

Submission  
No 4

**INQUIRY INTO ELECTRONIC CONVEYANCING  
(ADOPTION OF NATIONAL LAW) AMENDMENT BILL  
2022**

**Organisation:** The Law Society of NSW

**Date Received:** 9 March 2022

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THE LAW SOCIETY  
OF NEW SOUTH WALES

Our ref:PLC:JvdPgl090322

9 March 2022

The Hon Mark Banasiak MLC  
Chair, Portfolio Committee No. 4  
Legislative Council

Via Inquiry submission portal and  
by email: [portfoliocommittee4@parliament.nsw.gov.au](mailto:portfoliocommittee4@parliament.nsw.gov.au)

Dear Chair,

**Inquiry into the Electronic Conveyancing (Adoption of National Law) Amendment Bill 2022**

The Law Society of NSW appreciates the opportunity to provide comments in relation to the current Inquiry in relation to the Electronic Conveyancing (Adoption of National Law) Amendment Bill 2022. The Law Society's Property Law Committee has contributed to this submission. As the Bill concerns matters that will have national application, we understand that the Law Council of Australia, of which we are a constituent body, will also be making a submission from a national perspective, and incorporating views from its other constituent bodies.

**1. General comments**

Broadly speaking, the Law Society supports the Bill, on the basis that the amendments to the Electronic Conveyancing National Law ("ECNL") are required as part of the high-level changes to the regulatory framework necessary to achieve interoperability. The Law Society has long supported eConveyancing and the introduction of interoperability between Electronic Lodgment Network Operators ("ELNOs"). Interoperability will provide our members with the ability to conduct conveyancing transactions using the ELNO of their choosing without the need to subscribe to every ELNO that may enter the eConveyancing market. A primary purpose of the Bill is to impose an interoperability requirement on each ELNO, which we support as a necessary step to achieving interoperability.

The Law Society has been part of an ongoing process of consultation, over a number of years, to support the move to interoperability in eConveyancing. As part of that process, the Law Society has raised a number of concerns with the Bill, through the Law Council of Australia, which have been conveyed to the Australian Registrars' National Electronic Conveyancing Council ("ARNECC").

Although our concerns with the Bill are yet to be addressed, we note the *Ministerial statement on amending the Electronic Conveyancing National Law to deliver a secure*

*national interoperability regime and effective competition*, dated 28 January 2022 and published on the ARNECC website, states:

Ministers recognise this is a complex reform, which may require multiple regulatory amendments. While the basic requirement for ELNOs to interoperate will be included in the changes to be introduced in February 2022, Ministers recognise that stakeholders have provided important insights during the 2021 ECNL consultation, which must be properly considered. This will occur in 2022, along with the consideration of an enforcement regime, with further amendments to be introduced at a later date. Ministers wish to reiterate their thanks to all those who provided submissions and confirm that they will receive robust consideration.<sup>1</sup>

While we note that the Bill was not amended to reflect feedback received prior to introduction, the Ministerial Statement indicates a clear intent to consider the feedback separately, and the Law Society looks forward to continuing to engage in this consultation process.

We also acknowledge that should amendments to the Bill be made at this stage, it is likely that under the terms of the *Intergovernmental Agreement for an Electronic Conveyancing National Law*,<sup>2</sup> the amended Bill will be put on hold to enable consideration of the amendments by other jurisdictions, which will significantly delay the passage of the Bill, and potentially the introduction of this important reform.

## **2. Specific comments on the Bill**

### **2.1. Approach to the regulation of financial settlement**

The Law Society remains concerned that the amendments to the ECNL may not sufficiently address the wide and varied components of interoperable conveyancing transactions, particularly the financial settlement of interoperable transactions. The ECNL has a focus on the titling and registration aspects of the conveyancing process, consistent with the expertise of ARNECC. However, when considering the practical implications of interoperability, it is important that the regulation of financial settlement is included as part of the revised regulatory framework. This does not mean that the ECNL, or subsidiary provisions, should purport to overlap with the regulation of payment methods, but rather it should effectively provide for the completion of the whole of a conveyancing transaction, including “associated financial transactions”.

While we acknowledge the proposed role of an Industry Code in relation to the operation of financial settlement, as referred to in new s 22(2)(c6), in our view more fundamental changes are required to ensure the ECNL sufficiently captures the completion of an interoperable transaction, including financial settlement. To that end, we are of the view that the Bill would be improved by broadening the definition of “interoperability” in section 3 to ensure it captures financial settlement. Without such a comprehensive definition of “interoperability”, some of the new regulatory powers provided to the Registrars under s 22 may arguably be deficient and the amendments to the ECNL may not operate as intended.

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<sup>1</sup> Ministerial statement on amending the Electronic Conveyancing National Law to deliver a secure national interoperability regime and effective competition, published by ARNECC, 28 January 2022 <https://www.arnecc.gov.au/wp-content/uploads/2022/01/Ministerial-Statement-January-2022.pdf>.

<sup>2</sup> Part 10, Intergovernmental Agreement for an Electronic Conveyancing National Law, as published on the ARNECC website [https://www.arnecc.gov.au/wp-content/uploads/2021/08/IGA\\_for\\_an\\_Electronic\\_Conveyancing\\_National\\_Law.pdf](https://www.arnecc.gov.au/wp-content/uploads/2021/08/IGA_for_an_Electronic_Conveyancing_National_Law.pdf)

We have also suggested that the ECNL adopt the term “ELNO System”, a term currently used in the Model Operating Requirements (“MORs”), to ensure the regulation of the financial settlement of a conveyancing transaction is sufficiently addressed. Currently the ECNL provisions use the narrower term “ELN”, which, as defined in s 13, focuses only on the preparation and lodging of registry instruments, rather than a more holistic view of the operation of the ELNOs, which importantly includes effecting financial settlement. In our view, s 22 in relation to the Registrar’s ability to make MORs should be framed in relation to “ELNO Systems” rather than “ELN”, otherwise powers such as that in s 22(2)(c6) in relation to the Industry Code may be inconsistent with the scope of the ECNL.

## **2.2. Interoperability agreements, claims and misapplied funds**

New s 22(2)(c)(i) enables the Registrar to make MORs requiring an ELNO to enter into interoperability agreements with other ELNOs. In the Law Society’s view, it is preferable to minimise the content of interoperability agreements between ELNOs. Wherever possible, standard provisions for such interoperability agreements should be prescribed in the MORs, providing transparency for all stakeholders and any potential entrant to the ELNO market. We support the intent for such standardisation in new subsection 22(2)(c)(ii). We acknowledge that some operational matters may need to be included in interoperability agreements and cannot be standardised. However, matters impacting subscribers and their clients, such as claims resolution and liability, should not be left to negotiation between the ELNOs.

In that regard we note new s 22(2)(c5) provides the Registrars with powers to make MORs regarding the resolution of disputes between an ELNO and subscribers or their clients. Where funds are misapplied, a clear framework for the resolution of claims and disputes accessible by subscribers is crucial. Given the Industry Code operates between ELNOs and financial institutions only, s 22(2)(c5) has an important role to play in enabling clarification of a subscriber’s ability to access and interact with claims and dispute processes. We look forward to further detail being provided in the MORs in relation to these processes.

## **2.3. Responsibility of the Registrar**

The Law Society does not support the revisions to s 40. While we acknowledge that ARNECC does not regulate financial transactions, that is different to regulating the financial aspects of conveyancing transactions, which is an essential role for ARNECC to play in an interoperable environment. As mentioned earlier, ARNECC has traditionally focused only on the titling and registration aspects of the conveyancing process. That may have been feasible in a single ELNO environment, but it is not appropriate in an interoperable multi-ELNO environment.

## **3. Further consultation**

Stakeholders, regulators and the ELNOs have been involved in detailed consultation for several years now in working towards achieving interoperability. The current complex regulatory framework for eConveyancing requires a major overhaul to achieve this, and the building of the technical solution is highly complex. The Law Society continues to support interoperability and acknowledges that there is significantly more work to be done before interoperability can be delivered. We look forward to participating in the ongoing consultation process to refine the regulatory framework to appropriately address all aspects of an interoperable conveyancing transaction.

If you have any further questions in relation to this submission, please contact Gabrielle Lea,  
Policy Lawyer

Yours sincerely,

Joanne van der Plaats  
**President**