

**Submission
No 13**

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

Organisation: Australian Institute of Conveyancers

Date Received: 11 March 2022

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

PortfolioCommittee4@parliament.nsw.gov.au

Dear Committee Director,

RE: Submission to the Portfolio Committee, Electronic Conveyancing (Adoption of National Law) Amendment Bill 2022 (the Bill)

AIC National (AIC) appreciates the opportunity to provide a submission to the Portfolio Committee to support its review of the Bill.

We reiterate that AIC supports interoperability and considers interoperability to be an essential feature of the settlement/registration process and welcomes any benefits this may provide to conveyancing practitioners and their clients. In a multi-ELNO environment, it is essential that interoperability be seamless to the user, without introducing any additional costs or risks and foremost, provide the necessary security to our titling system.

AIC has been actively involved over many years in the consultation for the development of interoperability between Electronic Lodgement Network Operators (ELNOs). We also have been consistent in our feedback to the Australian Registrars' National Electronic Conveyancing Council (ARNECC) as to our position.

However, the AIC is concerned that the issues raised in the AIC's November 2021 submission remain to be addressed. Whilst the AIC acknowledges the undertaking from the Minister and ARNECC to work with stakeholders, to progress further amendments to the ECNL to be in place prior to full interoperability being operational, we are concerned that significant minutia remains to be negotiated between all stakeholders.

AIC has raised the following main concerns:

1. Dealing with Transaction failures

The Bill is proposed to be passed with the intent of establishing an appropriate Settlement and Payment Industry Code (the Industry Code). We have significant concerns as to the possible and quite likely incremental risk being introduced with additional ELNO's and fear any timing gap between the commencement of an appropriate Industry Code and commencement of ELNO's being interoperable will be problematic and negatively impact our industry and consumers.

We firmly believe that there should not be a period where an ELNO is interoperable and the framework for investigation and resolution as to misdirected funds or transactional failures has not been established.

Participation in the Industry Code should be mandated and a condition of an ELNO's approval to operate.

We note from the Regulatory Impact Statement (page 19-23) that the CFR and the ACCC support addressing regulatory gaps through self-regulation under a payments and industry code to be jointly developed by ELNO's and financial institutions under the governance of an Industry Steering Committee facilitated by Australian Payments Network Limited.

The suggestion is made that ELNO's can determine their operating requirements which will include their participation in the industry code however, we believe this falls short of providing protection that our members require and, at a minimum, this should be referred to and mandated in the ECNL.

Without it, there are likely to be significant issues.

2. Section 18A of the Bill

AIC agree that interoperability is central to e-conveyancing. Without interoperability the analogy is the same as a railway operating across State borders with different gauge rail tracks.

Without interoperability each subscriber would need to be the subscriber of each ELNO to operate within the e-conveyancing system and have various "participation agreements" with numerous ELNO's.

The Act defines a Participation Agreement, in relation to an ELN as follows:

- (a) If an ELN provides and operates the ELN an agreement between the ELNO and another person under which the other person is authorised to use that ELN, or
- (b) If the Registrar provides and operates the ELN, an agreement between the Registrar and another person under which the other person is authorised to use that ELN.

This means, each ELNO will have separate security applications and codes, differing rules, workspaces, devices, and applications with different training requirements impacting our members and consumers all of which will add to the costs, complexity, and security of the e-conveyancing system.

In an alarming scenario, without seamless interoperability if one ELNO is down all ELNO's will be down.

This is because, even if a subscriber is a member of another ELNO, if one ELNO suffers an outage, it may be possible for the subscriber to jump to another ELNO. However, because the subscriber already has a fully prepared workspace with a first ELNO they will need to recreate and re-perform all the functions, certifications, un-sign and resign registry instruments, recalculate duty assessments, rates charges, settlement figures and so on to complete the settlement.

If this happens on the day of or near settlement, then settlement is not going to be completed. It would be impossible to undo and recomplete all these functions in such a short space of time. And other subscribers and financial institutions would likely not agree to do so. Or want the first subscriber to pay any fees and charges to any other subscriber for the additional work and time.

People, the consumers, would be left in moving trucks, locked out of houses, retirement villages or nursing homes, or left without the proceeds of a sale. If this happened on the last day of the tax, or land tax year, who would pay the penalties and interest? Who will pay storage and accommodation costs or liquidated damages? The list could be extensive and the dollars significant.

Has this happened? On June 30, 2021, there was a PEXA outage and settlements that were due on that date rolled over to 1 July. Consequently, many people were left in moving trucks and had to make storage and accommodation arrangements and some were caught with tax liabilities.

Attribution for these consequences was the responsibility of the one fully approved ELNO. Where there are multiple ELNO's attribution not only for an outage but for misdirection of monies, un-lodged registry instruments or breaches of security would be complex. None of which is helpful to the consumers, who do not have a contractual relationship with an ELNO (unlike a subscriber) and likely no understanding of the complexities involved in resolving these issues.

If this Bill is enacted and adopted nationally such a scenario could occur not just in NSW but in every other jurisdiction and across jurisdictions.

Accordingly, we do not believe any discretion can be provided to a Registrar to Waive compliance with the Interoperability requirement as is suggested by Section 18A.

However, the Bill includes a new subsection (the problem parts are in **bold & underlined**)

“18A. ELNO required to establish and maintain interoperability

(1) A person approved as an ELNO under section 15 must, in accordance with the operating requirements, establish and maintain interoperability between the ELN operated by the person and each ELN operated by another ELNO.

(2) The Registrar may waive compliance with the interoperability requirement if the Registrar is satisfied that granting the waiver is reasonably necessary in all the circumstances.

(3) A waiver under subsection (2) may—

*(a) be **total or** partial, and*

(b) apply to particular persons approved as an ELNO under section 15 or particular classes of those persons, and

(c) apply generally or be limited in its application by reference to specified exceptions or factors, and (d) apply indefinitely or for a specified period, and

(e) be unconditional or subject to conditions or restrictions.”

AIC suggests the following amendments to s18:

“18A. ELNO required to establish and maintain interoperability

(1) A person approved as an ELNO under section 15 must, in accordance with the operating requirements, establish and maintain interoperability between the ELN operated by the person and each ELN operated by another ELNO.

(2) The Registrar may waive compliance with the interoperability requirement if the Registrar is satisfied that granting the waiver is reasonably necessary in all the circumstances.

(3) A waiver under subsection (2) may—

(a) be partial, and

(b) apply to particular persons approved as an ELNO under section 15 or particular classes of those persons, and

(c) apply generally or be limited in its application by reference to specified exceptions or factors, and (d) The granting of a waiver under this section must contain a provision that the ELNO must, within a reasonable time, establish and comply with interoperability, meet the operational requirements, and comply with the participation rules.

(e) An approval of an ELNO cannot be granted until:

*(1) the participation Rules as provided for in section 22 (2) (b) (c) and (d), have been approved by the Registrar and
 (2) the operating requirements for ELNO's as provided for in 22 (2) (a) (b) and (c) have been approved by the Registrar"*

The amendment to (d) will ensure that an ELNO meets the interoperability requirements but allows discretion to be granted by the Registrar in certain circumstances. For example, where a new ELNO does not quite meet the requirement but is able to demonstrate they will be able to do so, may be exempt from some requirements, which in the circumstances, must be met in a reasonable time.

The amendment to (e) approval to an ELNO will require that the ELNO is operational and that there are participation rules in place before an ELNO or ELNO's can be approved.

3. Regulation and Compliance

The delivery of an effective regulatory framework needs to consider the responsibilities of the Australian Registrars' National Electronic Conveyancing Council (ARNECC) and the protections necessary to deliver the high standards of protections of the Registrar and consumer outcomes.

The conclusions and observations made in the IGA Review Final Report (December 2019) and the ACCC report on E-Conveyancing Market Reform identified that the current regulatory environment does not adequately address a great number of issues.

AIC, in consultation with the Minister and other stakeholders, made our position clear, that there are significant consumer protection concerns as to the inevitable increase of risk in introducing additional ELNO's into the e-conveyancing system. Accordingly, an effective regulatory framework is necessary to ensure the protection of the Torrens title register and public confidence in the e-conveyancing system.

However, Section 38 of the Bill, rather than giving strength to the regulatory framework, removes any obligation for a Registrar to monitor the compliance of an ELNO. In the absence of ARNECC providing a regulatory function, the only suitable regulatory authority is the Registrar of each participating jurisdiction. Accordingly, the Bill should provide that the Registrar has the function of compliance monitoring of ELNO's.

The Bill consultation resulted in the AIC raising numerous regulatory concerns. These concerns have been ignored. The Bill has now been tabled with a series of additional amendments which still lacks the essential regulatory and public protection measures.

Specifically, it had been agreed that an ELNO should not be approved until it was capable of "interoperability" and met the "operational requirements".

AIC's view is that an ELNO must meet the definition of "interoperability" and "operational requirements" as provided for in the definitions (see Sections 22, 23 and 27) otherwise they should NOT qualify for approval.

The Registrar General would still have some discretion such as provisional approval until they meet the definition of "interoperability" and "operational requirement" within a reasonable time. However, what has suddenly appeared in the Bill, section 18 A (2) and (3) in addition to section 27 (2), is the capacity of the Registrar General to **waive** these requirements in whole and permanently. These amendments had not been subject to consultation.

Section 22 of the Bill provides that there should be "participation rules" and section 25 that there is a requirement of publication of the requirements and participation rules. These rules are to be determined by ELNO's and approved by the Registrar.

We understand that developing the rules regarding interoperability between different service providers over multiple users with multiple stakeholders is complex. However, it is the AIC's view, that the participation rules provided for in Section 22 (b) (i) to (f) must be in place before the approval of an ELNO.

If not, monies and documents and multiple transactions, (which can involve 8, 10, 12, or any number of parties), will pass from subscribers through ELNO through another and maybe a third or fourth ELNO or subscriber without these rules. Monies and documents go missing. This currently occurs in econveyancing, fortunately not often, in a single ELNO system. However, the problem is usually resolved as tracing and attribution of documents (and these are documents such as transfers of properties mortgages and so on) and monies is (mostly) relatively easy to resolve. With multiple ELNO's with no rules in place dealing with attribution, liability, insurance, and mechanisms for tracing and resolving disputes in a timely manner, and so on not in place, is alarming.

AIC's position is that the participation rules or at least some basic rules at Section s22 (b) (i)-(f), **MUST** be in place before approving an ELNO.

A further concern and what we consider is a basic issue is the abrogation of regulation and consumer protections in the Bill.

There is no regulation, monitoring, or compliance of approved ELNO's. ARNECC has made it clear they have neither the resources or inclination to regulate or monitor compliance of ELNO'S. Consequently, it was thought by those who were being consulted, the Registrar's of each jurisdiction would be responsible for monitoring, and compliance examinations. However, the Bill contains a provision, Section 38 that the Registrar is **not obliged to monitor ELNOs or conduct compliance examinations.**

In numerous forums it had been envisaged that a new body would be set up to regulate and monitor ELNO's. However, that proposal meant that land dealings would need to be levied for the funding of that body. That would require an increase in fees and was dropped. At some point ARNECC suggested that it would be appropriate for the ELNO's to reach an agreement on an industry standards code and the form that these issues will be resolved. As such this is what Section 22 (ba) covers.

AIC has advised the Minister that this was not only inadequate but also inappropriate for the type of work that involves fundamental property rights and interests and often represents consumers largest single financial asset.

An appropriate regulator needs to have regulatory responsibility and hold ELNOs' to account. Due to the Ministers being unable to determine an economic way of achieving this objective, they have taken the position that the necessity of the regulation and monitoring of ELNOs will be via a "Code of Industry Conduct" yet to be established.

AIC do not agree. AIC is of the view that if ARNECC will not or cannot regulate and monitor ELNOs' then the Registrar should.

4. Competition

Competition between ELNO's is cited as one of the primary objectives of Interoperability. However, the potential for abuse of market power by an ELNO in the subscriber market via an ELNO's expansion into "Downstream services" is a major concern and has not been addressed. Interoperability and its' reform should not be viewed as having a singular outcome for delivering competition. We should remain focused on attempting to deliver competition benefits for consumers and not to create, as an unintended consequence, an ELNO dominated marketplace.

ELNOs are in a position of substantial market power which derives from the regulatory framework that mandates the use of an ELN to lodge real property dealings with land registries. This requires that subscribers directly and indirectly provide ELNOs with sensitive information about their businesses and consumers.

ELNOs have access to substantial information about subscribers' businesses, including, but not limited to:

- Number and type of transactions
- Geographic area of operations
- Indicative information on number of employees
- Ability to estimate income and potential profit
- Details of subscriber's customers
- Identification of subscriber size

Through this data an ELNO will be able to assess the value of a practitioners' businesses and general competition law may not effectively prohibit them from using this information for acquisition or competition.

It is of critical importance to the AIC, its divisions, and the national conveyancing profession that the emergence of vertical integration by an ELNO is effectively managed as part of the regulatory reform framework for interoperability. The delivery of an effective regulatory framework by ARNECC needs to address vertical integration by amending the ENCL.

The limitation of an ELNO to commence downstream services competing with practitioners' subscribers is not adequate. Such services already exist in the market and are provided by associated companies of an existing ELNO.

The continued support for interoperability should not blind us to the enormous market power conferred on an ELN irrespective if there is duopoly or several market operators. Without clear policy and regulation on this issue there is a risk that the ELNOs, who will be competing for market share and profitability, will continue to look at outside opportunities to increase that market share. Rather than enabling competition, this will in fact lessen competition and choice for the consumer and has the potential to eradicate many SMEs across our national conveyancing profession.

In supporting e-conveyancing many key industry stakeholders have placed considerable trust in ARNECC's ability to regulate an important independent function underpinning the national economy.

However, the Bill overlooks this situation and without a disqualification of an ELNO, from being a subscriber, an ELNO will, with these advantages, provide an 'end-to-end service' to the consumers.

This has been a consistent and unambiguous issue raised by AIC during the interoperability journey. In addition, an ELNO also providing the service of a subscriber would erode the trust subscribers have in ELNO's and ARNECC.

These positions of anti-competitive behaviour and erosion of trust are supported in the following statements:

The original ARNECC discussion paper "**Proposed Electronic Conveyancing National Law**" (page 2) which noted:

"The NECDL ELN will essentially be a "web-based hub for parties to a conveyancing transaction to electronically prepare and settle the transaction and to electronically lodge the documents for registration at the appropriate land registry".

The Australian Competition and Consumer Commission (ACCC) in its submission to the **Inter-Governmental Agreement (IGA) Issues Paper (February 2019)**, stated that:

“Vertical integration by ELNOs into related parts of the supply chain has the potential to raise concerns in this industry”.

The ACCC went on to write that:

“The ACCC’s preferred regulatory structure is complete vertical separation between ELNO and downstream providers, as it removes the incentive to discriminate both on price and non-price terms...if an ELNO is permitted to vertically integrate to offer downstream services such as conveyancing services, then it is necessary to have in place robust functional separation requirements or ring fencing.”

Independent Pricing and Regulatory Tribunal (IPART) August 2019 Report noted that:

“Vertical integration may lead to efficiencies in the eConveyancing process, which will ultimately benefit consumers, vertical integration also has the capacity to stifle competition in upstream and downstream markets. If an ELNO chooses to supply the upstream or downstream service, it may have a distinct advantage over its upstream or downstream competitors. That is, without appropriate regulations to prevent it from doing so, the ELNO could:

- *Reduce prices to gain market share in the upstream or downstream market*
- *Recover the costs of providing the upstream or downstream service through the prices it charges for core ELNO services (unless the regulatory framework prevents it from doing so).”*

With the absence of regulatory protections ARNECC will potentially be restricted in its ability to apply future controls as noted in **July 2018 by Cristina Cifuentes Commissioner ACCC**, in writing to the Secretary Environment and Planning Committee (VIC) noting that in relation to transparency of regulation as it applies to privatisation of the Land Registry,

“Attempting to impose a sound regulatory structure after the assets have been transferred to private ownership and operation is inevitably more complex and potentially impossible compared with a well thought out and implemented regime pre-transfer.”

The issues of not effectively regulating vertical integration in a monopolistic or duopolistic market is well documented in reports such as:

- The Hilmer Review (1993)
- The Australian Competition and Consumer Commission Submission to the Productivity Commission Review of National Competition Policy Arrangements (2004) and
- The Productivity Commission Inquiry into Competition in the Australian Financial System report (2017).

ACCC Chair Mr Rod Sims, has on many occasions expressed the view that Governments need to take great care in establishing robust regulation where a monopoly or privatisation of a public asset is concerned. Mr Sims comments are relevant here as there are many parallels between privatisation and regulating the behaviours of an ELNO (see Minister’s second reading speech Hansard Electronic Conveyancing (Adoption of National Law) Amendment Bill 2022 15 February 2022 “I listen to Rod Sims all the time. If he had a podcast, I would listen to that as well”).

The ECNL should be amended to prevent the potential for anti-competitive behaviours and conflicts of interest between ELNO's and subscribers.

Suggested Amendment to the ECNL:

Section 15. Registrar may approve ELNO to provide and operate ELN:

*(1) The Registrar may approve a person as an Electronic Lodgment Network Operator (**ELNO**) to provide and operate an ELN.*

(2) The Registrar must not approve a person under this section unless the person meets the qualifications for approval set out in the operating requirements.

(3) An approval under this section must be in writing and must state the period for which it is to have effect.

(4) The Registrar may grant more than one approval under this section.

(5) A person is a "disqualified person" for the purposes of this Act if the person:

(i) Is a subscriber.

(ii) is a related entity to a subscriber.

*notwithstanding this section a financial services subscriber, for the purposes of or associated with financial services, is **not disqualified** from being approved as an ELNO.*

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.

We look forward to the Portfolio Committee review of the Bill and working with ARNECC and industry to bring about this important reform.

Yours sincerely,

Michelle Kent
President
AIC National