



Electronic Conveyancing (Adoption of National Law) Bill 2012

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Bill introduced, and read a first time and ordered to be printed on motion by the Hon. Greg Pearce.

Second Reading

The Hon. GREG PEARCE (Minister for Finance and Services, and Minister for the Illawarra) [11.44 a.m.]: I move:

That this bill be now read a second time.

The Electronic Conveyancing (Adoption of National Law) Bill 2012 will enact the Electronic Conveyancing National Law as a law of New South Wales. The national law is set out in the appendix to the bill. The national law facilitates a significant reform to the practice of conveyancing in New South Wales and Australia. New South Wales has been a leader of this important reform and is committed to the introduction of a national electronic conveyancing system in accordance with the Council of Australian Governments national partnership agreement to deliver a seamless national economy. New South Wales has also agreed to host the Electronic Conveyancing National Law and this bill fulfils that commitment.

In New South Wales we have one of the best land titling systems in the world, the Torrens system of land titles, which will be 150 years old on 1 January 2013. Australia is the home and origin of the Torrens system of land titles, which provides certainty of title to land and saves persons looking to purchase land from having to undertake an expensive investigation of the history of land in order to satisfy themselves of the validity of the title, as was formerly the case under what is known as the "old system". One of the great benefits of the Torrens system is that it makes conveyancing faster, simpler and much cheaper than under the old system. As a comparison, the conveyancing costs on a parcel of Torrens land are usually less than half the conveyancing fees that would have been charged if the same land was held under the old system. Almost all old system land in New South Wales has now been converted to the Torrens system.

The national law forms the basis of a national scheme for the electronic lodgement and processing of conveyancing transactions in Australia. Once the law is passed in New South Wales the other jurisdictions participating in national electronic conveyancing will either adopt the national law or enact corresponding legislation. It is somewhat appropriate that the Electronic Conveyancing National Law is being introduced on the eve of the 150th anniversary of the introduction of the Torrens system as it will provide the most significant advancement to conveyancing in Australia since the introduction of that system. The object of the national law is to promote efficiency throughout Australia in property conveyancing by providing a common legal framework that enables documents to be prepared, lodged and processed in electronic form. It is important to note that the bill does not derogate from the fundamental principles of the Torrens system.

The possible improvements to efficiency in conveyancing with a national law are significant to the national economy. There are \$280 billion of property transactions registered annually and over one-quarter of those—approximately 28 per cent—are in New South Wales. In order to achieve its objectives the national law authorises the Registrar General to authorise the operation of an electronic lodgement network and provides for the making of rules relating to the operation of that network. The network will be a web-based hub for parties to a conveyancing transaction to electronically prepare and lodge documents for registration with the Registrar General. The network will also facilitate the financial settlement of electronic conveyancing transactions. However, this aspect of the operation of a network is not mentioned in the national law as it is subject to existing regulatory oversight by the Reserve Bank or by the Australian Securities and Investments Commission.

The national law authorises the lodgement and registration of electronic land transactions and specifically provides that electronic land transactions have the same validity as if they had been conducted on paper. This is considered necessary to supplement the provisions of the Electronic Transactions Act, which is specifically excluded from applying to conveyancing transactions. The national law also provides for the digital signing of

electronic documents by subscribers to the electronic lodgement network. Subscribers will be lending institutions acting on their own behalf and solicitors and licensed conveyancers acting on behalf of their clients. As it is not economical for every individual to obtain a digital signature certificate for a single transaction, the national law provides for solicitors and conveyancers to be authorised to digitally sign documents on their client's behalf and to generally conduct a transaction electronically.

This authority will come from a new document called a client authorisation, provided for in the national law. The client authorisation form is being finalised jointly by the Australian Registrars' National Electronic Conveyancing Council, the Law Council of Australia, the Australian Institute of Conveyancers, and by representatives of the professional insurers for solicitors and conveyancers. Section 12 of the national law sets out the circumstances when a subscriber will be able to repudiate or deny a digitally signed document. In discussing this aspect of the national law it is important to note that a digitally signed document will be able to be unsigned by the subscriber at any time prior to settlement of the conveyancing transaction. Unsigning is the process of disconnecting the digital signature from the document and changing its status within the system to unsigned. This technical process is not dealt with specifically in the national law but is to be a necessary part of any electronic lodgement network under the operating requirements.

Proposed section 12 is one the most important sections of the bill. It provides that where a subscriber's digital signature is created for a document the other parties involved in the conveyancing transaction and the Registrar General may rely on that signature and assume that it has been created by the subscriber. It is essential to the success of electronic conveyancing that parties are able to rely on digitally signed electronic documents and to assume that a digital signature is correct and has been properly authorised unless a subscriber establishes otherwise. This proposition is consistent with what happens now with a person's written signature and legal precedents such as the presumption in favour of signing of a document by a company under section 129 of the Commonwealth Corporations Act 2001.

It is important also to note that persons appointed by a subscriber to digitally sign documents, who will be called "signers", must be a practising solicitor or licensed conveyancer under regulatory controls over who can do legal work under the Legal Profession Act. Signers will also be required to use digital signature credentials that comply with the Australian Government's Gatekeeper Public Key Infrastructure Framework regulated by the Australian Government Information Management Office. Accordingly, the digital signature framework to be used in electronic conveyancing is secure and reliable. Generally, where a subscriber has issued a signer with the credentials to digitally sign electronic conveyancing transactions, the subscriber will be bound by the signer's use of that signature, or the use of the signature by someone who is given access to and the means to use the signer's signature. There are limited circumstances in which a subscriber can deny or repudiate a digitally signed document after the transaction has become legally binding—that is, after settlement.

Proposed section 12 (4) states that for repudiation of a digital signature to be effective the subscriber must establish that neither they nor an employee, contractor, agent or officer with authority to create their digital signature digitally signed the document. They must also show that the creation of this digital signature was not enabled by a failure to comply with the participation rules or to take reasonable care in respect of the security of the digital signing credentials. The national law provides that it is up to the subscriber to establish the elements of proposed section 12 (4) to repudiate a digitally signed document. Accordingly, there is a presumption that a document that has been digitally signed is correct and properly authorised unless a subscriber establishes otherwise.

The Law Council of Australia has suggested that a subscriber may find it difficult to discharge the onus to establish that a digital signature was not created by a signer or a person authorised to create the signer's digital signature. This comment has been considered and it is acknowledged that a subscriber may have difficulty in discharging that onus and will likely require the services of a computer forensics expert in a similar way that handwriting experts are used to dispute the authenticity of the signature now. However, a relying party, who has no access to the subscriber's systems or knowledge of the circumstances of any authority given to the signer would find it impossible to establish that a digital signature was properly created. Accordingly, a reversal of the onus would create an even more difficult situation where a relying party faces the almost impossible task of proving that the digitally signed document was properly signed. A reversal of the onus is not consistent with other legal precedents previously mentioned and would lead to a presumption that a digital signature is not authentic unless a relying party can prove otherwise. Such a presumption would make any commercial transaction untenable.

Proposed section 12 does not require the subscriber to establish positively the identity of the person who purportedly created their digital signature on the particular document in question. They need only establish that neither they nor an authorised employee or agent signed the document. If prior to settlement a subscriber discovers that their digital signature credentials have been improperly used to digitally sign or to alter a document they may, and in fact will be required to, unsign the document and immediately notify the appropriate authorities, including the certification agency for the digital signature credentials. The Registrar General is authorised under the national law to approve an operator of electronic lodgement network, which is an electronic system to enable the preparation and lodgement of electronic conveyancing transactions with the Registrar General. The Registrar General can also set operating requirements that must be met by any operator of an

electronic lodgement network. In order to maintain a national system and consistency between the States and Territories a single set of requirements is being developed for all jurisdictions by the Australian Registrars' National Electronic Conveyancing Council.

The national law also allows the Registrar General to set rules, to be called participation rules, which must be complied with by the users of electronic conveyancing. The operating requirements and participation rules will be set on a nationally consistent basis by the Australian Registrars' National Electronic Conveyancing Council. For the success of electronic conveyancing it is critical that all its participants maintain confidence in both the system and their fellow participants. For that reason the national law provides the Registrar General with important powers to monitor the operation of electronic conveyancing and to check that operators of an electronic lodgement network are complying with the operating requirements and that subscribers, the users of a network, are complying with the participation rules.

Section 20 of the national law gives the Registrar General power to revoke or suspend an operator's approval to operate a network in certain circumstances, while section 26 allows the Registrar General to exclude a subscriber who fails to comply with the participation rules from using the network. In exercising his or her powers under the national law the Registrar General is subject to normal administrative law requirements to act reasonably and section 28 provides extensive rights of appeal against decisions by the Registrar General. As a national applied law scheme, the national law also contains an extensive interpretation schedule to ensure that its provisions are interpreted consistently across the Australian jurisdictions applying the law.

This bill is a major step to fulfilling Council of Australian Governments' commitment to create a national electronic conveyancing system and is a win-win for everybody involved. There are cost savings and efficiency gains for all participants in a conveyancing system that is expected to be more secure than the paper system it will progressively replace. Risk mitigation arrangements in electronic conveyancing, such as a national verification of identity framework to be provided in the participation rules, should also reduce property fraud and the overall exposure to liability for stakeholders in conveyancing. National electronic conveyancing is an exciting reform in which I am proud to play a part. I commend the bill to the House.