Supplementary Submission No 10a

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

Organisation: PEXA Group

Date Received: 23 March 2022

ABN 92 140 677 792
Property Exchange Australia Ltd

The Director
Portfolio Committee No. 4 – Industry, Parliament House
Macquarie Street, Sydney NSW 2000.

Submission emailed to: PortfolioCommittee4@parliament.nsw.gov.au

23 March 2022

Supplementary Submission for the Electronic Conveyancing (Adoption of National Law) Amendment Bill 2022

1. Introduction

This submission provides supplementary information from PEXA following the publication of submissions to the NSW Parliamentary Portfolio Committee No. 4 (Committee), and the oral testimony provided by various electronic conveyancing (eConveyancing) stakeholders at the related hearing on 17 March 2022.

PEXA maintains that its primary goal is the maintenance of a safe and secure eConveyancing ecosystem and that it is not opposed to the intensification of competition. The submissions and oral testimony provided to the Committee with respect to the Bill have highlighted two key concerns that are widely shared:

I. All witnesses agreed that the current Bill has significant gaps and does not yet represent a workable framework. We have been advised that these gaps are to be addressed in a future additional Bill. While there is no indication of how long this will take, it will almost certainly be well after the governments' expected start dates for interoperability; and
II. Most submitters stated that delay in the passage of this Bill to progress interoperability should be avoided.

The purpose of this submission is to outline to the Committee how these two concerns can be addressed by the inclusion of two orthodox safeguards into the current Bill, which will not cause any delay in the passage of the Bill or the roll out of the reform.

2. There is a sound case for including uncontroversial legislative safeguards

ARNECC, the ACCC, the Law Council, the Law Society, the Australian Banking Association (ABA), the Australian Institute of Conveyancers (AIC) and others, have each highlighted a broad range of gaps with the current Bill, including consumer protection, timeline feasibility, enforcement, definitions, financial settlement, dispute resolution, insurance and costs. In this regard, the recent ministerial announcement confirms that a further Bill amending the *Electronic Conveyancing (Adoption of National Law) Act* will be required, notwithstanding the fact there are only 115 working days remaining under the current timetable to solve for these issues.

Submissions from the AIC and from Dench McClean Carlson— commissioned by ARNECC to review the intergovernmental agreement for electronic conveyancing (IGA) — paint a frightening picture of what is at stake if interoperability is mandated before it is in fact workable: families on the street with their chattels due to a delayed settlement or, in much worse cases, losing their life savings with no-one to recover them from. PEXA shares these concerns. The Bill, and the inadequate arrangements in place for implementation, risk an extended period of delayed or failed property settlements commencing next year, which will not only put at risk Australian home buyers and sellers, but also the 10,000 legal and conveyancing firms and ~150 financial institution that rely on a safe, secure and efficient eConveyancing system every day.

It is clearly intended that interoperability should commence well before the second Bill. We strongly suggest it would be prudent for the NSW Parliament to consider the inclusion of self-contained but effective safeguards in this Bill. These measures would go a long way to addressing stakeholders' various concerns. As we outline below, these safeguards can readily be implemented within the current Bill and avoid any additional delays.

3. The legal framework enables NSW to include safeguards without causing delay

Under the Council of Australian Governments (COAG) Agreement of 2011, the States and Territories have agreed to implement a national cooperative legislative scheme for electronic conveyancing, including a nationally consistent Electronic Conveyancing National Law (ECNL).

Pursuant to this scheme, NSW was the first jurisdiction to introduce electronic conveyancing via the enactment of the Electronic Conveyancing (Adoption of National Law) Act 2012 (NSW) (NSW ECNL Act) which comprises:

- *Part 1: Preliminary* - includes the name of the Act, commencement and definitions.
- *Part 2: Application of the Electronic Conveyancing National Law* - adopts the ECNL (which is set out in the appendix) and sets out the state-specific requirements and definitions to enable the application of the ECNL in the NSW context (Application Act).
- *Part 3: Miscellaneous.*
- *Appendix*: contains the nationally agreed ECNL, developed pursuant to the IGA (Appendix).

With respect to the legislative amendment processes relating to the *NSW ECNL Act*, there are two distinct processes:

I. Amendments to the nationally agreed ECNL (the Appendix) require the consent of 75% of the parties to the IGA (those parties being each jurisdiction that is a party to the IGA as represented by their respective Ministers).[1] This requirement is usually time consuming and PEXA understands that it was on this basis that several witnesses expressed reservations about the Legislative Council considering any amendments.

II. Importantly, however, each jurisdiction that is a party to the IGA manages its own application act, which references and then mirrors the Appendix in the *NSW ECNL Act*. In each case, the provisions include state specific adaptive requirements. It therefore open to

[1] See section 10.4 of the IGA available here: https://www.arnecc.gov.au/wp-content/uploads/2021/08/IGA_for_an_Electronic_Conveyancing_National_Law.pdf

the NSW Parliament to make self-contained amendments to the front end of the NSW Law without impacting on or requiring the consent of other States and Territories.

In other words, it is open to the NSW Parliament to include some vital interim protections to be implemented by NSW in a way that imposes no obligations or risks for other jurisdictions or the overall timetable for reform.

4. Self-contained essential safeguards are required under the Bill to protect consumers

Two vital reforms are recommended. Both represent commonly expected or required practice for reforms of this scale in technology or infrastructure serving a large and vital sector of the Australian economy.

I. Independent assessment of readiness

Implementation of interoperability relies on a suite of complex organisations making changes to their technology and operating systems simultaneously, in an environment where consumers and industry have zero tolerance for losses. No single party can guarantee success or safety – all must be ready and there must be systems in place to respond and rectify inevitable issues that will occur.

Any adequate risk management framework would include independent assessment of readiness, linked to go/no go decisions.

A requirement for an independent readiness certification would directly address concerns raised by various stakeholders in their submissions and testimony to the Inquiry. For instance:

- A number of stakeholders expressed consumer safety concerns arising from the rushed implementation of interoperability, including the AIC, the ABA, and PEXA. For example, Dale Turner (AIC) told the Committee: *"Yes, I do agree that there should be an independent assessment of the system for the cybersecurity and other risks. That will give confidence to both consumers and to subscribers that the system is fully operable. The consequences of a failure are very serious and they can be expensive and extensive. It is important that that confidence is in-built within the system".*

- The AIC noted in its submission: "*AIC is supportive of interoperability however, we reiterate the requirement for all ELNOs to meet the qualification and operational requirements and for the appropriate regulatory framework and consumer protections to be established."*

- A number of stakeholders also expressed views that certainty is required to drive investment and commitment to the implementation of interoperability.[2] In this regard, an independent readiness certification assurance will provide industry with necessary certainty as to the readiness of their systems to successfully and seamlessly implement interoperability.

- The Australian Banking Association (ABA) also submitted that, *"a number of workstreams related to the realisation of interoperability have not progressed at the pace planned. One of these workstreams is the development of a standardised approach for payments integration…Without detailed information, particularly regarding how payments will be included within an interoperable environment, it is difficult for banks to assess the likely impact of moving to a multi-ELNO environment, or to plan the development of their internal*

[2] Including Sympli, the ASX, Greg Channell (ARNECC), the NSW Office of the Registrar General and the Australian Banking Association.

processes and systems… Additionally, in moving to a multi-ELNO environment it is important that negative customer and subscriber impacts are avoided."

- Further, in response to a question from the Chair of the Committee as to whether it would be appropriate for a review clause to be inserted into the end of the Bill, Fiona Landis of the ABA noted "*If there is an appropriate clause to build in to suggest that the success of it [i.e. interoperability] could be reviewed in the future, that might be appropriate, but we do not support anything that will result in further delay".*

Critically, a legislative requirement for an independent readiness certification would not delay the passage of the Bill (for the reasons outlined above in Section 3), nor the timetable to introduce interoperability. An independent readiness certification process is a common and prudent measure for reforms of the current scale of complexity, and would provide the necessary assurance to Government, industry and consumers that interoperability has been prepared and that all major stakeholders in the eConveyancing ecosystem are equipped and ready to perform their modified roles.

Multiple layers of independent readiness certifications are a standard requirement for industry-wide transformation projects and for large IT projects involving multiple organisations.

PEXA therefore recommends that the NSW Parliament could readily amend the *NSW ECNL Act* to include a requirement of an independent readiness certification. This would provide certainty and reassurance to all stakeholders (including Government), without delaying passage of the Bill.

For example:

> Insert new Part 3 (10)
> 10 Readiness Assessment
>
> 1) The Registrar must commission an expert and independent person to conduct and publish an assessment of the readiness of participating parties to interoperate in order to complete property transaction lodgements, and
> 2) The Registrar must not permit interoperable transactions (or types of interoperable transactions) until satisfied, on the basis of the independent assessment, that:
>   a. The transactions can be completed securely and in a timely manner; and
>   b. Systems are in place to respond and remediate any failing transactions or impacts on consumers, users or ELNOs.
>
> *Explanation* – the Government has foreshadowed that a second Bill is required to provide a range of protections and other essential framework elements. As the current Bill seeks to enable interoperability before these protections are in place, the proposed amendment will provide a critical interim safeguard measure for consumers and industry.

II. *Apply standard rulemaking processes and protections*.

The Bill confers unconstrained powers to ARNECC to regulate the activities of lawyers, conveyancers, lenders and ELNOs in areas beyond its existing expertise or resources. The Bill also allows ARNECC to exercise these powers without being subject to standard rule-making processes that apply generally under other Acts. These processes include consultation with affected parties, impact assessments and consideration of feedback.

The Bill allows ARNECC to avoid standard rule-making requirements via the loophole of describing the regulations made by Registrars as 'operating requirements'. This creates significant uncertainty and potential for adverse unintended outcomes with profound impacts on an ELNO or its customers.

To ensure that the rule-making processes commonly applied in other industries are in place to protect the e-conveyancing ecosystem, PEXA recommends that the Bill be amended to provide that the making of subordinate rules in NSW (Operating Requirements and Participation Rules) is subject to the *Subordinate Legislation Act 1989 (NSW).*

The *Subordinate Legislation Act* sets out requirements that apply to the making of regulations, by-laws or ordinances across the statute book. Coalition and Labor governments have placed considerable emphasis on the application of better regulation principles to reduce unnecessary red tape and protect the public and industry from unnecessary regulatory burdens, all underpinned by the Act's requirements. Rulemaking must follow requirements for public consultation, options and impact assessment analysis, and consideration of feedback prior to decision-making. This can be done by straightforward reference to the Act.

For example

Insert new Part 3 (11)
11 Model Operating requirements

1) Before an operating requirement is made or amended, the Registrar is to ensure that, as far as is reasonably practical, the requirements of Parts 2 (4) and (5) of the *Subordinate Legislation Act 1989* are complied with.

Explanation – At present, neither the existing ECNL or the Bill require any consultation or consideration of impacts when making rules. The proposed amendment seeks to apply the requirements that apply generally to the making of statutory rules in NSW, comprising guidelines, impact statements and consultation with affected parties.

5. Concluding remarks

In this supplementary submission PEXA has sought to assist the Committee by highlighting a path that would deliver what almost all of the submissions and witnesses have sought – timely progress of the Bill and the reform, while addressing widely held concerns about safety and security.

We hope you will concur and make recommendations in support.

Kind regards,

Simon Smith
Chief Operations Officer, PEXA