

Submission
No 9

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

Organisation: Law Council of Australia

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Law Council
OF AUSTRALIA

Office of the President

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Hon Mark Banasiak MLC
Chair
Portfolio Committee No. 4
Legislative Council
Parliament of New South Wales
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Dear Chair

Electronic Conveyancing (Adoption of National Law) Amendment Bill 2022 (NSW)

The Law Council of Australia (**Law Council**) is grateful for the opportunity to provide a submission to Portfolio Committee No. 4 – Customer Service and Natural Resources (**Committee**) in relation to the Electronic Conveyancing (Adoption of National Law) Amendment Bill 2022 (NSW) (**Bill**).

While this Bill is before the New South Wales Parliament, given its national implications, the Law Council has determined that it is appropriate to provide a submission reflecting views of its Constituent Bodies across Australia, including through their representation on the Law Council's National Electronic Conveyancing System Committee. The Law Council notes that the Law Society of New South Wales will also be providing a submission to this inquiry.

The Bill proposes amendments to the *Electronic Conveyancing National Law (ECNL)* which provides the legislative underpinning of the national scheme for the electronic settlement and lodgment of conveyancing transactions (eConveyancing). In particular, the Bill proposes amendments to the ECNL to require interoperability between Electronic Lodgement Network Operators (**ELNOs**).

The Law Council and its Constituent Bodies (in particular the state and territory law societies) have been long time participants in the development of the national electronic conveyancing system. Throughout this time, the Law Council has emphasised the importance of interoperability as part of this system. Since 2019, the Law Council has participated in the Interoperability Industry Panel and has sought to work with governments and other industry participants to develop an interoperability solution that benefits members of the legal profession, their clients and the industry as a whole.

The Law Council strongly supports competition between ELNOs and considers interoperability to be a critical feature of the future of the eConveyancing market. In the Law Council's view, competition in this market will drive innovation for improved products and services for users and increase downward pressure on prices. It will ensure that members of the legal profession have a choice as to which ELNO is best for them and will mean that they are not required to be signed up to multiple ELNOs.

The Law Council is broadly supportive of the amendments proposed in the Bill. The introduction of this Bill is an important step in the process towards interoperability. It is also an indication to the sector that progress is being made towards the important goal of interoperability.

Although further amendments will be required to the ECNL before interoperability is fully achieved during 2023, the passage of the Bill in its present form reflects an urgent imperative to legislatively mandate interoperability. This is a necessary signal to the market that investment in a competing ELNO will not be futile.

Previous recommendations by the Law Council (and other stakeholders) to the Australian Registrars' National Electronic Conveyancing Council (**ARNECC**) in November 2021 have yet to be implemented. The Law Council's recommendations are set out in an **attachment** to this submission for the information of the Committee. The Law Council's recommendations relate to the:

- definition of interoperability;
- use of the term 'ELNO system';
- definitions of 'digital signature' and 'digitally signed';
- operating requirements (interoperability agreements and disputes); and
- responsibility of the Registrars.

The Law Council notes the Ministerial Statement of 28 January 2022,¹ in which the relevant Ministers from each state and territory committed to working with stakeholders, including the Law Council, to progress further amendments to the ECNL to be in place prior to full interoperability being operational. In the Law Council's view, the recommendations set out in the attachment can be addressed in the next stage of reforms. The Law Council welcomes the Ministers' commitment to progressing further reforms to the ECNL and looks forward to participating in the ongoing consultation process.

It is important to note that the Bill is not only an initiative of the New South Wales Government but is the considered outcome of the deliberations of ARNECC as well as by the relevant Ministers from each state and territory. Against this background, scrutiny by the New South Wales Parliament should be approached with great care as any amendments proposed would need to be agreed at multiple national levels. It is the Law Council's considered view that any concerns with the Bill (including those raised in the attachment) ought to be addressed in the next Bill already foreshadowed by ARNECC and Ministers. The *Intergovernmental Agreement for an Electronic Conveyancing National Law*,² ought to be given some deference by the NSW Parliament both in the interests of comity but also, in the Law Council's view, in the support of the national law paradigm which underpins the ECNL. To treat the Bill as a mere enactment by the New South Wales Parliament would be a mistake in this context and the Law Council strongly recommends a non-interventionist approach in such cases, unless the mechanism by which the terms of the Bill have achieved

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

² Intergovernmental Agreement for an Electronic Conveyancing National Law (2011) pt 10 <https://www.arnecc.gov.au/wp-content/uploads/2021/08/IGA_for_an_Electronic_Conveyancing_National_Law.pdf>.

national agreement has been demonstrably defective – a conclusion not open in respect of the subject Bill.

If the Law Council may be of any further assistance to the Committee in its consideration of this Bill, please contact Mr John Farrell, Senior Policy Lawyer

Yours sincerely

Mr Tass Liveris
President

Attachment – 'Issues to be addressed in the next stage of reforms

1. This attachment reflects input provided by the Law Council to the Australian Registrars' National Electronic Conveyancing Council (**ARNECC**) in November 2021 in relation to Draft Amendments to the *Electronic Conveyancing National Law (ECNL)* which are now contained in the Electronic Conveyancing (Adoption of National Law) Amendment Bill 2022 (NSW) (**Bill**).
2. The following submissions are provided to Portfolio Committee No. 4 – Customer Service and Natural Resources as an indication of the issues which the Law Council will seek to address through further consultation with ARNECC and the relevant Ministers before interoperability is fully achieved during 2023.

Definition of interoperability

3. The definition of 'interoperability' plays a crucial role in extending the operation of the ECNL to regulate interoperability. It is therefore important that the definition be comprehensive.
4. In the Law Council's view, the proposed definition of 'interoperability' in revised subsection 3(1) of the ECNL (see paragraph [1] of Schedule 1 of the Bill) is too narrow, in that it only captures the interworking between different Electronic Lodgment Networks (**ELNs**). By limiting the definition to ELNs, the definition does not account for the other parts of Electronic Lodgment Network Operator (**ELNO**) Systems that are necessary for the functionality and capability of interoperable transactions.
5. Consequently, as currently drafted, the definition neglects to include the financial settlement of an interoperable transaction. Leaving this important aspect of the process to other industry regulators has the potential to fragment responsibility, liability and practical co-ordinated control and operation to a multiplicity of different regulators who may be at odds with each other and have little knowledge and understanding of eConveyancing and interoperability.
6. The definition of interoperability could benefit by using the term 'ELNO Systems' (see discussion below) rather than 'ELNs' in the opening words. Alternatively, the Law Council suggests that the reference to a conveyancing transaction in subclause (a) should additionally include 'and any associated financial transaction'.
7. Without a comprehensive definition of 'interoperability' which includes financial settlement, some of the new regulatory powers provided to the Registrars under revised section 22 of the ECNL (see further discussion below) may not operate as intended. For example:
 - the proposed narrow definition of interoperability appears to unduly limit the scope of disputes referred to in proposed paragraph 22(2)(c)(iii) (see paragraph [10] of Schedule 1 of the Bill); and
 - arguably, the power to make Model Operating Requirements (**MORs**) regarding the Industry Code (proposed subsection 22(2)(c6) – see paragraph [10] of Schedule 1 of the Bill) is inconsistent with the scope of the ECNL.

Use of term 'ELNO System'

8. Consideration should be given to moving the definition of 'ELNO System' that currently appears in the MORs into the ECNL.³
9. The definition of 'ELNO System' appropriately incorporates the financial settlement aspect of a conveyancing transaction. In the Law Council's view, there are many instances where the wider term of 'ELNO System' would be more appropriate instead of the narrower term 'ELN'. It is essential to stakeholder confidence in the regulatory framework to support interoperability that this gap is addressed.
10. Section 13 of the ECNL defines an ELN with a narrow focus on the preparation and lodgment of registry instruments and other documents for the purposes of the land titles legislation and is silent on the ELN's equally important role in enabling financial settlement. As currently drafted, it draws an artificial line excluding the essential financial settlement that completes the whole of a conveyancing transaction.
11. Proposed section 18A imposes a requirement on ELNOs to establish and maintain interoperability between ELNs operated by the ELNO and by other ELNOs. The limitation of the requirement to ELNs is too narrow. The provisions would be more comprehensive if framed in terms of interoperability between 'ELNO Systems'. As currently drafted, section 18A would appear to exclude any requirement for ELNOs to be able to conduct interoperable associated financial transactions.
12. It would also be more appropriate to use the wider term 'ELNO System' in subsection 22(2) of the ECNL wherever 'ELN' is used. The inadvertent consequence of using the narrower term 'ELN' may be to exclude regulation of essential parts of the systems used to complete and settle an interoperable conveyancing transaction. Further, unless revised section 22 is expanded to include the 'ELNO System', arguably some of the existing and proposed MORs that purport to regulate the wider 'ELNO System' may not operate as intended.⁴

Definitions of 'digital signature' and 'digitally signed'

13. Generally, the Law Council welcomes the changes proposed to section 12 of the ECNL to support interoperability and the reliance by financial institutions on directions for the payment of money under proposed subparagraph 12(1)(c)(v) (see paragraph [5] of Schedule 1 to the Bill). In the Law Council's view, a number of accompanying changes are required in the MORs. The Law Council will continue to pursue these changes with ARNECC through the ongoing consultation process.
14. The reliance regime established by subsection 12(1) of the ECNL is critically dependent on the subscriber being unable to repudiate their digital signature. The right to repudiate in subsection 12(4) includes where the digital signature was not created by the subscriber (or by someone for whose conduct the subscriber is bound).

³ Model Operating Requirement 2 (definition of ELNO System). This definition states: 'ELNO System means the ELNO's systems for facilitating the preparation of Electronic Workspace Documents relevant to a Conveyancing Transaction, the financial settlement of a Conveyancing Transaction (if any) and the presentation for Lodgment of electronic Registry Instruments or other electronic Documents at a Land Registry, and includes the ELN.'

⁴ See, eg, Model Operating Requirement 7.6.2(b) which refers to 'ELNO System'.

15. The definition of digital signature in section 3 of the ECNL is:

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.

16. It appears to the Law Council that this language is suggestive of the person's private key rather than the product of using that key, and the definition of 'digitally sign' therefore compounds the problem by using the phrase 'create a digital signature' which is the same as the language of subsection 12(4) of the ECNL (yet section 12 never uses the term 'digitally sign').
17. The difference between the digital credential a person gets and their use of it to sign a document needs to be very clear if section 12 of the ECNL as amended by the Bill is to work effectively. Otherwise, to use paragraph 12(4)(a) as an example, the digital credential that a person is given by an ELNO is not 'created' by them. It is applied to digitally sign a document or a workspace or a line in a workspace.
18. Conversely, under section 14 of the *Electronic Transactions Act 2000* (Cth), the approach taken is to test whether a purported originator was in fact the originator personally or by an authorised agent. It seems to the Law Council that such an approach is more appropriate and, for the purpose of subsection 12(4) of the ECNL, assuming the relevant definitions are fixed, it should use analogous language, such as 'a subscriber is to be taken to have digitally signed an instrument or other document bearing their digital signature unless it was not digitally signed by that person or with that person's actual or implied authority'.

Amendments to Section 22 of the ECNL – Operating requirements for ELNOs

19. The Law Council notes proposed paragraph 22(2)(c) of the ECNL (see paragraph [10] of Schedule 1 of the Bill) enables the Registrar to make MORs requiring ELNOs to enter into interoperability agreements with other ELNOs.
20. Throughout its engagement in the Interoperability Industry Panel process, the Law Council has emphasised its position that the content of interoperability agreements between ELNOs should be minimal and, wherever possible, provisions should be located in the ECNL or MORs to provide transparency and confidence for all stakeholders, and to assist any potential entrant to the ELNO market. The Law Council maintains this position.
21. The Law Council acknowledges that some operational matters may need to be included in interoperability agreements. However, public interest matters (such as privacy) and matters impacting upon subscribers and their clients (such as claims resolution and liability) must not be left to negotiation between the ELNOs.
22. In the Law Council's view, for matters that are appropriate to include in an interoperability agreement, standard provisions should be adopted where possible. The Law Council is therefore supportive of the reference in proposed subparagraph 22(2)(c)(ii) to 'standard provisions'. For transparency, where possible, interoperability agreements should be publicly available and any provisions that are sought to be kept confidential should be produced to the Registrar for approval and to ensure consistency with the standard provisions.

23. The Law Council welcomes proposed paragraph 22(2)(c5) of the ECNL (see paragraph [10] of Schedule 1 of the Bill) which provides the Registrars with powers to make MORs regarding disputes between an ELNO and subscribers or their clients. While the Industry Code is likely to address the ways in which the ELNOs and financial institutions will interact with each other, where funds are misapplied, a clear framework for the resolution of claims and disputes accessible by subscribers is crucial. Proposed paragraph 22(2)(c5) is an important component in establishing a mechanism that allows subscriber to access and interact with claims and dispute processes.
24. The Law Council also advocates for an ELNO to be liable to a subscriber (and, through them, their client) for any loss or damage that occurs as a result of a conveyancing transaction not proceeding to completion (including financial settlement). The Subscriber/Client won't be able to prove which ELNO was at fault, so as soon as it is clear that the Subscriber/Client was not at fault, the compensation should be paid by the ELNO to its Subscriber or the Subscriber's client within 14 days. If that ELNO can show that another ELNO is in fact wholly or partially liable for the loss, they have a right of indemnity under the ECNL. The Law Council will continue to pursue this position with ARNECC through the ongoing consultation process.

Amendments to Section 40 of the ECNL – Responsibility of the Registrars

25. The Law Council does not support the revisions to section 40 of the ECNL as set out in paragraphs [17]-[18] of Schedule 1 of the Bill.
26. The Law Council acknowledges that ARNECC and its members do not regulate financial transactions. However, in the Law Council's view, the regulation of the financial aspects of conveyancing transactions is an appropriate and essential role for ARNECC and its members to play in an interoperable environment.
27. The use of the term 'responsibility' in proposed subsection 40(2) (see paragraph [18] of Schedule 1 of the Bill) is ambiguous. The various matters referred to are indeed within the remit of ARNECC pursuant to the Inter-Governmental Agreement.
28. The scope of ARNEC's liability is a separate issue if that is what the section is seeking to limit. In the Law Council's view, it is unfair for Registrars to exclude liability where their act or omission has caused loss to a consumer. A better remedy is for a compensation regime to operate in such matters, analogous to the current system that underpins indefeasibility. Certainly, any suggestion that consumers have to bear the risk of Registrar negligence is rejected. ARNECC is squarely vested with the duty to ensure that electronic conveyancing is implemented in a commercially effective way.