



AUSTRALIAN REGISTRARS NATIONAL ELECTRONIC CONVEYANCING COUNCIL

ARNECC Members

## Changes to the *Electronic Conveyancing National Law*

The paper is provided for the information of industry, for discussion at the national industry panel meeting on 5 May 2021. If you have any queries regarding this paper, please contact:

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## Position Paper: Changes to Electronic Conveyancing National Law

### ARNECC Summary Statement on proposed changes to the ECNL to support interoperability in electronic conveyancing

This paper sets out ARNECC's agreed position on changes that are proposed to be made to the Electronic Conveyancing National Law (ECNL). The Paper reflects ARNECC's policy position, which is subject to cabinet approval. The specific wording of the proposals will be drafted and agreed by the Parliamentary Counsel's Committee.

#### BACKGROUND

ARNECC has resolved to make changes to the ECNL to encourage market competition, provide alternatives to deal with non-compliance and to clarify some issues of uncertainty.

The proposed changes fall into three broad categories.

1. **Interoperability** – Electronic conveyancing is transitioning from a single Electronic Lodgment Network Operator (ELNO) to a multi ELNO environment. Although the legal framework for electronic conveyancing always allowed for multiple operators to be approved by a Registrar, there is nothing in the legislation that requires ELNOs to interoperate. To facilitate a competitive market, the ECNL is to be amended to include appropriate controls to require and manage interoperability between competing ELNOs.
2. **Enforcement** - One of the key recommendations of the recent IGA review was that an enforcement regime be introduced. The proposed regime will apply to both ELNOs and to the Subscribers who use the system. Details of the proposals are outlined in an accompanying Paper, titled 'Changes to enforcement powers in the Electronic Conveyancing National Law'.
3. **Minor amendments addressing practice issues** - Some separate amendments are proposed, primarily relating to matters of practice. Issues covered include information sharing between Registrars and expanding the heads of power to make operating requirements to clarify that the Model Operating Requirements (MOR) can deal with issues like integration.

#### 1. Interoperability

The purpose of the reform is to facilitate market-wide interoperability so that Subscribers can engage in electronic conveyancing transactions across the entire market through their chosen ELNO.

This will mean that an ELNO must take reasonable steps to:

- establish interoperability between its ELN and each other ELN, including to provide interoperability on reasonable request from another ELNO, on agreed terms and conditions, and
- ensure that its interoperability arrangements with another ELN enables Subscribers on its ELN to conduct a conveyancing transaction with Subscribers on the other ELN on an equivalent basis to a conveyancing transaction conducted solely between Subscribers to its own ELN.

Registrars should have a power to exempt an individual ELNO or a specified class of ELNOs from the interoperability requirements in defined circumstances.

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To meet this objective, the ECNL will be amended to include:

### 1.1 A requirement to interoperate

The requirement to interoperate will be included within the ECNL but Registrars will have the ability to waive the requirement in circumstances including:

- to aid implementation by allowing an incremental rollout so that systems can be built and tested,
- to allow land registries to accommodate new ELNOs,
- to accommodate future technology changes and innovations in ELN models.

### 1.2 Definition of interoperability

The ECNL will define interoperability to include the following key considerations:

*Interoperability* means the interworking of ELNs in a way that allows:

- a person who is a Subscriber to an ELN to conduct an electronic conveyancing transaction with one or more Subscribers to other ELNs,
- the preparation of a registry instrument or other document in electronic form using data from different ELNs.

### 1.3 The MOR will set specific conditions for interoperability

In keeping with the existing framework for electronic conveyancing, the specific regulatory requirements needed for interoperability will be established through the MOR. Section 22 of the ECNL allows Registrars to determine operating requirements. The existing heads of power in section 22 will be utilised or enhanced to allow operating requirements that deal with the below.

- **Interoperability Agreements** – The terms on which ELNOs will interoperate will be established by agreements that interoperating ELNOs will enter into. Although these agreements will be negotiated by the ELNOs, ARNECC will play a role in the process by providing a framework of key terms that must be included or principles that must be covered. To facilitate this, the ECNL will be amended to include a power for the Registrars to determine operating requirements specifying the matters that are to be addressed in an ELNO's interoperability agreement.
- **Resolution of complaints and disputes** – It is important for all stakeholders that there be an effective mechanism to resolve disputes that may arise in an interoperable transaction. To address this, the MOR will require that interoperability agreements include an appropriate dispute resolution process that meets a minimum criterion to ensure its effectiveness and is consistent with the regulatory regime.
- **Cost-based fees for the Responsible ELNO** - In an interoperable transaction, the ELNO responsible for settlement and for lodging documents with the Land Registry should be able to charge other participating ELNOs a fee for those services. Until the market matures, Registrars should have power to regulate, or impose principles around, the pricing of those fees.

### 1.4 Extending the reliance regime to include financial instructions digitally signed in an interoperable ELN

The parties to an electronic conveyancing transaction rely on instructions given and documents signed by way of digital signature. Section 12 of the ECNL includes a reliance regime which provides

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that, where a digital signature is created for a registry instrument or other document in connection with a conveyancing transaction, that digital signature is binding on the Subscriber and any person for whom that Subscriber acts. This assurance is given for the benefit of:

- each party to the transaction
- their Subscriber
- a person claiming through a party, and
- the Registrar, (after the instrument or document has been lodged for registration).

The reliance regime adequately addresses authorisation and reliance issues for lodgment of a conveyancing transaction in a single ELN environment but needs to be extended to cover interoperable transactions, particularly with regards to the associated financial settlement instructions. It is proposed to amend section 12 and extend the regime so that:

- it specifically covers instructions for financial settlement (the financial settlement schedule)
- for the benefit of financial institutions and other ELNOs participating in the transaction.

## **2. Other Minor Amendments**

### **2.1 Referral and sharing of compliance examination information with other Registrars**

Electronic conveyancing is a national reform, with ELNOs and many Subscribers operating Australia wide. Registrars need to be able to share with each other information gathered through the compliance examination process or as it relates to conveyancing transactions. To address this, it is proposed that the ECNL be amended to specifically allow Registrars to:

- Share with other Registrars, information relating to:
  - an ELNO's compliance with the ECNL and Operating Requirements, and
  - a Subscriber's compliance with the ECNL and Participation Rules,including the outcome of a compliance examination or other investigation.

It is also proposed to allow Registrars to refer matters to a Registrar in another jurisdiction.

### **2.2 Clarification of heads of power authorising Registrars to make MORs**

The MOR currently includes provisions aimed at encouraging competition. To clarify that Registrar's can determine requirements to address these issues, section 22 will be amended to specifically allow operating requirements for:

- Integration
- Separation, and
- ELNO Service Fees.