Authority which issued the relevant digital signature, in relation to protecting the key and reporting any possible compromise of the key, and took reasonable care to protect the IT system and its security where the private key was stored.

(A Relier is a person who relies on the Digital Signature and includes other Subscribers in the ELN Workspace, Transacting Parties; and the land registry upon lodgment of the registry instruments giving effect to the transaction.)

Part 3 — Electronic Lodgment Networks

Division 1 — Preliminary

12. Electronic Lodgment Network

- (1) An Electronic Lodgment Network (*ELN*) is an electronic system that enables the lodging of registry instruments and other documents in electronic form for the purposes of the land titles legislation.
- (2) An ELN may also enable the preparation of registry instruments and other documents in electronic form for lodging under the land titles legislation.

Division 2 — Operation of Electronic Lodgment Networks

13. Registrar may provide and operate ELN

The Registrar may provide and operate an ELN.

14. Registrar may approve ELNO to provide and operate ELN

- (1) The Registrar may approve a person as an Electronic Lodgment Network Operator (*ELNO*) to provide and operate an ELN.
- (2) The Registrar must not approve a person under this section unless the person meets the qualifications for approval set out in the operating requirements.
- (3) An approval under this section must be in writing and must state the period for which it is to have effect.
- (4) The Registrar may grant more than one approval under this section.

15. Effect of approval as ELNO

- (1) A person who is approved as an ELNO under section 14 may provide and operate an ELN:
 - (a) for the period stated in the approval, and
 - (b) in accordance with the operating requirements.
- (2) Subsection (1) is subject to sections 17 and 18.
- (3) In performing functions as an ELNO, a person approved under section 14 is not and does not represent the Crown, and is not an agent of the Crown.

- (4) The approval of a person as an ELNO does not restrict or prevent the provision, by that person, of services additional to those provided by the ELN.
- (5) Subsection (4) is subject to the operating requirements.

16. ELNO required to comply with operating requirements

A person approved as an ELNO under section 14 must comply with the operating requirements.

17. Renewal of approval as ELNO

- (1) The Registrar may renew an approval of a person as an ELNO under section 14 if the Registrar is satisfied that the person continues to meet the qualifications for approval set out in the operating requirements.
- (2) The renewal of an approval under this section must be in writing and must state the period for which the renewal is to have effect.

18. Revocation or suspension of approval as ELNO

The Registrar may revoke or suspend the approval of a person as an ELNO in the circumstances set out in the operating requirements.

19. Monitoring of activities in ELN

- (1) The Registrar may monitor activities in an ELN for any purpose, including (without limitation) for the purpose of maintaining the integrity of the titles register.
- (2) This section does not limit Division 5.

Division 3 — Operating requirements and participation rules

20. Operating requirements for ELNOs

- (1) The Registrar may determine, in writing, requirements relating to the operation of an ELNO (*operating requirements*).
- (2) The operating requirements may (without limitation) include provisions relating to the following matters:
 - (a) the financial standing of an ELNO,
 - (b) compliance with the participation rules, including (without limitation):
 - (i) requiring an ELNO to use a participation agreement when authorising persons to use an ELN, and
 - (ii) requiring participation agreements to incorporate the participation rules,
 - (c) the technical and operational requirements for an ELN,
 - (d) the insurance cover to be held by an ELNO,
 - (e) the circumstances in which the Registrar may suspend or revoke the approval of a person as an ELNO,
 - (f) the giving of directions to an ELNO by the Registrar, for example a direction to restrict, suspend or terminate a subscriber's or other person's use of an ELN.

21. Participation rules

- (1) The Registrar may determine, in writing, rules relating to access to and the use of an ELN (*participation rules*).
- (2) The participation rules may (without limitation) include provisions relating to the following matters:
 - (a) the eligibility criteria for subscribers,
 - (b) the obligations of subscribers, including (without limitation) any representations or warranties they are required to give,
 - (c) the circumstances in which a subscriber's authority to use the ELN may be suspended or terminated,
 - (d) client authorisations, including (without limitation):
 - (i) the form of client authorisations,
 - (ii) whether client authorisations can be revoked, and if so how and in what circumstances,
 - (iii) the effect (if any) on client authorisations of the death, incapacity or bankruptcy of, or other circumstance affecting, a party to a conveyancing transaction or a subscriber,
 - (e) the obligations of subscribers to verify the identity of their clients,
 - (f) the certification of registry instruments and other documents for use in connection with the ELN,
 - (g) digital signatures, including (without limitation), the obligations of subscribers in relation to:
 - (i) the security of electronic systems that enable digital signatures to be used,
 - (ii) the reporting of incidents in which the security of such systems have been or might have been compromised,
 - (h) the retention of documents created or obtained in connection with a subscriber's use of an ELN,
 - (i) compliance by subscribers with the participation rules, including (without limitation) how subscribers demonstrate compliance with the rules, the procedures for notifying non-compliance and how non-compliance may be remedied.

22. Registrar to have regard to nationally agreed model operating requirements and participation rules

- (1) In this section:
model provisions means any model operating requirements or model participation rules from time to time developed and published by ARNECC.
- (2) In determining operating requirements and participation rules under this Law, and in determining changes to those requirements or rules, the Registrar must have regard to any model provisions.

23. Publication of operating requirements and participation rules

- (1) The Registrar must ensure that the following are made publicly available:
 - (a) the current operating requirements and participation rules,
 - (b) all superseded versions of the operating requirements and participation rules.

- (2) The operating requirements and participation rules, and any changes to either of them, must be made publicly available at least 20 business days before the operating requirements or participation rules or, as the case requires, the changes to them take effect.
- (3) However, changes to the operating requirements or participation rules may take effect within a shorter period (including immediately on being made publicly available), if the Registrar is satisfied that the changes need to take effect urgently because an emergency situation exists.
- (4) For the purposes of subsection (3), an emergency situation exists if the Registrar considers that, because of the occurrence of an event or the existence of particular circumstances, the operation, security, integrity or stability of an ELN or the titles register or the land titles system is being, or is likely to be, jeopardised.
- (5) Documents may be made publicly available in accordance with this section in any manner the Registrar considers appropriate, including (without limitation) by means of a website.

24. Subscribers required to comply with participation rules

- (1) A subscriber who is authorised under a participation agreement to use an ELN must comply with the participation rules relating to that ELN.
- (2) If a subscriber fails to comply with the participation rules relating to the subscriber's use of an ELN, the Registrar may:
 - (a) if the Registrar operates the ELN, restrict, suspend or terminate the subscriber's use of the ELN,
 - (b) if an ELNO operates the ELN, direct the ELNO to restrict, suspend or terminate the subscriber's use of the ELN.
- (3) Subsection (2) does not limit or affect any right, power, authority or remedy that the Registrar or an ELNO has under the operating requirements, the participation rules, a participation agreement or any other law of this jurisdiction in relation to non-compliance with the participation rules.

Division 4 — Appeals

25. Appeal against decisions of Registrar

A person who is the subject of any of the following decisions (an *appellable decision*) may appeal against the decision to the responsible tribunal:

- (a) a decision by the Registrar to refuse to approve the person as an ELNO,
- (b) a decision by the Registrar to refuse to renew the person's approval as an ELNO,
- (c) a decision by the Registrar to suspend the person's approval as an ELNO,
- (d) a decision by the Registrar to revoke the person's approval as an ELNO,
- (e) a decision by the Registrar to restrict, suspend or terminate the person's use, as a subscriber, of an ELN operated by the Registrar,
- (f) a decision by the Registrar to direct an ELNO to restrict, suspend or terminate the person's use, as a subscriber, of the ELN operated by the ELNO.

26. Determination of appeal

- (1) After hearing the appeal, the responsible tribunal may:

- (a) confirm the appellable decision, or
 - (b) amend the appellable decision, or
 - (c) substitute another decision for the appellable decision.
- (2) In substituting another decision for the appellable decision, the responsible tribunal has the same powers as the Registrar under this Law.

27. Costs

- (1) The responsible tribunal may make any order about costs it considers appropriate for the proceedings under this Division.
- (2) This section does not apply if the responsible tribunal has power under another law of this jurisdiction to make an order about costs for proceedings under this Division.

28. Relationship with Act establishing responsible tribunal

This Division applies despite any provision to the contrary of the Act that establishes or continues the responsible tribunal, but does not otherwise limit that Act.

Division 5 — Compliance examinations

29. Compliance examinations

The Registrar may, on receiving a request or complaint from any person or on the Registrar's own initiative, conduct an investigation (*compliance examination*) under this Part:

- (a) in relation to an ELNO for either or both of the following purposes:
 - (i) ascertaining whether or not the operating requirements are being, or have been, complied with,
 - (ii) investigating any suspected or alleged case of misconduct with respect to the operation of an ELN,
- (b) in relation to a subscriber for either or both of the following purposes:
 - (i) ascertaining whether or not the participation rules are being, or have been, complied with,
 - (ii) investigating any suspected or alleged case of misconduct with respect to the use of an ELN.

30. Obligation to cooperate with examination

- (1) An ELNO or a subscriber in relation to whom a compliance examination is being conducted must cooperate fully with the person conducting the compliance examination for the purpose of ensuring that the person is able to conduct a proper compliance examination.
- (2) In particular, an ELNO or a subscriber must comply with any reasonable request by the person conducting the compliance examination:
- (a) to furnish specified information or to produce specified documents, or
 - (b) to take specified action for the purposes of the compliance examination.
- (3) If an ELNO fails, without reasonable excuse, to cooperate as required by this section, the Registrar may take any action that the Registrar is authorised to take under the operating requirements and that the Registrar considers appropriate, which may

include (without limitation) the suspension or revocation of the ELNO's approval under section 18.

- (4) If a subscriber fails, without reasonable excuse, to cooperate as required by this section, the Registrar may take any action that the Registrar is authorised to take under the operating requirements, the participation rules or the land titles legislation and that the Registrar considers appropriate.
- (5) For the purposes of subsections (3) and (4), it is a reasonable excuse for an individual to fail to give stated information, answer a question or to produce a document, if giving the information, answering the question or producing the document might tend to incriminate the individual.

31. Registrar may refer matter to appropriate authority

- (1) In this section:

appropriate authority:

- (a) means a person, body or organisation who or which is empowered by a law of this jurisdiction or of another State or the Commonwealth to take investigatory, disciplinary or other action, and
 - (b) includes (without limiting paragraph (a)):
 - (i) a law enforcement agency, and
 - (ii) a regulatory or disciplinary body for persons engaged in any profession, occupation, calling or business.
- (2) Instead of conducting a compliance examination in relation to any matter, or at any time during a compliance examination or after the completion of a compliance examination in relation to any matter, the Registrar may refer the matter to an appropriate authority.
 - (3) If the Registrar refers a matter to an appropriate authority, the Registrar is not obliged to take any other action in relation to the matter.

32. Registrar may delegate power to conduct compliance examination

The Registrar may delegate to a person any function under this Division, other than this power of delegation.

33. Land titles legislation not limited

Nothing in this Division limits or affects any provision of the land titles legislation that authorises or permits any investigation, inquiry or examination of any kind.

Part 4 — Miscellaneous

Division 1 — Liability of Registrar

34. Registrar not obliged to monitor ELN or conduct compliance examination

The Registrar is not obliged:

- (a) to monitor activities in an ELN under section 19; or
- (b) to conduct or complete a compliance examination under Part 3 Division 5.

35. No compensation

No person is entitled to receive compensation for any loss or damage arising out of anything done or omitted in good faith in, or in connection with, the monitoring of activities in an ELN under section 19 or the conduct of a compliance examination under Part 3 Division 5, including (without limitation):

- (a) any decision made, in good faith, not to monitor activities in an ELN or not to conduct a compliance examination, and
- (b) any decision made, in good faith, as to how activities in an ELN are to be monitored or how a compliance examination is to be conducted.

36. Registrar not responsible for additional services provided by ELNO

The mere fact that an ELNO provides services that are additional to those provided by the ELN operated by that ELNO does not make the Registrar responsible for the regulation or operation of those additional services.

Division 2 — Relationship with other laws

37. Relationship with other laws

- (1) This Law prevails to the extent of any inconsistency with another law of this jurisdiction.
- (2) Subsection (1) does not apply if another law of this jurisdiction expressly states that, or to the effect that, a provision of that law, or of another law of this jurisdiction, has effect despite the provisions, or a specified provision, of this Law.

38. Other laws relating to electronic transactions not affected

This Law is in addition to, and not in substitution for:

- (a) the laws of this jurisdiction in relation to electronic transactions, and
- (b) any other law of this jurisdiction that authorises or permits the use of electronic documents for the purposes of the land titles legislation.

39. Powers may be exercised for purposes of this Law

If any provision of the land titles legislation empowers the making of an instrument of a legislative or administrative character, or the doing of any other act or thing, that power is to be construed (with all necessary changes) as including a general power to make instruments of that character, or to do that act or thing, for the purposes of this Law.