



AUSTRALIAN REGISTRARS NATIONAL ELECTRONIC CONVEYANCING COUNCIL

# Introduction of the Electronic Conveyancing National Law

## Regulation Impact Statement for Decision

February 2013  
This report contains 186 pages

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## Foreword

Real property conveyancing in every Australian State or Territory operates under the principles of the Torrens title system of land title registration<sup>1</sup>. Each jurisdiction has its own Land Registry that maintains a titles register in accordance with jurisdiction-specific legislation and practices. Generally, a statutory officer appointed under that legislation, referred to in this document as the Registrar, is responsible for the administration of the titles register.

The process for updating the titles register has historically been paper-based though, over the past 25 years, there has been a movement to electronic systems and electronic registers. Similarly, financial institutions and industry practitioners have converted to electronic environments for communication and administration associated with real property transactions.

Since 2001, it has been recognised that the development and implementation within Australia of National Electronic Conveyancing based on a consistent national approach is desirable. There is general agreement between industry and government that now is the time to improve the efficiency of processes associated with real property conveyancing by introducing National Electronic Conveyancing. The move to an electronic business environment for conveyancing will require changes in industry processes and practices in areas such as roles and responsibilities of key participants and technology.

In order to allow the fullest use of electronic systems, the electronic gap between conveyancing industry systems and the Land Registries' systems needs to be bridged. As a result of that gap documents created electronically are required to be printed and signed by the parties, physically exchanged and largely physically lodged with the appropriate Land Registry for updating of the titles register. This means that "straight through" processing is not possible and further efficiency improvements cannot be made.

While some States in Australia have, to some degree, made progress in bridging that gap<sup>2</sup>, there has not been any nationally consistent approach to providing a facility for conveyancing transactions to be managed electronically from the conveyancing process itself right through to registration of the transaction.

While regulatory and administrative responsibilities are State-based, as discussed above, many key industry participants (e.g. major banks, independent mortgage processors) are increasingly national in their operations.

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<sup>1</sup> The Torrens Title system is a system of title by registration that is guaranteed by the State.

<sup>2</sup> Queensland: e-Lodgment and d-Lodgment. E-Lodgment is an internet based platform that gives secure and direct access to the Automated Titles System (ATS) for the electronic lodgment of land registry forms. Scanned documents are uploaded into the system where they are automatically assessed (after optical character recognition) for the applicable fees. The lodger then confirms the lodgment, with an agreement to pay the fees due. D-Lodgment offers the same capabilities and features as e-Lodgment via a web services interface instead of through a web browser. The d-Lodgment system allows lodgment of fully digital documents (i.e. as XML data, rather than scanned images).

Tasmanian: Tasmanian Online Land Dealings System (TOLD), a web-based facility that enables its subscribers to access, complete, print, save and edit land dealings. It also provides the ability for subscribers to electronically lodge priority notices, caveats, withdrawal of caveats and withdrawal of priority notices.

Victoria: Electronic Conveyancing Victoria (ECV), enabling electronic financial settlement and online lodgment of caveats, withdrawal of caveats, mortgages, discharges of mortgages, transfers of land, applications by surviving proprietor, State Revenue Office charges and discharges and a number of administrative notices.

Recognising the opportunity for efficiencies from a national approach to electronic conveyancing, the eight States and Territories in Australia joined with key industry and professional stakeholders in 2005 to co-operatively develop National Electronic Conveyancing.

The National Electronic Conveyancing Office (NECO) was established in 2005 to support the development and implementation of National Electronic Conveyancing.

As part of its role, NECO developed roadmap documents outlining a National Electronic Conveyancing system. This included a National Business Model developed in consultation with stakeholders during 2005-2008. The National Business Model defined and described the overall business context for the conveyancing and mortgage financing industry in Australia.

In July 2008 COAG agreed that National Electronic Conveyancing is to provide an efficient and effective national platform to:

- settle real property transactions electronically;
- prepare and lodge registry instruments electronically with Land Registries; and
- meet associated duty and tax obligations electronically<sup>3</sup>.

The implementation of National Electronic Conveyancing was then formalised by inclusion by COAG as one of a group of reforms to be delivered pursuant to the COAG Agreement<sup>4</sup>, to which all States and Territories of Australia are parties. COAG has charged its Business Regulation and Competition Working Group (BRCWG) with responsibility for implementing the COAG Agreement, including National Electronic Conveyancing. As conveyancing is subject to State, rather than Federal laws, the Commonwealth is not otherwise directly involved in the project.

The COAG Agreement includes an implementation plan with agreed milestones for the implementation of 27 deregulation priorities, including National Electronic Conveyancing<sup>5</sup>.

All jurisdictions except for the Australian Capital Territory have signed an Intergovernmental Agreement for an Electronic Conveyancing National Law (IGA). The IGA came into effect on 21 November 2011 and the Australian Registrars Electronic Conveyancing Council (ARNECC) was established. ARNECC is comprised of the Registrar from each jurisdiction or his or her nominee<sup>6</sup>.

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<sup>3</sup> See COAG Communiqué of 3 July 2008 meeting available at [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2008-07-03/index.cfm](http://www.coag.gov.au/coag_meeting_outcomes/2008-07-03/index.cfm)

<sup>4</sup> In 2008, the Commonwealth, States and Territories agreed to a new framework for federal financial relations to provide a foundation for collaboration on policy development and service delivery and facilitate the implementation of economic and social reforms in areas of national importance. The *Intergovernmental Agreement on Federal Financial Relations* changed the focus from prescriptions on service delivery by the States to specific objectives, outcomes, outputs and performance indicators. This included a new form of payment, National Partnership payments, to fund specific projects and to facilitate and/or reward States that deliver on nationally significant reforms. See [http://www.coag.gov.au/intergov\\_agreements/federal\\_financial\\_relations/](http://www.coag.gov.au/intergov_agreements/federal_financial_relations/)

<sup>5</sup> See COAG website at: [http://www.federalfinancialrelations.gov.au/content/national\\_partnership\\_agreements/Other/seamless\\_national\\_economy/all\\_states\\_part1.pdf](http://www.federalfinancialrelations.gov.au/content/national_partnership_agreements/Other/seamless_national_economy/all_states_part1.pdf)

<sup>6</sup> Except in Western Australia where the ARNECC representative is the Registrar and/or other member of the Western Australian Land Information Authority nominated by the Chief Executive. This reflects the fact that, in WA, the Registrar of Titles and the Commissioner of Titles are responsible for the integrity of the Torrens title register and the Authority is responsible for its administration.

The Registrar of each jurisdiction becomes a member of ARNECC, or may appoint a nominee in his or her stead, upon the Registrar's jurisdiction signing the IGA.

ARNECC is the body established to facilitate the implementation and ongoing management of the regulatory framework for National Electronic Conveyancing to the extent that it facilitates or relates to the lodgment of documents with the Registrar, and an Electronic Lodgment Network Operator's (ELNO) relationship with the Registrar. The Electronic Conveyancing National Law (ECNL) will facilitate the implementation of National Electronic Conveyancing by providing legislative authority for the creation and lodgment of electronic instruments/documents and provides that electronic instruments are to be treated in the same manner as paper instruments.

National Electronic Conveyancing is a legislative and business environment for the:

- preparation and lodgment of registry instruments with Land Registries electronically; and
- settlement of real property<sup>7</sup> transactions electronically.

National Electronic Conveyancing in Australia will be delivered through an online business platform called an Electronic Lodgment Network (ELN). An 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. It is a gateway or channel for documents to be presented for lodgment with the existing Land Registries. In addition to providing a gateway for lodgment of documents with the Land Registries, the ELN is expected to provide a mechanism for the settlement of the financial aspects of a conveyancing transaction.

Because of security requirements, only registered "subscribers" (generally lawyers, conveyancers and lenders) will be entitled to use the system on behalf of their clients or on their own behalf. It is not intended that the electronic conveyancing system be available for use by members of the general public unless they are represented by a subscriber.

A subscriber representing a client will enter into a Client Authorisation agreement authorising the subscriber to act for the client in an electronic transaction. Before entering into the Client Authorisation agreement, the subscriber must verify the identity of the client in accordance with Verification of Identity rules.

A subscriber will create electronic documents (eg registry instruments and instructions, settlement schedule) in an electronic workspace shared with other subscribers acting in relation to, or involved in, a conveyancing transaction. Various data and lodgment verification checks will occur before settlement. The electronic documents will be signed by the subscriber affixing a digital signature to the documents. If the conveyancing transaction is complete and ready to settle on the nominated settlement date, financial settlement will occur automatically by electronic funds transfer. Once settlement has occurred the Land registry instruments will be electronically lodged with the appropriate Land Registry.

Since 2004 consultation involving a wide range of stakeholder groups has been undertaken regarding National Electronic Conveyancing. From 2009 onwards key stakeholders have been involved in the development of the legal framework for

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<sup>7</sup> The term 'real property' is used in this report as a proxy for real estate (except where otherwise noted).

National Electronic Conveyancing, culminating in the release on 30 March 2012 of the draft Model Participation Rules, draft Model Operating Requirements and the draft ECNL for comment. In addition the Consultation Regulation Impact Statement (Consultation RIS) with the draft ECNL attached was released on 6 July 2012.

Following further revision and stakeholder consultation, a final version of the draft ECNL has been prepared. While there have been changes in detail within provisions of the draft ECNL in response to submissions from stakeholders, the preferred option for regulation of National Electronic Conveyancing by means of a national applied law scheme remains unchanged. The draft ECNL will form part of the legal framework for National Electronic Conveyancing.

This Decision Regulation Impact Statement (RIS) is intended to provide information to assist State and Territory governments in deciding the form of the legal framework for National Electronic Conveyancing. It provides information on the draft ECNL and other options.

The RIS has been prepared in accordance with the Council of Australian Governments (COAG) requirements to assess the impact on Australian governments, industry and the community of the introduction of National Electronic Conveyancing. In particular, this document takes into account the COAG principles for preparing a RIS that state that *'the purpose of preparing a RIS is to draw conclusions on whether regulation is necessary, and if so, on what the most efficient regulatory approach might be'* and that a RIS *'ensures that new or amended regulatory proposals are subject to proper analysis and scrutiny as to their necessity, efficiency and net impact on community welfare'*<sup>8</sup>.

This RIS is structured as follows:

**Section 1** identifies the nature and extent of the problem in Australia;

**Section 2** sets out the objectives of this government action;

**Section 3** outlines and discusses the available regulatory options;

**Section 4** details the approach taken to the impact analysis and economic appraisal and also details the results of the analysis of each options considered, including costs and benefits, and provides key findings and recommendations;

**Section 5** outlines the consultation undertaken;

**Section 6** sets out the conclusion and recommended option;

**Section 7** describes an implementation and review strategy; and

**Section 8** contains definitions and terms.

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<sup>8</sup> COAG (2004) *Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard Setting Bodies*. Council of Australian Governments. Office of Best Practice Regulation, page 14

## Executive summary

National Electronic Conveyancing is a legislative and business environment for the preparation and lodgment of registry instruments with Land Registries electronically and the settlement of real property transactions electronically.

The decision to introduce a national system for electronic conveyancing was mandated by COAG when National Electronic Conveyancing was included in the *National Partnership Agreement to Deliver a Seamless National Economy 2008* (the COAG Agreement)<sup>9</sup>.

The Consultation RIS was prepared under the oversight of the ARNECC and with the assistance of KPMG in accordance with the Council of Australian Governments (COAG's) *Best Practice Regulation Guide* and in consultation with the Office of Best Practice Regulation (OBPR)<sup>10</sup>.

ARNECC is the body established to facilitate the implementation and ongoing management of the regulatory framework for National Electronic Conveyancing to the extent that it enables or relates to the lodgment of documents with the Registrar<sup>11</sup>, and the relationship between the Registrar and an Electronic Lodgment Network Operator (ELNO).

The ECNL will provide the legislative basis to enable documents in electronic form to be lodged and dealt with under the land titles legislation of each participating jurisdiction and facilitate the introduction of National Electronic Conveyancing.

## Problem or need for government action

Conveyancing has remained largely manual and paper-based despite levels of automation in industry systems and within Land Registries across Australia. The physical exchange of paper documents at settlement is required to complete the transfer of property, as is the physical lodgment of signed and witnessed paper documents to effect changes in the titles register.

“Straight through” processing between conveyancing industry participants and Land Registries where conveyancing documents are lodged electronically is currently not possible. The inability to prepare and lodge electronically prevents the realisation of efficiencies that would arise from minimising manual handling of conveyancing documents.

A common regulatory framework is required to enable documents in an electronic form to be lodged under the Torrens land title legislation in each State and Territory. This will promote economic efficiency in conveyancing throughout Australia and provide significant economic benefits to the industry, particularly to businesses operating nationally.

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<sup>9</sup> See

[http://www.federalfinancialrelations.gov.au/content/national\\_partnership\\_agreements/Other/seamless\\_national\\_economy/national\\_partnership.pdf](http://www.federalfinancialrelations.gov.au/content/national_partnership_agreements/Other/seamless_national_economy/national_partnership.pdf).

<sup>10</sup> Information about COAG's regulation impact assessment process can be found at <http://www.finance.gov.au/obpr/proposal/coag-requirements.html>

<sup>11</sup> **Registrar** means the Registrar General or similar State or Territory official having responsibility for the jurisdiction's Land Registry function as listed in section 10.



## Objectives

The objective of introducing the ECNL is to facilitate a uniform legislative and business environment for National Electronic Conveyancing. National Electronic Conveyancing is intended to deliver efficiency throughout Australia in real property conveyancing.

The introduction of the ECNL is consistent with and is considered essential to the implementation of National Electronic Conveyancing as agreed in the COAG Agreement.

## Industry Participation Optional

Industry participation in National Electronic Conveyancing should bring benefits to the conveyancing industry that will encourage participation. However, the decision to participate will be up to the individual member of the conveyancing industry. There is no present intention to make participation in National Electronic Conveyancing mandatory or to remove paper based conveyancing.

Also, individuals wanting to complete their own property transactions will need to use the existing paper based process, as it will not be viable for an individual to meet the requirements to become a subscriber for a single transaction.

## Regulatory Options

In line with COAG's Best Practice Regulation Guide, a range of feasible policy options, including non-regulatory, self-regulatory, co-regulatory and government regulatory approaches have been considered, as well as the Do Nothing option as a baseline. These regulatory options have been reviewed against the performance objectives agreed with stakeholders during development of the *NECS Legal Framework Development Report*<sup>12</sup> (the Report) prepared by Clayton Utz.

Based on assessment of the options against the agreed performance objectives and on the recommendations of the Report, the conclusion is that the proposed ECNL and government regulation of electronic conveyancing is the most favourable option. The proposed ECNL and government regulation of electronic conveyancing is necessary to implement National Electronic Conveyancing and to ensure that it operates with at least the same legal efficacy as the regulated paper-based system.

## ECNL Impact Analysis

No national quantitative analysis of the economic impact associated with the introduction of National Electronic Conveyancing has been undertaken. However, New South Wales did undertake economic analysis of electronic conveyancing and an indicative quantitative analysis of the potential costs and benefits of National Electronic Conveyancing, based on the New South Wales figures proportionately scaled up to reflect the national position, is included at Appendix A.

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<sup>12</sup> NECS Legal Framework Development Report is available at: <http://www.necs.gov.au/Redesign--Legal-Framework-2/default.aspx>

Based on the analysis outlined in Appendix A, the net savings attributed to the private sector nationally over 17 years are estimated to be \$530m (in NPV<sup>13</sup> terms) while the net savings attributed to the public sector nationally is estimated to be \$50m (in NPV terms).

## Consultation

Stakeholder consultation has been conducted nationally since 2004. Of particular relevance to this proposal, Clayton Utz undertook extensive stakeholder consultation during 2009 as part of the development of the legal framework for National Electronic Conveyancing. The consultation program involved four major consultation requests with key stakeholders seeking comments and information on specific areas of interest including, but not limited to:

- key differences in regulation of practitioners and of conveyancing practice among jurisdictions;
- identification of current conveyancing processes in jurisdictions and future National Electronic Conveyancing processes;
- statement of purpose and performance objectives for the legal framework for National Electronic Conveyancing;
- proposed legal framework, including the intergovernmental agreement and development of model rules and conditions; and
- insurance and professional liability issues.

Stakeholder views have been considered and incorporated in the development of the legal framework.

ARNECC released the Consultation RIS on Friday 6 July 2012 for a four week public consultation period. The majority of the feedback received during that period related to the ECNL.

Some submissions in response to the Consultation RIS were critical of the quantum of costs and savings in the quantitative analysis. The economic appraisal contained in this RIS is based on the best available information at the time the RIS was prepared. Further, the scaling up of the New South Wales analysis is appropriate given that the business of conveyancing is fundamentally the same across jurisdictions, with the real difference lying in the volume of transactions.

It should be noted however that COAG's decision to introduce National Electronic Conveyancing is reflective of the costs to business productivity of duplicative and inconsistent practices, processes and regulations.

The sensitivity analysis confirms that costs will be incurred by both public and private participants in National Electronic Conveyancing in order to realise the savings that result from that participation.

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<sup>13</sup> Net Present Value (NPV) is the value, as of a specified date, of future cash inflows less all cash outflows (including the cost of investment) calculated using an appropriate discount rate.

Whilst during the consultation process the quantum of costs and savings contained in the economic analysis have been questioned there has been insufficient evidence provided to justify any amendment of the economic analysis.

On the other hand one respondent agreed that there would be savings in NPV terms.

No submission suggested that the preferred option be any option other than Option 5.

ARNECC has undertaken additional consultation on the ECNL by releasing it to key stakeholders for comment. In addition ARNECC has met with key stakeholders to discuss the key issues raised in their comments.

Appendix C is a list of persons who provided a submission in response to the Consultation RIS. Appendix E is a list of persons who provides a submission in response to the 30 March 2012 release of the draft ECNL.

## **Conclusion and recommended option**

Introduction of National Electronic Conveyancing produces a positive NPV over the timeframe of the analysis given the assumptions used. The savings associated with National Electronic Conveyancing have been estimated to exceed costs by \$580m (in NPV terms) during the 17 year period upon which the 2008 economic analysis was based.

The recommended regulatory option is the implementation of a common legal framework that enables documents in electronic form to be lodged and dealt with under the land titles legislation of each jurisdiction. The recommended legal framework is modelled on the recommendations of the Report.

## **Implementation and review**

The IGA provides governance for the development, implementation and management of the regulatory framework.

To ensure consistency across jurisdictions it has been proposed the ECNL is introduced using an application law scheme (which is commonly used to introduce national legislation). New South Wales will be the host jurisdiction for the national legislation and plans to enact the ECNL in 2012.

As soon as practicably possible following the passing of the ECNL in New South Wales, the other participating jurisdictions will enact an application law or corresponding law to adopt the ECNL.

The IGA provides for the review of the ECNL after seven years or at such earlier time as may be agreed between the parties to the IGA. The maximum time period of seven years provides sufficient certainty for an ELNO as well as providing sufficient time for the Registrars to determine the effectiveness or otherwise of the ECNL. If either a particular section of the ECNL, or any other part of the legal framework, requires amendment this can occur at any time.

# 1 Problems and need for government action

This section outlines the existing problems and why it is necessary for government action to be taken to introduce National Electronic Conveyancing.

## 1.1 Need for a National Regulatory Framework

No common regulatory framework exists to enable documents in an electronic form to be lodged under the Torrens land title legislation in each State and Territory. This impedes productivity growth and makes it more difficult for businesses, particularly those operating nationally, to maximise efficiency. In order to facilitate National Electronic Conveyancing, government needs to provide a nationally consistent regulatory framework.

Real property conveyancing in every Australian State or Territory operates under the principles of the Torrens title system of land title registration<sup>14</sup>. Each jurisdiction has its own Land Registry that maintains a titles register in accordance with jurisdiction specific legislation and practices. Generally, a statutory officer appointed under that legislation is responsible for administration of the titles register.

The Registrars are statutory officers whose statutory independence, and that of those who hold that office after them, cannot be fettered by entering into agreements which bind them and limit their ability to appropriately undertake their legislative responsibilities. However, in an attempt to promote consistency the IGA provides that ARNECC will develop one nationally agreed set of MPRs and one nationally agreed set of MORs with any jurisdiction specific provisions in either<sup>15</sup>. ARNECC will also coordinate amendments to the MPRs and MORs in an endeavour to maintain national consistency to the greatest extent possible.

Banks and other mortgage lenders are increasingly operating on a national basis, rather than at the State level. Banks and other mortgage lenders are currently lodging in eight different environments. Approximately, sixty percent of real property transactions processed and recorded each year at the Land Registries are cases that involve mortgages.

A single, national legal framework governing the operation of electronic conveyancing is required to address inefficiencies associated with the different environments. This does not mean that uniform Torrens title legislation is necessary but that a common legal framework throughout Australia will enable documents in electronic form to be lodged and dealt with under the land titles legislation of each jurisdiction in the same way. This will promote economic efficiency throughout Australia in real property conveyancing and provide significant economic benefits to the community as well as provide a sound basis for further harmonisation in the future.

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<sup>14</sup> The Torrens title system is a system of title registration guaranteed by the State.

<sup>15</sup> The intention is jurisdiction specific matters to be limited to Land Registry requirements for document templates and data content to be provided by ELNOs to Land Registry and business rules for ELNO workspaces in preparing such documents and data for Land Registry in respect of land in that jurisdiction, and requirements of ELNOs arising from conveyancing practices specific to that jurisdiction, and those that are required because of local legislative provisions.

## 1.2 Paper based medium and the electronic gap

The medium used for conveyancing has remained largely manual and paper-based despite levels of automation in industry systems and within Land Registries across Australia. The physical exchange of paper documents at settlement is required to complete the transfer of property, as is the physical lodgment of signed and witnessed paper documents to effect changes in the titles register.

The requirement that documents created electronically be printed and signed by the parties, physically exchanged and (largely) physically lodged with the Land Registry for registration, prevents “straight through” processing both within conveyancing industry participants, and between conveyancing industry participants and Land Registries. This prevents the efficiencies that would arise from minimising manual handling of conveyancing documents.

Economic efficiencies will be achievable if “straight through” processing of documents in electronic form can be achieved. Doing this means providing the electronic infrastructure to close the “electronic gap” between conveyancing industry systems and Land Registries’ systems.

While Queensland, Tasmania and Victoria have made progress in bridging that gap with the various provisions facilitating the State based forms of electronic lodgment, there is no consistent approach to closing the electronic gap or facilitating “straight through” processing of electronic property transactions. Those State specific provisions do not provide the needed consistency for a single national system as mandated by the COAG Agreement.

National Electronic Conveyancing will allow the conduct of conveyancing, mortgage financing and other property-related transactions using electronic services provided by an ELNO for the settlement of property transactions and lodgment of registry instruments with Land Registries, effectively bridging the gap between electronic document management and preparation systems used by conveyancing industry participants and the electronic land registry systems.

## 1.3 Electronic Transactions Acts

All jurisdictions in Australia have an Electronic Transaction Act (ETA) that is modelled on the Commonwealth ETA. The ETA provides that requirements under a law of the jurisdiction may generally be met in an electronic form.

However, the ETA does not of itself permit or validate transactions in electronic form, rather than physical form. The effect of the ETA is to ensure that mere use of electronic communications for a particular transaction does not render the transaction invalid. Significantly, at the time the ETA was passed it was generally accepted that it should not apply to conveyancing transactions which resulted in the exclusion of the application of the ETA to transactions with land in some jurisdictions (New South Wales and South Australia).

While instruments will become infeasible<sup>16</sup> once registered in the Torrens Register of the jurisdiction, the national land market is a significant part of the national economy and the validity of electronically conducted land transactions must be put beyond doubt.

Accordingly, it is considered that implementation of National Electronic Conveyancing will require a specific authorisation for the Registrars to receive registry instruments by electronic lodgment and to register such instruments with the same effect as receiving and registering paper instruments under the jurisdiction's Torrens legislation. This is considered necessary as there has been some doubt expressed that the ETA in each jurisdiction provides sufficient certainty for the registration of conveyancing transaction instruments in the titles registers.

## 1.4 How significant is the problem?

The Australian property sector is a multi-billion dollar industry with around \$250 billion in property sales annually. Australia-wide, the residential conveyancing market generated estimated transactional revenue of \$2.4 billion in 2009-10, excluding agent sales fees and taxes.

Receiving documents electronically will allow efficiency in processing and recording of transactions that will be necessary to cope with anticipated increases in document lodgments in the future.

National Electronic Conveyancing has the potential to beneficially affect a significant proportion of conveyancing transactions, even in the earlier stages where limited transaction types will be accepted.<sup>17</sup> In 2009-10, there were approximately 988,000 property transactions across Australia in scope for electronic conveyancing.

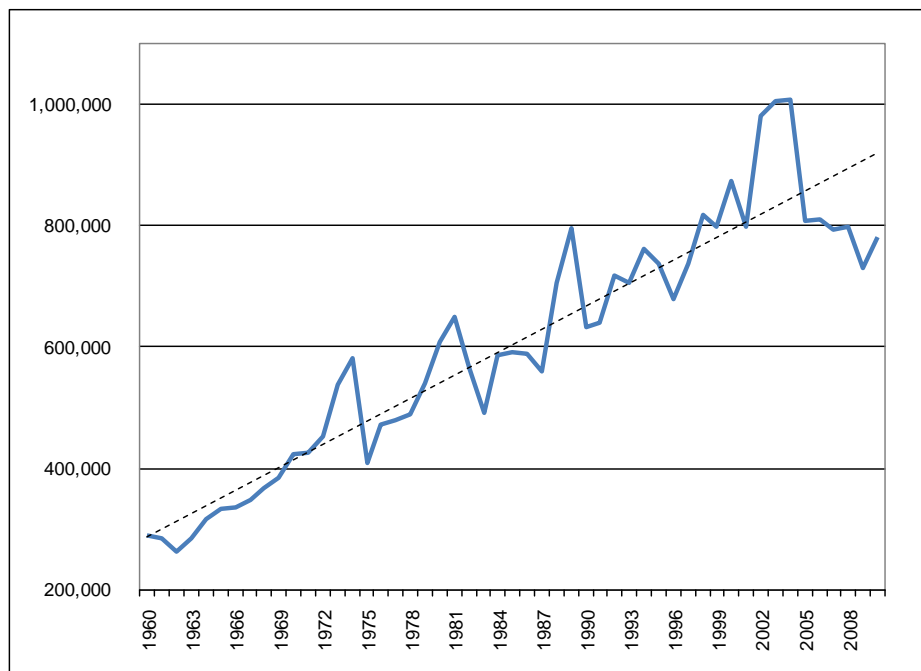
Whilst the number of property transactions in recent years has fallen below the long-term trend due to the cyclical nature of the property market and the impact of the global financial crisis, it is expected that the number of property transactions will continue to increase over time as population growth increases the demand for property. Figure 3-1 shows, as an example, the number of registry instruments lodged in New South Wales over the last 50 years, which demonstrates how the number of property transactions continue to increase over time despite fluctuations in the property cycle.

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<sup>16</sup> Subject to a limited number of statutory exceptions.

<sup>17</sup> It is anticipated that initially limited transaction types will be able to be lodged electronically with the scope being expanded over time. However, some complex paper transaction types may always remain on paper.

Figure 1-1 Number of registry instruments lodged in New South Wales per financial year, 1960-2010



Source: Land and Property Information NSW a division of the Department of Finance and Services

## 1.5 What are the impacts of maintaining the status quo?

The main impact of not introducing a common national regulatory framework enabling documents in electronic form to be lodged under the Torrens title legislation in each State and Territory is that National Electronic Conveyancing will not be implemented and the current paper-based conveyancing system will be retained. This gives rise to the following issues.

- The maintenance of inefficiencies and complexity of conveyancing across the country with 8 differing regimes which exacerbate costs for national conveyancing operators and vendors and purchasers of property across borders.
- No common approach to dealing with inefficiencies and complexities resulting in different approaches across jurisdictions.
- The physical exchange of documents at settlement is required to complete the transfer of property.
- The physical lodgment of signed and witnessed paper documents is required to effect changes in the titles register.
- Banks and other mortgage lenders are increasingly operating on a national basis, rather than at the state level. Banks and other mortgage lenders are currently lodging in eight different environments. Further, while the majority of bank processes are now completed electronically, mortgage financing is still largely paper based, and will remain so for as long as it is necessary for documents to be printed out and manually signed and lodged.

- Remaining with the current systems will put increasing budgetary pressures on Land Registries across Australia needing to maintain manual processes to receive and process large numbers of paper documents. In the absence of investment in new systems for the electronic lodgment and examination of dealings, significant recruitment and training will need to be undertaken to ensure the skills of retiring staff are transferred to new staff, whilst allowing for sufficient time to train new recruits. This process may be costly given the associated difficulties of recruitment of title examiner skills not readily available in the marketplace.

## 1.6 Why is government action needed to address the problem?

The Torrens system of title ensures real property rights are secure, transparent and readily transferable. Real property rights and the development of an efficient model of maintaining a register of these rights are fundamental to the effective functioning of a market-based economy for all types of property. In the case of real property, these rights ensure that property buyers, vendors, banks and Land Registries have a robust and reliable source of information at all times. This serves to minimise the transaction costs associated with the transfer of rights to real property.

The move to an electronic business environment for conveyancing requires both amendment of existing legislation in some jurisdictions to allow electronic conveyancing as well as new provisions to facilitate the lodgment of electronic documents with the Land Registries for registration in the Torrens title registers.

Given the number of different stakeholder groups involved in the conveyancing process and the significance of each State and Territory in the regulation of the process and operation of the Land Registries, government action is required to:

- implement the common regulatory framework to facilitate the delivery of National Electronic Conveyancing committed to by the COAG Agreement;
- provide the confidence necessary for the significant investment required by all stakeholders in order to maximise the economic benefits from the change;
- achieve maximum efficiencies in property conveyancing and financing nationally;
- maximise the prospects for enabling legislation, Operating Requirements, Participation Rules and jurisdictional practices and requirements to have uniform operation and effect across all jurisdictions, subject to specific jurisdictional variations on certain subject matters where necessary; and
- to provide the required infrastructure and systems in the Land Registries to be able to accept, investigate and register electronic land transaction documents.

The ECNL in conjunction with the IGA promotes consistency and the minimisation of jurisdictional specific requirements which should lead to a reduction of jurisdictional differences and a lowering of compliance costs.

ARNECC believes that the introduction of electronic conveyancing will assist in driving national consistency in conveyancing practices and the members of ARNECC are committed to working collaboratively through the IGA.



## 2 Objectives

This section outlines the objectives of introducing National Electronic Conveyancing legislation and its consistency with government policy.

### 2.1 Objective of government action

This proposal implements the COAG Agreement with respect to electronic conveyancing. Through the COAG Agreement the States and Territories are committed to:

- continuing to reduce the level of unnecessary regulation and inconsistent regulation across jurisdictions;
- delivering agreed COAG deregulation and competition priorities; and
- improving processes for regulation making and review.

The COAG Agreement is intended to contribute to the following outcomes:

- creating a seamless national economy, reducing costs incurred by business in complying with unnecessary and inconsistent regulation across jurisdictions;
- enhancing Australia's longer-term growth, improving workforce participation and overall labour mobility; and
- expanding Australia's productive capacity over the medium-term through competition reform, enabling stronger economic growth<sup>18</sup>.

The introduction of an efficient and appropriate legislative framework is essential to delivering National Electronic Conveyancing and contributing to the achievement of the COAG Agreement's intended outcomes.

Specifically, the objective of introducing an efficient and appropriate legislative framework is to facilitate a uniform legislative and business environment for National Electronic Conveyancing, which in particular will reduce the level of inconsistent regulation across jurisdictions with regard to conveyancing and reduce costs of doing business in multiple jurisdictions.

The appropriate legislative framework will facilitate a uniform legislative and business environment for National Electronic Conveyancing, that:

- provides a framework for approval and oversight of ELNs;
- allows electronic documents to be accepted for lodgment;

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<sup>18</sup> See Objectives and Outcomes Part 2 of the National Partnership Agreement To Deliver a Seamless National Economy at:  
[http://www.federalfinancialrelations.gov.au/content/national\\_partnership\\_agreements/Other/seamless\\_national\\_economy/national\\_partnership.pdf](http://www.federalfinancialrelations.gov.au/content/national_partnership_agreements/Other/seamless_national_economy/national_partnership.pdf).

- maximises efficiencies for industry and government by facilitating common rules; and requirements of electronic lodgment across all jurisdictions;
- generates the same confidence in validity and enforceability of transactions as presently exists for paper conveyancing transactions.

## 3 Options

A range of regulatory options are available for National Electronic Conveyancing including government controlled regulation, self-regulatory, co-regulatory and non-regulatory approaches. COAG's *Best Practice Regulation Guide* requires any feasible policy options to be considered in preparing a Regulation Impact Statement. The costs and benefits of each option are to be considered and the option that generates the greatest net benefit for the community to be preferred.

### 3.1 Regulatory options

In this section the four regulatory options referred to above are considered as well as the Do Nothing option as a baseline.

The nature of these options as they relate to National Electronic Conveyancing are outlined in Table 5-1.

*Table 3-1: Possible regulatory options for electronic conveyancing*

Regulatory option	Summary description of option
Do Nothing	No change to current activities or participants in conveyancing. Continued reliance on the current separate State and Territory systems that are largely paper-based and reliant on a physical meeting for settlement, and or development of differing State and Territory approaches to utilisation of technology for efficiency gains in land title registration.
<b>Options for introduction of National Electronic Conveyancing</b>	
Non-regulation	National Electronic Conveyancing is unregulated, and operates concurrently with a regulated, paper-based conveyancing system.
Self-regulation	Industry develops and implements a voluntary set of rules or code of practice for National Electronic Conveyancing.
Co-regulation	Industry administers its own regulatory arrangements for National Electronic Conveyancing, with backing from legislation developed by the Government.
Government-controlled regulation	Government develops the legislation and regulates National Electronic Conveyancing.

Extensive consultation and review of the most efficient legal framework for National Electronic Conveyancing was undertaken by Clayton Utz in the Report undertaken in 2009 and early 2010<sup>19</sup>.

As part of the process of developing a legal framework for National Electronic Conveyancing, Clayton Utz developed and consulted on performance objectives for the legal framework against which possible options could be assessed.

The performance objectives developed by Clayton Utz drew in part on the performance objectives developed for the Risk Management Framework for Electronic

<sup>19</sup> NECS Legal Framework Development Report is available at: <http://www.necs.gov.au/Redesign---Legal-Framework-2/default.aspx>

Conveyancing contained in the Risk Assessment<sup>20</sup> undertaken by Clayton Utz in 2007. The performance objectives were endorsed by all stakeholders with minor modifications and have been adopted in this RIS for assessment of the possible regulatory options for the legal framework.

The Performance Objectives<sup>21</sup> require that the National Electronic Conveyancing legal framework:

1. maximise efficiencies by facilitating common rules across all jurisdictions for the authorisation and operation of ELNOs, the use of ELNOs and the conduct of electronic conveyancing transactions while permitting necessary variations only in relation to certain jurisdiction-specific matters<sup>22</sup> or which are required because of local legislative provisions.
2. contribute to generating at least the same confidence in the validity and enforceability of NECS transactions and instruments as presently exists for paper conveyancing transactions and instruments.
3. seek to ensure as far as possible:
  - that its conduct and liability rules are consistent, clear and specific; and
  - that all legal and regulatory mechanisms which impose legal duties and liabilities and incentives on conduct in National Electronic Conveyancing are consistent and provide clear and specific compliance guidance and clear and specific liability allocation to stakeholders.
4. allocate liability among stakeholders so as to be transparent, equitable and efficient, workable and acceptable to stakeholders.
5. be broadly acceptable to stakeholders.

## 3.2 Assessment of Regulatory Options

Each potential regulatory model has been compared based on how well it satisfies the performance objectives for the legal framework for National Electronic Conveyancing.

### **Option 1 - No Change**

The no change option is included as a baseline. Deciding not to implement National Electronic Conveyancing does not automatically result in there being no changes to conveyancing practices. In fact, experience in the history of diverging paper systems shows it is highly likely that this option would facilitate further divergent development in the 8 jurisdictions seeking efficiency improvements from bridging the “electronic gap” between Land Registries and the conveyancing industry. This is evident from the very

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<sup>20</sup> Risk Assessment of the National Electronic Conveyancing System at: <http://www.necs.gov.au/Risk-Management-2/default.aspx>

<sup>21</sup> NECS Legal Framework Development Report at section 4.

<sup>22</sup> The matters for jurisdiction-specific rules are: Land Registry requirements for document templates and data content to be provided by ELNOs to Land Registry and business rules for ELNO workspaces in preparing such documents and data for Land Registry in respect of land in the jurisdiction, and requirements of ELNOs arising from conveyancing practices specific to that jurisdiction - see National Electronic Conveyancing Office, "NECS Requirements Definition" (version 6, September 2008), paragraphs 6.5.4.1 and 6.5.4.2.

different approaches taken in Victoria, Queensland and Tasmania<sup>23</sup> and, without a coordinated approach to National Electronic Conveyancing, it is likely that the other States and Territories would also introduce different State based systems.

The no change option fails to take advantage of the opportunity at this point of time to develop a nationally consistent approach to the regulation of electronic conveyancing where both government and industry are supportive of such an approach.

The no change option inevitably means even more divergence between the 8 jurisdictions in both conveyancing and land title registration practices and accordingly, *performance objectives 1 and 3*, which require the development of common or consistent practices, could not be achieved.

*Performance objective 2* is not applicable as it relates to comparison with the present conveyancing systems.

*Performance objective 4* would not be achieved as each jurisdiction has differing rules that can mean differing liability arrangements and different results in the same circumstances depending upon where a matter arises.

There is widespread support for a National Electronic Conveyancing system from all stakeholders in the conveyancing industry, especially from organisations that operate in more than one jurisdiction. Also, the government sector is clearly supportive of National Electronic Conveyancing with its introduction being mandated by the COAG Agreement. Accordingly, *performance objective 5* would not be achieved if there is no change to the current jurisdiction based development of regulation of conveyancing practices for electronic conveyancing.

## **Option 2 – Non regulation**

Under this option no new regulatory measures would be implemented to support National Electronic Conveyancing which would operate concurrently with a regulated, paper-based conveyancing system.

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<sup>23</sup> Queensland: e-Lodgment and d-Lodgment. E-Lodgment is an internet based platform that gives secure and direct access to the Automated Titles System (ATS) for the electronic lodgment of land registry forms. Scanned documents are uploaded into the system where they are automatically assessed (after optical character recognition) for the applicable fees. The lodger then confirms the lodgment, with an agreement to pay the fees due. D-Lodgment offers the same capabilities and features as e-Lodgment via a web services interface instead of through a web browser. The d-Lodgment system allows lodgment of fully digital documents (i.e. as XML data, rather than scanned images).

Tasmanian: Tasmanian Online Land Dealings System (TOLD), a web-based facility that enables its subscribers to access, complete, print, save and edit land dealings. It also provides the ability for subscribers to electronically lodge priority notices, caveats, withdrawal of caveats and withdrawal of priority notices.

Victoria: Electronic Conveyancing Victoria (ECV), enabling electronic financial settlement and online lodgment of caveats, withdrawal of caveats, mortgages, discharges of mortgages, transfers of land, applications by surviving proprietor, State Revenue Office charges and discharges and a number of administrative notices.

Under this option each Land Registry would still have requirements for accepting documents for lodgment and some legislation would be necessary in at least a few jurisdictions (for example, to remove the current exclusion of conveyancing transactions from the operation of the Electronic Transaction Acts in NSW and SA). However, there would be no controls on who could set up and operate an ELN and arrangements in each jurisdiction would be free to develop inconsistently so that *performance objectives 1 and 3*, which require the development of common or consistent practices, could not be achieved.

Without a common regulatory framework and no basis for approval or control of ELNs it is unlikely that stakeholders or the community generally would have sufficient confidence to commit any significant proportion of the \$250 billion worth of annual property sales to the system, nor would professional indemnity insurers cover its use.

Accordingly, other than low risk transactions such as caveats it is unlikely that *performance objective 2* could be achieved, nor would the system be likely to be commercially viable as it would not generate sufficient stakeholder and community confidence to capture a large proportion of conveyancing business over a reasonable take up period.

*Performance objective 4* would not be achieved as each jurisdiction would maintain the current arrangement of differing rules that can mean differing liability arrangements and different results in the same circumstances depending upon where a matter arises and this would be further complicated by diverse approaches to unregulated electronic conveyancing practice.

While there is widespread support for a consistent approach to National Electronic Conveyancing from all stakeholders in the conveyancing industry, especially from organisations that operate in more than one jurisdiction, there is no support for differing approaches across jurisdictions, which is inevitable under this option. Also, the government sector is committed to National Electronic Conveyancing by the COAG Agreement and this cannot be achieved without the introduction of common regulatory framework for electronic conveyancing across Australia. Accordingly, *performance objective 5* would not be achieved.

### **Option 3 – Self Regulation**

This option entails the conveyancing industry developing a voluntary set of rules or codes of practice for National Electronic Conveyancing which would again operate concurrently with a regulated, paper-based conveyancing system.

The development of common and consistent rules and codes of practice would prove difficult given the diverse and sometimes conflicting interests of stakeholders involved in the conveyancing industry. Also, within a stakeholder group there, is diversity between jurisdictions which would severely hamper obtaining national consistency, even within a stakeholder group. Also, the voluntary nature of these arrangements would be very unlikely to garner sufficient confidence to realise the level of take up of electronic conveyancing to make National Electronic Conveyancing viable.

The results would be similar to those for option 2 and this option would not achieve any of the performance objectives.

### **Option 4 – Co-Regulation**

In this option the conveyancing industry would administer its own regulatory arrangements for National Electronic Conveyancing, with backing from legislation developed by government.

While legislation would increase certainty and confidence to some degree this option shares most of the issues of options 2 and 3. National consistency would be difficult to achieve with differing legislative schemes in the States and Territories and potentially different approaches from different stakeholder organisations both between stakeholder groups and between jurisdictions. Accordingly, *performance objectives 1 and 3*, which require the development of common or consistent practices, would not be achieved.

In comparison with the current regulated paper based system the self administered regulatory arrangements are unlikely to achieve the same level of confidence in validity and enforceability of transactions so that *performance objective 2* will not be achieved.

The backing of a co-regulatory arrangement by legislation could potentially achieve an arrangement of liability allocation that is relatively transparent and workable. However, it is unlikely to be consistent between jurisdictions. Therefore *performance objective 4* would not be achieved to any degree as each jurisdiction would still have differing rules that can mean differing liability arrangements and different results in the same circumstances depending upon where a matter arises.

This option is unlikely to achieve widespread support from stakeholders or the community. The diverse and sometimes conflicting interests of stakeholders in the conveyancing industry would still cause issues between the various interest groups having a stake in administration of electronic conveyancing. Stakeholder feedback in NSW in 2005<sup>24</sup> identified as a key issue the importance to industry and community confidence in electronic conveyancing of continued government sector involvement. This issue is essentially recognition of the success of the Torrens system of title by registration in establishing and maintaining industry and community confidence. Government also would not see this as an effective means of regulating electronic conveyancing and would not support this option as it would not achieve a nationally consistent approach or liability rules. *Performance objective 5* would therefore not be achieved.

### **Option 5 - Government Controlled Regulation**

Under option 5 government develops legislation and regulates National Electronic Conveyancing.

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<sup>24</sup> See "Electronic Settlement, Electronic Lodgment and Automatic Registration of Real Property Dealings in NSW Public Consultation Feedback Report" March 2005 at [http://necnsw.lpi.nsw.gov.au/data/assets/pdf\\_file/0003/143922/PCD\\_Feedback\\_Report.pdf](http://necnsw.lpi.nsw.gov.au/data/assets/pdf_file/0003/143922/PCD_Feedback_Report.pdf)

Strong and nationally coordinated government involvement in the development and implementation of the regulatory framework for National Electronic Conveyancing is considered necessary by all stakeholders in order to facilitate the common regulation of electronic conveyancing across all jurisdictions and to maximise efficiencies for both industry and government. This would achieve *performance objective 1*. This option is aimed at ensuring that jurisdictions do not have divergent regulatory approaches to electronic conveyancing.

Similarly, involvement of government in regulating National Electronic Conveyancing will engender the greatest confidence in electronic conveyancing by imposing regulatory requirements across the diverse and often conflicting interests of stakeholders for the benefit of all. Only under option 5 is there the possibility of ensuring that *performance objective 2* will be met.

A clear and consistent framework for liability can be achieved, with *performance objectives 3 and 4* being met, through government controlled legislation and nationally set and applied requirements and rules. Government set requirements and rules will also be transparent as they will be required to be published, will have clear timeframes for implementation of changes and appeal frameworks.

In discussions with stakeholders option 5 has been a clear preference, principally due to its ability to meet *performance objectives 1 to 4*. In addition this option is most acceptable to the government sector due to the need to maintain the integrity of the Torrens land title system operated in all Australian jurisdictions, and the security of ownership as well as the reduced complexity and cost of conveyancing that is made possible under the Torrens system of land administration. Accordingly option 5 will also meet *performance objective 5*.



## Conclusion

Table 3-2: Assessment of possible regulatory options against objectives

Performance Objective	Do Nothing	Non-regulation	Self-regulation	Co-regulation	Govt-controlled regulation
1. Maximises efficiencies for industry and government by facilitating common regulation of electronic conveyancing across all jurisdictions	x	x	x	x	✓
2. Generates the same confidence in validity and enforceability of transactions as presently exists for paper conveyancing transactions	NA	x	x	x	✓
3. Ensures that:					
(a) conduct and liability rules are consistent, clear and specific	x	x	x	x	✓
(b) all legal and regulatory mechanisms are consistent and provide clear and specific compliance guidance	x	x	x	x	✓
4. Allocates liability in a manner that is transparent, equitable, efficient, and workable	x	x	x	✓	✓
5. Is broadly acceptable to government, industry and the community	x	x	x	x	✓

Of all of the regulatory models available option 5 stands out as the only option that has the capacity to meet the performance objectives set for National Electronic Conveyancing to any degree whatever. Accordingly, the approach represented by Government controlled regulation through the introduction of national legislation is supported.

Based on this comparison and on the recommendations of the Report and its assessment of the requirements for an efficient and effective legal framework to meet the agreed performance objectives, the conclusion is that government regulation of electronic conveyancing through national legislation is the best option. The proposed ECNL and government regulation of electronic conveyancing is necessary to implement National Electronic Conveyancing and to ensure that it operates with at least the same legal efficacy as the regulated paper-based system.

The proposed legal framework for National Electronic Conveyancing is closely modelled on the recommendations of the Report. The foundational elements of the legal framework are:

- an **Intergovernmental Agreement for an Electronic Conveyancing National Law (IGA)** to provide governance for the development, implementation and management of the regulatory framework including the establishment of ARNECC to coordinate the Registrars' activities in relation to the regulatory framework for National Electronic Conveyancing;

- the **ECNL** to be enacted in NSW and then applied in other jurisdictions;
- **ARNECC** which will advise the States and Territories on matters relating to National Electronic Conveyancing and develop nationally agreed Operating Requirements and Participation Rules;
- **Model Operating Requirements** to be set by ARNECC and that will apply to any operator of an Electronic Lodgment Network (ELN);
- **Model Participation Rules** to be set by ARNECC and that will apply to all Subscribers to an ELN.

This recommended legal framework to facilitate National Electronic Conveyancing is being implemented<sup>25</sup>. The IGA is operative and ARNECC has been formed to oversee and advise on the implementation of National Electronic Conveyancing. The ECNL that is the subject of this RIS is the next step in implementing the recommended legal framework and provides the legal basis for the operating agreement, model operating requirements and model participation rules.

### 3.3 Electronic Conveyancing National Law (ECNL)

The proposed ECNL will facilitate the implementation of electronic conveyancing in Australia. The key provisions are summarised below. The object of the ECNL is to promote efficiency throughout Australia in real property conveyancing by providing a common legal framework that enables documents in electronic form to be lodged and dealt with under the land titles legislation of each jurisdiction.

The ECNL provides authority to the Registrar in respect of electronic transactions to supplement the existing powers in each jurisdiction's land titles legislation. In doing so the ECNL has application beyond National Electronic Conveyancing and will enable all forms of electronic lodgment with a Land Registry.

The key provisions of the ECNL are summarised below. The ECNL is attached as Appendix H.

#### Electronic Lodgment

While real property transactions become indefeasible once registered in the titles register of the respective jurisdiction, the validity of electronically conducted land transactions must be put beyond doubt in view of the significance of a stable and secure land titling system to land owners and the holders of other interests in land and of the national land market to the national economy.

Accordingly, in order to authorise the lodgment and registration of electronic instruments, it is considered necessary that the ECNL include provisions to supplement the ETA.

The ECNL provides that:

- documents may be lodged electronically (in a form and by a means approved by the Registrar);

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<sup>25</sup> For further detail on the legal framework developed by Clayton Utz, please refer to *Clayton Utz, NECS Legal Framework Development, Final Report Volume 1*, accessed at <http://www.necs.gov.au/Redesign--Legal-Framework-2/default.aspx>

- the Registrar must receive and deal with documents lodged electronically;
- electronic documents have the same status as the equivalent paper documents; and
- documents signed digitally (by a subscriber) have the same effect as if they had been executed by the relevant party.

### **Client Authorisations**

In National Electronic Conveyancing, vendors and purchasers will not themselves sign registry instruments but will engage a subscriber (a solicitor or conveyancer) to represent them. The subscriber will digitally sign registry instruments (and other electronic documents) on behalf of their client.

Where a subscriber is engaged to represent a client, an unequivocal form of client authorisation is necessary. The client authorisation will provide clear authority for a subscriber to digitally sign registry instruments on their client's behalf. The client authorisation will have some similarities to a power of attorney, though for specific purposes. As a result it may be possible to argue that the client authorisation will be subject to various State or Territory provisions setting requirements for powers of attorney. For example, in some jurisdictions a power of attorney must be registered before being used to authorise a land transaction. Accordingly, the ECNL provides that a client authorisation is not subject to any jurisdiction legislation setting requirements for powers of attorney.

The ECNL provides that by entering into an approved form of client authorisation, a transacting party may authorise a subscriber to:

- digitally sign electronic registry instruments and other electronic documents on that transacting party's behalf;
- lodge electronic registry instruments and other electronic documents with the relevant Land Registry;
- authorise any financial settlement involved in the transaction; and
- do anything necessary to complete the transaction electronically.

### **Reliance on Digital Signatures**

Digital signatures are an important part of National Electronic Conveyancing's in-built technical and legal measures to provide confidence in electronic conveyancing, and in particular the integrity of digitally signed electronic documents.

A strong, reliable and trusted structure for digital signatures mitigates the risk of a subscriber, and any client represented by the subscriber, repudiating all or part of a signed electronic document by claiming that the:

- subscriber did not sign the document; or
- document was altered after the subscriber signed it.

The success of National Electronic Conveyancing requires a strong attribution rule<sup>26</sup> to apply to digital signatures to ensure subscriber accountability. A strong attribution rule also supports the attribution of the digital signature to a client on whose behalf a subscriber purports to sign.

Without a strong attribution rule for digital signatures, the Land Registry and the parties to a conveyancing transaction could not rely on signatures and certifications made by a subscriber in electronic instruments. As a result of feedback during consultation on the draft ECNL the attribution rule has been amended to provide that a Subscriber cannot repudiate a digital signature:

- created by:
  - the Subscriber itself
  - an employee, agent, contractor or officer of the Subscriber who had the Subscriber's express or implied authority to sign using the Subscriber's digital signature; or
- where the signer did not have the Subscriber's express or implied authority to sign and was able to sign due to:
  - a failure by the Subscriber, its employees, agents, contractors or officers to comply with the Participation Rules; or
  - a failure by the Subscriber, its employees, agents, contractors or officers to take reasonable care.

Under the amended attribution rule a Subscriber would not be liable for:

- the fraudulent use of a digital signature by an employee, agent, contractor or officer who *was not* authorised to create a digital signature
- the fraudulent use of a digital signature by an unauthorised person (whether an employee, agent contractor or officer, or not) where the signing was not enabled by a failure to comply with the Participation Rules or to otherwise take reasonable care.

### **Electronic Lodgment Networks and Electronic Lodgment Network Operators**

In each jurisdiction it is the Registrar who has responsibility for the administration of the titles register and the registration of registry instruments in the jurisdiction. The Registrars (ARNECC) will collectively set conditions for authorisation of an ELNO and conditions for access and use of an ELN. An ELN is an electronic system or platform that enables the preparation and lodging of registry instruments in electronic form.

The ECNL empowers the Registrar to operate or to authorise one or more persons to operate an ELN in respect of land in the jurisdiction.

National E-Conveyancing Development Limited (NECDL), a company established by the New South Wales, Victoria, Queensland and Western Australian governments, is expected to become the first ELNO once the ECNL is in place<sup>27</sup>. However, the legal framework does not preclude other organisations from applying to become an ELNO.

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<sup>26</sup> An attribution rule is a rule which states when the subscriber, on whose apparent behalf a digital signature certificate has been applied to sign a document, is bound by that signature.

<sup>27</sup> For further information on NECDL see its website at <http://www.nationaleconveyancing.com.au/>.

Should other ELNOs be approved in the future, interoperability may need to be provided for in the operating requirements. However, interoperability will be facilitated by the fact that all ELNOs will be required by the operating requirements to use a data standard set by ARNECC for data communications between themselves and the land registries.

In managing electronic conveyancing the Registrar may:

- renew the approval of an ELNO if the ELNO continues to comply with the operating requirements, or revoke or suspend the approval of an ELNO in certain circumstances to be set out in the operating requirements.
- monitor activities in an ELN for any purpose, including ensuring that the integrity of the titles register is maintained.

### **Operating Requirements and Participation Rules**

The ECNL empowers the Registrar to determine requirements relating to the operation of an ELN, known as operating requirements and requires that an ELNO must comply with the operating requirements<sup>28</sup>.

The operating requirements may cover topics such as the financial standing of an ELNO, operational and technical standards, insurance cover to be held by an ELNO, the suspension or revocation of an ELNO's approval and directions to an ELNO to restrict, suspend or terminate a subscriber's use of an ELN.

Similarly, the Registrar may determine rules relating to access to and use of an ELN, known as participation rules, and the ECNL requires that subscribers comply with the participation rules<sup>29</sup>.

The participation rules may cover topics such as the eligibility criteria for subscribers, representations or warranties to be given by subscribers, suspension or termination of a subscriber's access, obligations of subscribers to verify the identity of their client, certification of registry instruments, digital signatures and the retention of documents by subscribers.

If a subscriber fails to comply with the participation rules relating to the subscriber's use of an ELN, the Registrar may restrict, suspend or terminate the subscriber's use of an ELN provided by the Registrar or, in respect of an ELN operated by an ELNO, direct the ELNO to restrict, suspend or terminate the subscriber's use of the ELN.

ARNECC will determine model operating requirements and model participation rules that are intended to be adopted by each Registrar so that they are nationally uniform (although the models may include jurisdiction specific provisions).

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<sup>28</sup> The operating requirements are expected to be finalised in early 2013. However, the nature and content of the operating requirements was made evident in a draft of the Model Operating Requirements released by ARNECC on 30 March 2012 and available at [http://www.arnecc.gov.au/data/assets/pdf\\_file/0014/170321/ARNECC\\_MOR\\_Paper\\_30\\_March\\_2012.pdf](http://www.arnecc.gov.au/data/assets/pdf_file/0014/170321/ARNECC_MOR_Paper_30_March_2012.pdf).

<sup>29</sup> The participation rules are expected to be finalised in early 2013. However, the nature and content of the participation rules was made evident in a draft of the Model Participation Rules released by ARNECC on 30 March 2012 and available at [http://www.arnecc.gov.au/data/assets/pdf\\_file/0016/170323/ARNECC\\_MPR\\_Paper\\_30\\_March\\_2012.pdf](http://www.arnecc.gov.au/data/assets/pdf_file/0016/170323/ARNECC_MPR_Paper_30_March_2012.pdf).

The Registrar must ensure the current and superseded versions of the operating requirements and participation rules are publicly available and any changes to the operating requirements or participation rules usually must be published at least 20 business days before the changes take effect.

### **Appeal Rights**

The ECNL provides a right of appeal to a responsible court (to be nominated in each jurisdiction's application law) against the decision of a Registrar to:

- refuse to approve the person as an ELNO;
- refuse to renew the person's approval as an ELNO;
- suspend the person's approval as an ELNO;
- revoke the person's approval as an ELNO;
- restrict, suspend or terminate the person's use, as a subscriber, of an ELN operated by the Registrar; or
- direct an ELNO to restrict, suspend or terminate the person's use, as a subscriber, of the ELN operated by the ELNO.

The right of appeal can only be exercised once a person has received written grounds for the decision.

### **Compliance Examination**

The Registrars operate State guaranteed land title systems, the efficacy and accuracy of which will be reliant upon the certifications given by subscribers<sup>30</sup>, the accuracy of the electronic instruments they prepare, and on the supporting evidence that subscribers will be required to retain.

Consequently, it will be necessary for the Registrar to have the ability to check compliance with the operating requirements and participation rules, either on a random compliance assurance basis or as part of an investigation into alleged or suspected misconduct. Compliance examinations may be made by attendance at the party's premises, after reasonable notice, to inspect the required documents or by requiring documents to be produced to the Registrar within a specified period, or as otherwise required by the Registrar.

These reviews will not be conducted in person by the Registrar and it may also be the case that such reviews may be included in, or conducted in tandem with, other professional compliance inspections by or on behalf of regulatory bodies such as conveyancing or legal practice regulators or revenue offices. Accordingly, the Registrar will require the ability to delegate the compliance examination function to an appropriate officer or to appoint an agent.

An ELNO or a subscriber must cooperate with any compliance investigation in that they must comply with any reasonable request by the person conducting the compliance examination:

- to furnish specified information or to produce specified documents; or

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<sup>30</sup> Under the Participation Rules, a subscriber will be required to give various certifications in relation to an electronic instrument, relating to the verification of the identity of its Client; Client Authorisations; supporting evidence; correctness and compliance with relevant legislation and the Registrar's requirements; and, in the case of a mortgage, an instrument specific certification relating to the signing of the mortgage.

- to take specified action for the purposes of the compliance examination.

Instead of conducting a compliance examination in relation to a matter, or at any time during a compliance examination or after the completion of a compliance examination in relation to a matter, the Registrar may refer the matter to an appropriate authority.

An appropriate authority includes a law enforcement agency, and a regulatory or disciplinary body for persons engaged in any profession, occupation, calling or business.

The Registrar is not obliged to conduct any compliance examination or monitor activities in an ELN.

### **No Compensation for matters arising out of Compliance Examination**

The ECNL does not affect or change any existing compensation rights under the States and Territories Torrens title legislation. It does, however, provide that where the Registrar has acted in good faith no person is entitled to receive compensation for any loss or damage arising out of anything done or omitted, or in connection with the monitoring of activities in an ELN or the conduct of a compliance examination by the Registrar (or his or her delegate) including (without limitation) any decision made,:

- not to monitor activities in an ELN or not to conduct a compliance examination, and
- as to how activities in an ELN are to be monitored or how a compliance examination is to be conducted.

### **Interpretation**

To ensure consistency in interpretation nationally, the ECNL excludes the operation of each jurisdiction's usual interpretation laws and instead includes a standard schedule of interpretation provisions to ensure consistent interpretation in all jurisdictions applying the ECNL. This approach, and the interpretation schedule included in the ECNL, is used in a number of other national law schemes.

## 4 Impact analysis

Notwithstanding that the decision to introduce National Electronic Conveyancing has been taken by COAG, this section analyses the economic impact at a national level associated with the introduction of National Electronic Conveyancing. No national quantitative analysis has been undertaken. However, economic analysis has been undertaken in New South Wales and a quantitative analysis of the potential costs and benefits of National Electronic Conveyancing based on the New South Wales figures is included at Appendix A<sup>31</sup>. This quantitative analysis is indicative only as it is based on figures scaled up according to the New South Wales proportion of the national conveyancing industry.

It is important to note that ELNs will be provided and operated by approved ELNO's that will be commercial entities. The fees charged to an industry participant user of National Electronic Conveyancing will be determined by the ELNO and not by the Land Registries<sup>32</sup>.

Similarly, it is important to note that the decision to pass on to consumers any savings or costs that accrue to an industry participant user of National Electronic Conveyancing lies with the industry participant and not with the Land Registries.

Some submissions in response to the Consultation RIS questioned the quantum of costs and savings in the quantitative analysis. The economic appraisal contained in this RIS is based on the best available information at the time the RIS was prepared. Further, the scaling up of the New South Wales analysis is appropriate given that the business of conveyancing is fundamentally the same across jurisdictions, with the real difference lying in the volume of transactions.

It should be noted however that COAG's decision to introduce National Electronic Conveyancing is reflective of the costs to business productivity of duplicative and inconsistent practice, processes and regulations.

The sensitivity analysis confirms that costs will be incurred by both public and private participants in National Electronic Conveyancing in order to realise the savings that result from that participation.

### 4.1 Baseline comparison –'Do nothing'

'Do nothing' is referred to here only for comparison with the costs and benefits of the introduction of National Electronic Conveyancing as decided by COAG. This would have meant no change to current activities or participants and means retaining the current state level, paper-based system for conveyancing.

As discussed in Section 3, the option of doing nothing will lead to the persistence of industry costs in the form of:

- physical document preparation, handling and exchange;
- physical attendance at settlement;

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<sup>31</sup> A statement as to the impact of the ECNL on Victoria is provided at Appendix G

<sup>32</sup> The fees for registering land registry documents in the titles register and the fees for obtaining land information from the titles register will continue to be set by the Land Registries.



- physical lodgment, compliance assurance and processing of documents; and
- administrative costs, in particular for banks, arising from dealing with different lodgment environments and practices in each jurisdiction.

In the absence of investment by Land Registries in new systems for the electronic lodgment and examination of dealings, significant recruitment and training will need to be undertaken to ensure the skills of retiring Land Registry staff are transferred to new staff, whilst allowing for sufficient time to train new recruits. This process may be costly given the associated difficulties of recruitment of title examiner skills not readily available in the marketplace.

The “Do nothing” option would not produce any net benefits (i.e. cost savings) to the conveyancing industry, nor to the Land Registries in each jurisdiction, as it is the status quo.

#### **4.1.1 Risk**

Key risks associated with the current paper based conveyancing system include:

- failure to settle or delay to settlement – whereby the preparation for settlement was incomplete due to the conduct of one party to the transaction or an inability to make timely settlement arrangements with the transacting party (for example, the bank);
- the time delay between settlement and lodgment presents a risk period in which a writ or caveat can be recorded on the title and prevent registration of the settled transaction;
- documents not in a registrable form – due to documentation errors in the manual preparation process;
- loss of paper documents and title – for example, by the purchaser’s or mortgagee’s representative after settlement and prior to lodgment;
- the inability (due to rising staff costs) to maintain sufficient staff resources with the requisite skills for compliance assurance of transactions before registration;
- resources are not available to undertake the significant recruitment and training needed to ensure the skills of retiring Land Registry staff are transferred to new staff, whilst allowing for sufficient time to train new recruits given the associated difficulties of title examiner skills not readily being available in the marketplace.;
- paper based fraud – including fraud in relation to the actual conveyancing process (such as signature forgery, misleading a victim into signing documents and identity fraud), presentation of fraudulent cheques at settlement and cheques cancelled following settlement; and
- reliance on data capture systems (for example manual data entry or optical character recognition) that are not as accurate as digitally signed discrete data items.

Whilst the incidence of these Key risks is very low, and the impact when they do occur may be minor, they can, depending on the circumstances, also have significant consequences to the parties. Fraud, for example, can cause a great deal of distress and uncertainty even though ultimately most people would obtain compensation from Torrens assurance funds operated by the jurisdictions or from other sources.

Also, a failure to settle on time or delay to settlement may have very few consequences but a significant delay could potentially result in a contract for sale being rescinded and consequential litigation.

#### 4.1.2 Competition effects

Maintaining the status quo would not have any adverse competition effects on the conveyancing or related markets. It will however, not produce any improvements in the efficiency or reduction in the transaction costs (and other benefits) associated with the introduction of National Electronic Conveyancing.

## 4.2 Who could be affected- key stakeholders in electronic conveyancing

There are a number of key stakeholders in National Electronic Conveyancing. The key stakeholders are set out below.

- An **ELNO** is the operator of the ELN. There will initially be at least one national ELNO and there may be additional ELNOs in the future.
- A **client** can be any individual or organisation with an interest in land/real property or who is a party to a transaction in land/real property. Key examples of clients are registered proprietors, vendors and purchasers.
- A **subscriber** is any individual, or organisation meeting the eligibility requirements for a subscriber in the participation rules and using an ELN to prepare and sign electronic instruments, settlement statements and information reports. An APRA regulated financial institution, legal practitioner, licensed conveyancer are examples of a subscriber.
- **Licensed Service Providers (LSPs)** are providers of tailored user interfaces, integration and support services to subscribers.
- **Land Registries (LR)** are the jurisdiction-based custodians of the Torrens Title Registers of land titles and interests for the properties being dealt with in the transaction and are responsible for the integrity and accuracy of those registers.
- **Revenue Offices (RO)** are the jurisdiction-based collectors of duties and taxes payable on land and property transactions and are responsible for effective systems of compliance with legislated duty and tax obligations.

## 4.3 Participation Optional

Industry participation in National Electronic Conveyancing should bring benefits to the conveyancing industry that will encourage participation. However, the decision to participate will be up to the individual member of the conveyancing industry. There is no present intention to make participation in National Electronic Conveyancing mandatory or remove paper based conveyancing.

However, individuals wanting to complete their own property transactions will need to use the existing paper based process, as it will not be viable for an individual to meet the requirements to become a subscriber for a single transaction.

The following table outlines the action required by stakeholders to participate in electronic conveyancing<sup>33</sup>. Ongoing participation in electronic conveyancing requires monitoring and maintenance of these actions.

*Table 4-1: Participation requirements*

Description	Sector						
	LR	RO	ELNO	Fin Inst	Lawyers /Conveyancers	LSP	Client
<b>Legal Framework</b>							
Enact Electronic Conveyancing National Law	✓						
Update jurisdiction legislation to be consistent with electronic conveyancing	✓	✓					
Establish national regulator for electronic conveyancing (ARNECC)	✓						
Establish Model Operating Requirements	✓						
Establish Model Participation Rules	✓						
Implementation of jurisdiction Operating Agreement	✓		✓				
Establish contracts for support services			✓				
Implementation of Participation Agreement between ELNO and subscribers			✓	✓	✓		
<b>Systems</b>							
Provision of ELN			✓				
Enablement of Licensed Service Provider (LSP) systems to support industry use of ELN			✓			✓	
Comply with Data Standard and protocol for information exchange	✓	✓	✓	✓	✓	✓	
Delivery of Land Registry and Revenue Office products and services for electronic transaction compliance assurance	✓	✓	✓				
Enablement of electronic lodgment of registry instruments	✓		✓				
Enhancement of Land Registry and Revenue Office systems for processing electronic conveyancing transactions	✓	✓					

<sup>33</sup> These actions are consistent across all jurisdictions in Australia.

Description	Sector						
	LR	RO	ELNO	Fin Inst	Lawyers /Conveyancers	LSP	Client
Enhancement of subscriber systems for electronic conveyancing <sup>34</sup>			✓	✓	✓	✓	
Provision of Financial settlement system			✓	✓			
<b>User of Electronic Lodgment Network</b>							
Application and registration of subscribers			✓	✓	✓		
Acquisition of Digital Signature Certificate for each subscriber and any authorised signers				✓	✓		
<b>Transaction participation</b>							
Selection of subscriber to represent the client and to prepare and execute an electronic conveyancing transaction							✓
Client Authorisation Agreement to provide a subscriber with instructions and authority for an electronic transaction					✓		✓

**Key:**

LR	Land Registry in each jurisdiction	Lawyers/Conveyancers	Subscribers that are legal practitioners or licensed conveyancers
RO	Revenue Office in each jurisdiction	LSP	Licensed Service Providers
ELNO	Electronic Lodgment Network Operator	Client	Individual or organisation as transacting party
Fin Inst	Subscribers that are Financial Institutions		

## 4.4 Factors that may affect industry participation

The following table outlines the factors that individual conveyancing industry service providers may perceive as reasons to opt in or out of electronic conveyancing. It will be up to individual conveyancing industry service providers to weigh up the actual and/or perceived costs, savings, risks and liabilities in deciding whether to participate in electronic conveyancing.

<sup>34</sup> At its most basic level, an ELN will be accessible via a browser interface and very little, if any, system enhancement will be required if a reasonable internet connection is already available. However, to be able to increase efficiency and reuse data already captured, enhancement of existing document management software will be required. LSPs are expected to provide these upgrades to existing systems.

Table 4-2: Factors that may affect industry participation

	Factor	Reasons to opt in	Reasons to opt out
<b>Cost and service</b>	Upfront investment to adopt electronic conveyancing e.g. subscriber IT investment and registration cost	The investment set-up cost for electronic conveyancing is acceptable and justified by the financial business case	The investment set-up cost for electronic conveyancing is not justified by the financial business case
	Service acceptability	The services provided by the ELN are acceptable to the industry stakeholder and their client	The services provided by the ELN are not acceptable to the industry stakeholder and their client
	ELN transaction costs	The transaction fees provided by the ELN are acceptable to the industry stakeholder and their client	The transaction fees provided by the ELN are not acceptable to the industry stakeholder and their client
	Ongoing subscriber transaction costs	The savings provided by electronic conveyancing outweigh the additional costs incurred	The savings do not provide an adequate business case for adopting electronic conveyancing
	Costs associated with compliance with the MPRs	The streamlining of processes insofar as the Rules facilitate national consistency	Initial and ongoing compliance costs are too high.
<b>Risks and liabilities</b>	Transaction management and due diligence checks	Automated electronic notification of changes to Lodgment Case status and automated completion checks	Loss of opportunity for face to face final settlement due diligence checks
	Lodgment Case compliance checks required	Automated compliance assurance services provided to support practitioner checks	Loss of opportunity for face to face final settlement due diligence checks
	Increasing identity fraud within the community	Agreed practice standards such as Client Identity Verification (CIV) which, if followed, will mitigate the risk of identity fraud being committed and potential liability for that fraud	Additional administration of CIV and Client Authorisation checks
	Financial transaction risks	Features provided in financial settlement functions that reduce the risk of erroneous or fraudulent payments	Practitioner risks associated with electronic funds transfer in electronic settlement
	Signing on behalf of Client	Effective mandatory practices and documentation to support practitioner role	Preference for Client to directly execute transaction documentation

	Factor	Reasons to opt in	Reasons to opt out
	Electronic security risks	Compliance with agreed security policy standard will mitigate the risk	Additional practitioner skills required and risks associated with having to operate in a fully electronic environment
<b>Savings</b>	Potential for straight-through processing of conveyancing transactions	Electronic conveyancing can facilitate straight-through processing of transactions which is expected to be of particular benefit for lenders	Straight-through processing is of no real benefit to the stakeholder
	More convenient facilities for completing property transactions	Electronic systems with business to business communication and interoperability with in-house systems justify adoption of electronic conveyancing	Inadequate interoperability with existing systems to justify adoption of electronic conveyancing
	Less labour intensive dealing preparation, financial settlement and dealing lodgment processes	Electronic conveyancing provides significant time savings in conducting an electronic conveyancing transaction	Inadequate resource time or productivity savings to justify adoption
	Faster lodgment of time-critical dealings, such as caveats	Immediate lodgment of transactions ready for lodgment	Inadequate time saving in preparation and lodgment of time critical dealings
	Electronic transfer of funds for financial settlement and faster access to funds received in settlements	Benefits provided by electronic settlement services provide justification for adoption of electronic conveyancing	Electronic settlement provide no benefits justifying adoption of electronic conveyancing
	Ease of remote access to the Land Registry	Easier access to settlement and lodgment for rural and remote communities	Electronic access to settlement and lodgment is insufficient benefit compared to existing processes
	Greater certainty that dealings are lodged in registrable order	Less dealings lodged with errors, omissions or inconsistencies requiring attention and correction	The task of preparing electronic transactions is greater than the benefits from supporting services provided
	Competitive advantage	Competitive advantage because major industry participants incentivise the adoption of electronic conveyancing.	No competitive advantage because of industry and community lack of confidence in electronic conveyancing

Sources:

- *NECO industry consultation*, refer <http://www.necs.gov.au/NPT-Resolutions/default.aspx>
- *Economic Appraisal of electronic conveyancing in NSW*, refer [http://necnsw.lpi.nsw.gov.au/\\_data/assets/pdf\\_file/0006/143934/NECS\\_KPMG\\_final\\_report\\_Jan\\_2009.pdf](http://necnsw.lpi.nsw.gov.au/_data/assets/pdf_file/0006/143934/NECS_KPMG_final_report_Jan_2009.pdf)
- *National E-Conveyancing in NSW – Consultation Feedback Report*, refer [http://necnsw.lpi.nsw.gov.au/\\_data/assets/pdf\\_file/0012/153021/Consultation\\_Feedback\\_Report.pdf](http://necnsw.lpi.nsw.gov.au/_data/assets/pdf_file/0012/153021/Consultation_Feedback_Report.pdf)

There are significant benefits for all industry participants in National Electronic Conveyancing. Every legal/conveyancing practice will benefit from savings in preparation of documents, and avoidance of costs in both arranging and attending physical settlement (and it is expected that most of the factors that contribute to a 30% failure rate for settlements will be eliminated in electronic conveyancing). The new services to be provided by land registries for checking transactions prior to lodgment should also all but eliminate requisition and rework costs.

For national businesses such as banks and large development companies, there will be additional savings achieved through more consistent practices across jurisdictions. It is expected that all but a few industry participants will eventually opt in to electronic conveyancing. The main contributing factor for those few expected to opt out of National Electronic Conveyancing is likely to be unfamiliarity and general distrust of the technology and electronic transactions.

A decision to opt in may be further encouraged by industry participants, in particular major financial institutions, passing on savings achieved in National Electronic Conveyancing through reduced mortgage establishment fees if the transaction can be completed electronically.

## **4.5 Competition effects**

The potential competition effects of the introduction of electronic conveyancing are set out below.

### **4.5.1 Increased competition within conveyancing and financial services industries**

The National Electronic Conveyancing platform will be a web based “hub” business where subscribers access a shared electronic workspace to prepare documents to effect a conveyancing transaction. Efficiency benefits will be best realised by subscribers conducting as many transactions as possible electronically through the platform. The greater the number of subscribers using the platform and therefore the greater the number of transactions that can be conducted electronically, the greater the benefits to all subscribers using the platform.

Conveyancing industry service providers and financial institutions who decide to implement electronic conveyancing may decide to differentiate between the cost of paper and electronic conveyancing, based on the cost of providing their services through either medium. Assuming that transactions effected electronically can be provided at a lower cost and that the cost savings are passed on to consumers, the introduction of National Electronic Conveyancing may increase competition within each of the conveyancing and financial services industries.

Participation in National Electronic Conveyancing by the major financial institutions may also drive smaller banks to participate, as the smaller financial institutions seek to keep up with changes in the market and remain competitive.

## 4.5.2 Potential for competing Electronic Lodgment Network Providers

Securing a national full-service electronic conveyancing platform requires a consistent regulatory framework and commitment by all of the jurisdictions to fund the necessary investment in land registry systems. The establishment of a successful and stable electronic lodgment network to provide electronic conveyancing services across Australia also requires significant investment and risk management if this important reform is to be successful. There are significant political, commercial and practical challenges to establishing a viable and effective e-conveyancing platform as evidenced by a number of failed attempts to establish electronic conveyancing in the past.

For this reason COAG decided that NECDL would build and provide an electronic lodgment network and a number of States contributed financially to establish and support that company during its development phase.

The ECNL does not limit the number of ELNOs that may be approved by the Registrar.

In the view of the participating jurisdictions the establishment work being undertaken with NECDL and the ensuing development of an ELN by NECDL is likely to have the effect of reducing barriers to entry because:

- an established regulatory framework will be in place to accommodate potential future entrants;
- the significant development costs in establishing an ELN will be reduced because the design of electronic transactions and the data standard will have stabilised; and
- the operation of the NECDL ELN will provide potential future entrants with confidence by minimising risk in the context of unproven technology, unproven market demand and unproven regulatory feasibility.

The work that will be undertaken by the various Land registries, banks and other users as they interface with and use a National ELN (including, where necessary, making any necessary modifications to their own systems and training staff) will also open the way for future providers.

Accordingly, whilst it is expected that NECDL will be the only ELNO initially, the ECNL allows for the Registrar to provide an ELN or for the Registrar to approve a person to provide and operate an ELN. In the future one or more ELNO's may be authorised to provide and operate an ELN.

The current manual paper based conveyancing system will also remain as an alternative to electronic conveyancing, at least for the foreseeable future. Complete replacement of the paper-based conveyancing system is unlikely for a considerable period as some transactions are not easily adapted for electronic lodgment. However, the services provided by settlement and lodgment agents or service providers are likely to be negatively impacted because the volume of paper based conveyancing transactions is likely to be significantly reduced over time following the introduction of electronic conveyancing.



## 4.6 Other Options Considered

In July 2008 COAG recognised that National Electronic Conveyancing would provide significant advantages to the National economy as a whole and decided to implement National Electronic Conveyancing as part of the National Partnership Agreement to Provide a Seamless National Economy. Under the COAG plan, National Electronic Conveyancing is to provide an efficient and effective national platform to:

- settle real property transactions electronically;
- prepare and lodge registry instruments electronically with Land Registries; and
- meet associated duty and tax obligations electronically<sup>35</sup>.

Prior to the decision by COAG, the States and Territories were investigating options for implementing electronic conveyancing. New South Wales commissioned an economic appraisal in 2008 that investigated a number of different service delivery options. The service delivery options which were considered included:

- **Option 1 – Do nothing:** involves no change to the current activities undertaken as part of the conveyancing process;
- **Option 2 – Retain paper based system and introduce lodgment technology:** involves no change to the current conveyancing process apart from the technology for document preparation, providing ready data capture for the NSW Land Registry (either as barcodes on forms or a portal for instrument generation);
- **Option 3 – Introduction of National Electronic Conveyancing:** investment in electronic conveyancing based on the *NECS Roadmap* as published by NECO; and
- **Option 4 – State-based system:** involves single jurisdictional implementation and investment in a NSW system which does not have the same national coverage of electronic conveyancing, but would have most of its key functions.

Given the agreement through COAG in 2008 that committed the Commonwealth, States and Territories to the introduction of a National Electronic Conveyancing system, *Option 4 – State-based system* was not subject to modelling of costs and benefits in the 2008 economic appraisal.

Further, *Option 4 – State-based system* is counter to the deregulation agenda commenced through the National Competition Policy reforms of the 1990s and 2000s, and more recently through the development of the *National Partnership Agreement to Deliver a Seamless National Economy* (2008), which have both sought to remove or reduce differences across jurisdictions that negatively impact on business.

Additionally it was determined that Option 4 would not achieve the same savings as National Electronic Conveyancing due to a number of factors including:

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<sup>35</sup> See COAG Communiqué of 3 July 2008 meeting available at [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2008-07-03/index.cfm](http://www.coag.gov.au/coag_meeting_outcomes/2008-07-03/index.cfm)

- increased implementation costs due to the duplication in each jurisdiction, lack of interoperability and unnecessary costs in providing for data linkages to differing State or Territory systems;
- decreased adoption of electronic conveyancing by national businesses such as the banks leading to decreased adoption overall.

Given the COAG agreement that committed the Commonwealth, States and Territories to the introduction of National Electronic Conveyancing, Option 4 – State based system was not subject to modelling of costs and benefits in the 2008 economic appraisal and consequently was included as an option in the Consultation RIS.

## 4.7 Impact of introducing National Electronic Conveyancing

The impact of introducing National Electronic Conveyancing is expected to be positive in that it will result in net benefits for the economy as a whole. More detail of the impact of National Electronic Conveyancing can be found in Appendix A.

### 4.7.1 Quantifiable costs and benefits

The introduction of National Electronic Conveyancing is expected to lead to **cost savings** for the economy as a whole. In terms of quantifying the savings of National Electronic Conveyancing, these are expected to be primarily realised in:

- electronic settlement and lodgment, which removes the need to arrange and physically attend settlement and lodgment;
- reduced duplicated data entry and re-work;
- courier and bank cheque savings.

The introduction of National Electronic Conveyancing will also involve additional costs, which can be broadly summarised as follows:

- industry and Land Registry IT set up, maintenance and staff training costs;
- ELN establishment and operational costs;<sup>36</sup>
- time required to complete client authorisation and subscriber administration of users of the ELN;
- cost associated with the approval of cleared funds in the ELN; and
- industry support costs, that is, the service costs for licensed service providers who may offer tailored interfaces, integration and support services as an alternative to direct access to the ELN.

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<sup>36</sup> In practice, ELNO capital and operating costs will be recovered through user fees. User fees were discussed in consultation with industry during the preparation of the 2008 economic appraisal, but ELNO projected costs are used in the economic analysis.

Tables 6-3 to 6.5 summarise the estimates of the economic impact of National Electronic Conveyancing on a national level (1-1) and nationally for the private (1-2) and public (1-3) sectors. Based on the outputs scaled up from the 2008 NSW economic appraisal, the economic impact of National Electronic Conveyancing is estimated to deliver a total net benefit of \$582.0m (in NPV terms) during the period between 2011-12 and 2027-28<sup>37</sup>. The private sector share is a net benefit of \$532.4m and the public sector share a net benefit of \$49.60m. More detail of the indicative quantitative analysis of the potential costs and benefits of National Electronic Conveyancing, based on scaled up NSW figures, is included at Appendix A.

*Table 6.3: Summary of Economic Impact of Introduction of National Electronic Conveyancing (\$m, 2011 dollars)*

NPV National Electronic Conveyancing	
<b>Economic appraisal results</b>	
Capital costs	(\$258.9)
Recurrent costs	(\$1,084.1)
Savings	\$1,924.9
<b>Net Present Value (2011-12 to 2027-28)</b>	<b>\$582.0</b>

*Source: Scaled up and adjusted from KPMG 2008 economic appraisal*

*Table 6.4: Summary of impact of National Electronic Conveyancing on private sector (\$m, 2011 dollars)*

NPV National Electronic Conveyancing	
<b>Economic appraisal results</b>	
Capital costs	(\$226.9)
Recurrent costs	(\$984.1)
Savings	\$1,743.4
<b>Net Present Value (2011-12 to 2027-28)</b>	<b>\$532.4</b>

*Source: Scaled up and adjusted from KPMG 2008 economic appraisal*

*Table 6.5 Summary of impact of National Electronic Conveyancing on public sector (\$m, 2011 dollars)*

NPV National Electronic Conveyancing	
<b>Economic appraisal results</b>	
Capital costs	(\$31.9)
Recurrent costs	(\$100.0)
Savings	\$181.5
<b>Net Present Value (2011-12 to 2027-28)</b>	<b>\$49.6</b>

*Source: Scaled up and adjusted from KPMG 2008 economic appraisal*

The above estimates are based on the following take up rates.

<sup>37</sup> At the time the Economic Analysis was undertaken one of the assumptions made was that first ELNO would be operating in 2011-12.

Table 4-6: Assumed take up rates

Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10	Year 11	Year 12	Year 13 onwards
0%	0%	3%	9%	18%	29%	42%	58%	73%	85%	93%	97%	100%

Source: NECO, Draft Funding Model for a National Electronic Conveyancing System (March 2008), Figure 12

Sensitivity analysis has been undertaken to quantify the impact on the NPV calculations of varying a number of assumptions:

- discount rates of 5, 7 and 10 percent;
- take up rate: +/- 10 percent of the base annual take up rate assumptions (up to a maximum of 100% take up);
- costs: +/- 10 percent of the capital and recurrent cost estimates;
- savings: +/- 10 percent of the recurrent savings estimates; and
- capital costs: increasing the IT and set up capital costs for industry and government by 50 percent.

The sensitivity analysis provided in section 3 of Appendix A shows that variations in the key assumptions still provide a significant net benefit in NPV terms.

#### 4.7.2 Qualitative benefits

In addition to the benefits and costs of National Electronic Conveyancing in the above analysis, a range of qualitative impacts has been identified.

The table below outlines additional qualitative benefits of National Electronic Conveyancing and identifies the likely beneficiaries by stakeholder group.

Table 4-3: Qualitative benefits of National Electronic Conveyancing

Benefits	Means by which benefits achieved	Beneficiary				
		Govt	Financial Inst.	Lawyer/Conveyancer	LSP	Public
Common national conveyancing infrastructure	<ul style="list-style-type: none"> <li>• Uniform electronic conveyancing legal framework and practices</li> <li>• Single IT infrastructure and data standard supporting property transactions in all states and territories</li> </ul>	✓	✓	✓	✓	
Improved access for rural and remote communities	<ul style="list-style-type: none"> <li>• Practitioner access to electronic conveyancing is only limited by availability of the Internet services</li> </ul>			✓		✓

Benefits	Means by which benefits achieved	Beneficiary				
		Govt	Financial Inst.	Lawyer/Conveyancer	LSP	Public
Transaction assurance	<ul style="list-style-type: none"> <li>Common virtual workspace for all subscribers involved in a transaction ensuring data integrity, sharing of transaction information and transaction preparation status</li> <li>Title activity check and lodgment verification services for on-demand monitoring of transaction assurance</li> <li>Immediate confirmation of lodgment result, and subsequent registration of dealings in registrable form</li> </ul>	✓	✓	✓		✓
Faster transaction processing	<ul style="list-style-type: none"> <li>Electronic financial settlement facilitating earlier availability of cleared funds for payees after settlement</li> <li>Direct lodgment of dealings immediately after settlement mitigating risks associated with lodgment delay inherent in paper-based conveyancing</li> </ul>		✓	✓		✓
Capacity increase within Land Registry	<ul style="list-style-type: none"> <li>Electronic lodgment will increase the capacity within Land Registries to process fluctuating and growing lodgment volumes and decrease processing times</li> </ul>	✓	✓	✓		✓

### 4.7.3 Risk

The risks associated with the electronic conveyancing process were covered extensively in the risk assessment undertaken by Clayton Utz in 2007<sup>38</sup>. The process risks identified were consequently addressed in the Report<sup>39</sup>.

The key risks that may affect realisation of the economic benefits associated with the introduction of National Electronic Conveyancing include:

<sup>38</sup> Available from the NECS website at <http://www.necs.gov.au/Risk-Management-2/default.aspx>

<sup>39</sup> For further detail on the legal framework developed by Clayton Utz, please refer to Clayton Utz, NECS Legal Framework Development, Final Report Volume 1, accessed at <http://www.necs.gov.au/Redesign--Legal-Framework-2/default.aspx>

- **Assumed take up rate is over-estimated** – the estimated net savings of National Electronic Conveyancing are largely dependent on the take-up rate. Any change to the assumed take-up rate will consequently change the net savings. For example, if the assumed take-up rate is too optimistic, the net savings modelled in Appendix A<sup>40</sup> will be lower than they otherwise would have been.
- **Cost estimates may be under-estimated** - although the 2008 economic appraisal suggests that the results are robust to material changes in other variables (e.g. costs of implementation).

## 4.8 Net savings by case type

The original New South Wales analysis showed the following savings on a case-by-case basis. These figures are indicative of savings in all jurisdictions in view of the overall similarities in conveyancing practice and real property laws in all of the jurisdictions. While some economies of scale may apply to overall costs in larger firms, the savings indicated below will apply generally per case within acceptable limits regardless of the jurisdiction or the size of the conveyancing practice.

*Table 4-4 Indicative net savings by case type*

Differentiation of savings by case type	
Transaction Type	Savings per Case
Discharge (D)	\$ 3.93
Transfer (T)	\$ 169.60
Mortgage (M)	\$ 26.83
Discharge & Transfer (DT)	\$ 168.98
Discharge & Mortgage (DM)	\$ 169.70
Transfer & Mortgage (TM)	\$ 171.47
Discharge, Transfer & Mortgage (DTM)	\$ 253.35
<b>Average</b>	<b>\$ 169.54</b>

<sup>40</sup> These variations are modelled in the Sensitivity Analysis included in Appendix A.

## 5 Consultation

### 5.1 Consultation undertaken on National Electronic Conveyancing

From 2004 stakeholder consultation strategies have ranged from awareness raising to direct engagement with identified stakeholders to increase understanding of National Electronic Conveyancing. Specific strategies and tools include meetings, workshops, face-to-face briefings, newsletters, surveys and publication of issues papers<sup>41</sup>.

This has enabled policy makers to gain an understanding of the practicalities of National Electronic Conveyancing and its impact on government and industry as well as identifying potential compliance risks and other issues.

Appendix C provides a complete timeline of the consultation history for the broader National Electronic Conveyancing program<sup>42</sup>.

The findings from stakeholder consultations and responses to issues papers provided input into a number of reports which has fed into the development of the development of National Electronic Conveyancing<sup>43</sup>. Reports in particular include the NECS Roadmap documents, regulatory reviews conducted by Gilbert and Tobin and Clayton Utz, web services requirements and non-functional requirements definitions.

### 5.2 Consultation on Development of a Legal Framework for National Electronic Conveyancing

In January 2009, Clayton Utz was engaged by the National Electronic Conveyancing Office to prepare a report on the development of a legal framework necessary to support National Electronic Conveyancing.

In preparing the report Clayton Utz determined:

- the purpose of a single national legal framework (the legal framework) for National Electronic Conveyancing and what it must achieve
- the performance objectives that must be met by the legal framework
- the components of the legal framework necessary for it to be effective in achieving the performance objectives.

The “*NECS Legal Framework Development Report*” (the Report) was published in two volumes in February 2010<sup>44</sup>.

In preparing the Report, Clayton Utz conducted extensive consultation with stakeholders releasing four consultation packages and request for feedback on various aspects of the legal framework being developed.

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<sup>41</sup> See [www.necs.gov.au](http://www.necs.gov.au) for a comprehensive list of issues papers

<sup>42</sup> Unless otherwise stated, information on the consultation program was sourced from NECSO documents, presentations and press releases.

<sup>43</sup> National Electronic Conveyancing Office, *National Consultation Program*, accessed at <http://www.necs.gov.au/default.aspx?ArticleID=513#Keyinitiatives>

<sup>44</sup> <http://www.necs.gov.au/Redesign---Legal-Framework-2/default.aspx>.

The first stakeholder consultation request sought comments regarding the:

- key differences in regulation of practitioners and conveyancing practice among jurisdictions;
- identification of current conveyancing processes in jurisdictions and future electronic conveyancing processes;
- current paper based conveyancing practices; and
- comparison of conveyancing practices in all jurisdictions (except Tasmania and ACT) and a list of key issues and challenges for an effective legal framework for National Electronic Conveyancing.<sup>45</sup>

The second consultation request sought comment on the:

- draft statement of purpose and performance objectives for the National Electronic Conveyancing legal framework; and
- revised and expanded list of key issues and challenges of defining a legal framework for National Electronic Conveyancing.<sup>46</sup>

The third consultation report focused on legal relationships which an ELNO has with government and other electronic conveyancing stakeholders. Comments were sought on:

- the statement of purpose and performance objects for the legal framework which was modified following comments on the Second Consultation Package;
- a top-down analysis of how Clayton Utz proposed how the legal framework should operate through National Electronic Conveyancing enabling legislation;
- intergovernmental agreements and development of model rules and conditions which are to be imposed on ELNOs by each jurisdiction and supplemented by permitted jurisdictional requirements; and
- a framework-level description of the subject matter of the participation rules for the National Electronic Conveyancing legal framework.<sup>47</sup>

The fourth consultation request focused on a range of issues relating to liability and compensation in the National Electronic Conveyancing program. Comments were sought on the:

- updated performance objectives for the risk management framework and the performance objectives relating to liability for the legal framework;
- liability positions of various electronic conveyancing stakeholders;
- general insurance issues; and
- attribution rule to work through fraud scenarios examining the liability of subscribers and certifiers for misuse of private keys to create digital signatures and misdirection of settlement monies were provided.<sup>48</sup>

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<sup>45</sup> Clayton Utz, *NECS Legal Framework Development Final Report*, 4/02/2010, p112.

<sup>46</sup> Clayton Utz, p112.

<sup>47</sup> Clayton Utz, p.114.

<sup>48</sup> Clayton Utz, p.115.



Separate to the consultation requests, a number of briefings as part of the wider Clayton Utz stakeholder consultation program were conducted with the following stakeholders:

- Land Registry representatives;
- bank lender representatives;
- national project team members;
- State project team;
- liability insurers' representatives; and
- regulators of conveyancers and lawyers<sup>49</sup>.

### 5.3 Incorporation of stakeholder views on Legal Framework

As a result of the extensive consultation with stakeholders during development of the Report Clayton Utz incorporated stakeholder views into the Report. Clayton Utz has stated that the acceptability of the legal framework to National Electronic Conveyancing stakeholders has been tested throughout its stakeholder program<sup>50</sup>.

In turn the legal framework for National Electronic Conveyancing that will be implemented by the Electronic Conveyancing National Law is based largely on the Report and subsequent consultation.

Areas where stakeholder views were adopted include:

- The specifics of the implementation of the participation agreement and participation rules. Specific implementation of the rules identified in the report has been directly attributable to stakeholder consultation undertaken throughout the project.<sup>51</sup>
- Two views were put concerning the obligations of parties to each other in a workspace. Clayton Utz considered that the benefit of those obligations should be extended to Clients of the Subscribers but only to the Subscribers and Clients represented in the relevant Workspace. Stakeholder feedback generally agreed with this proposed limitation<sup>52</sup>.

The diverse and often competing interests of stakeholders also led to conflicting views in some circumstances resulting in some views not being adopted. Examples of this are:

- Clayton Utz raised in stakeholder consultations whether there was a need for the establishment of a first resort separate compensation fund for Clients and registered proprietors who suffer losses in National Electronic Conveyancing. While several stakeholders supported a first resort compensation fund in principle others doubted it would work in practice. Questions were raised as to what losses and claimants would be covered and how it would be funded and how it could be ensured that such a compensation fund was to be the first resort.

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<sup>49</sup> Clayton Utz, p.115.

<sup>50</sup> Clayton Utz, p.20.

<sup>51</sup> Clayton Utz. P.34.

<sup>52</sup> Clayton Utz, pp 59 & 60.

Clayton Utz came to the view that there was not a demonstrated case for another compensation fund for National Electronic Conveyancing (regardless of whether it is a first recourse fund)<sup>53</sup>.

- Clayton Utz proposed a strong attribution rule for digital signatures defining very limited circumstances where a subscriber could repudiate such a signature. All stakeholders (industry and government) who commented on this issue (except for one) favoured a strong attribution rule (one or other of the two proposed) and the most favoured proposal was adopted. This would provide confidence to parties in National Electronic Conveyancing that digital signatures relied on by them or their Subscribers were reliable and could only be repudiated in very limited circumstances. The dissenting view, by a professional indemnity insurer, was that a strong attribution rule was not required<sup>54</sup>.

## 5.4 Submissions in response to the Consultation Regulation Impact Statement

ARNECC released the Consultation RIS on Friday 6 July 2012 for a four week public consultation period. Six submissions were received. The majority of the submissions related to the draft ECNL. Appendix D is a table containing consolidated feedback not related to the draft ECNL. The table at Appendix D also contains ARNECC's response to the feedback, including where it is addressed in this RIS.

Whilst during the consultation process the quantum of costs and savings contained in the economic analysis have been questioned there has been insufficient evidence provided to justify any amendment to the economic analysis.

On the other hand one respondent agreed that there would be savings in NPV terms.

No submission suggested that the preferred option be any option other than Option 5.

Appendix C is a list of persons who provided a submission in response to the Consultation RIS.

## 5.5 Additional Consultation on the draft Electronic Conveyancing National Law

ARNECC undertook additional consultation on the draft ECNL by releasing it to key stakeholders for comment on 30 March 2012. In addition ARNECC met with key stakeholders to discuss the key issues raised in their comments. The table at Appendix F contains a consolidation of the comments received in response to ARNECC's release of the draft ECNL, additional issues raised during the follow-up meetings and comments received in relation to the draft ECNL as part of submissions to the Consultation RIS.

The table at Appendix F also contains ARNECC's response to those comments including indicating amendments to the draft ECNL where they have been made. An amended draft ECNL is provided at Appendix F. Appendix E is a list of persons who provided a submission in response to the 30 March 2012 release of the draft ECNL.

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<sup>53</sup> Clayton Utz, p.19.

<sup>54</sup> Clayton Utz, pp 82-84.

## 6 Conclusion and recommended option

The introduction of National Electronic Conveyancing is a commitment by COAG. It is supported by economic analysis on the basis that it produces a positive NPV given the assumptions used.

Based on the impact analysis in Appendix A, National Electronic Conveyancing will produce a positive NPV over the timeframe of the analysis given the assumptions used. The savings associated with National Electronic Conveyancing have been estimated to exceed costs by \$580m (in NPV terms) during the 17 year period.

However, it must be recognised there is a degree of uncertainty in the estimates of the economic impacts (both costs and savings) identified in this Consultation RIS.

The principal uncertainties include:

1. The assumed take up rate may be too optimistic – the estimated net savings of National Electronic Conveyancing are largely dependent on the take-up rate. Any change to the assumed take-up rate will consequently change the net savings.
2. Cost estimates may be underestimated.
3. The impact analysis included in this RIS is based on analysis of the economic impact of electronic conveyancing in New South Wales. Those figures have been scaled up to a national level and the overall costs and savings during the 17-year period allocated to the private and public sectors. In estimating the results at a national level, the results from the 2008 economic appraisal on the implementation of electronic conveyancing in NSW were extrapolated based on New South Wales' share of national conveyancing transactions and reflecting known changes in cost from 2008 to 2010. The results are therefore indicative only of the savings National Electronic Conveyancing might provide to the Australian economy. The allocation to public or private sectors was undertaken by estimating on a category-by-category basis, which of the private sector or public sector was likely to bear the additional costs of National Electronic Conveyancing, earn the cost savings, and the approximate share of each category of cost or savings attributable to each sector.

Despite these uncertainties, the sensitivity analysis provided in Appendix A shows that in spite of variations in the key assumptions National Electronic Conveyancing will still provide a significant net benefit in NPV terms.

Whilst during the consultation process the quantum of costs and savings contained in the economic analysis have been questioned there has been insufficient evidence provided to justify any amendment of the economic analysis.

The economic appraisal contained in the RIS is based on the best available information at the time the RIS was prepared. Further, the scaling up of the New South Wales analysis is appropriate given that business of conveyancing is fundamentally the same across jurisdictions, with the real difference lying in the volume of transactions.

The sensitivity analysis confirms that costs will be incurred by both public and private participants in National Electronic Conveyancing in order to realise the savings that result from that participation.

The recommended regulatory option is the implementation of a common legal framework that enables documents in electronic form to be lodged and dealt with under the Torrens titles legislation of each jurisdiction. The recommended legal framework is modelled on the recommendations of the Report.

The ECNL will facilitate the implementation of electronic conveyancing in Australia and the realisation of the economic benefits forecast.

While the introduction of National Electronic Conveyancing was committed to by COAG it is supported by economic analysis on the basis that it produces a positive NPV over the timeframe of the analysis given the assumptions used. Under this option, the savings associated with electronic conveyancing will exceed costs by \$582.0m (in NPV terms) during the period between 2011-12 and 2027-28<sup>55</sup>.

This option will result in net savings to the private sector and the public sector of approximately \$532.4m and \$49.6m (in NPV terms) respectively, over this period.

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<sup>55</sup> At the time the Economic Analysis was undertaken one of the assumptions made was that first ELNO would be operating in 2011-12.

## 7 Implementation and review

### 7.1 Implementation of legal framework

The IGA provides governance for the development, implementation and management of the regulatory framework.

To ensure consistency across jurisdictions it has been proposed the ECNL is introduced using an application law scheme (which is commonly used to introduce national legislation). New South Wales will function as the host jurisdiction for the national legislation and plans to enact the ECNL in 2012.

As soon as practicably possible following the passing of the ECNL in New South Wales, the other participating jurisdictions will enact an application law or corresponding law to adopt the ECNL.

ARNECC is the body established to facilitate the implementation and ongoing management of the regulatory framework for National Electronic Conveyancing to the extent that it facilitates or relates to the lodgment of documents with the Registrar, and an ELNO's relationship with the Registrar.

ARNECC membership comprises the Registrar or their nominee from each Australian State and Territory.

The principal functions of ARNECC are to:

- advise the State and Territory Governments on any proposed changes to the ECNL;
- provide authoritative advice to the States and Territories about matters relating to National Electronic Conveyancing; and
- ensure that, as far as is practicable, business practices with respect to National Electronic Conveyancing are consistent when implemented by the Registrars in each jurisdiction.

ARNECC is committed to open, accountable and responsive decision making which is informed by effective communication and consultation between ARNECC and key conveyancing stakeholders.

By engaging proactively with stakeholders, both through ARNECC-initiated consultations and through consultations organised by others, ARNECC aims to achieve the best possible outcome for National Electronic Conveyancing by:

- obtaining feedback on the potential impact of the proposed regulatory mechanisms that are applicable to National Electronic Conveyancing;
- benefiting from the expertise of stakeholders, notably in identifying and analysing issues relating to the proposed regulatory mechanisms;
- providing opportunities for alternative approaches to any identified issues regarding the proposed regulatory mechanisms to be considered; and
- promoting understanding of the work of ARNECC and its role.

ARNECC will consult in accordance with its Stakeholder Engagement and Consultation Policy<sup>56</sup> to ensure that stakeholders' views are considered in making determinations.

## **7.2 Provision of a National Electronic Conveyancing Platform**

NECDL was established as a company limited by guarantee in January 2010 under a Governance Agreement between the Victorian, New South Wales and Queensland Governments and they were joined later by Western Australia which also became a member of NECDL.

COAG has resolved that NECDL is to create, implement and operate a National Electronic Conveyancing platform.

NECDL has since become a company limited by shares which allows the company to receive industry funding.

NECDL has completed its business case and forecast funding requirement to build and operate an ELN. It has recently acquired relevant intellectual property from several States and commenced the design and build of the system in August 2011.

For further information about NECDL see <http://www.nationaleconveyancing.com.au/>.

## **7.3 Review of performance**

The IGA provides for the review of the ECNL the after seven years, or at such earlier time as may be agreed between the parties to the IGA. The maximum time period of seven years provides sufficient certainty for an ELNO as well as providing sufficient time for the Registrars to determine the effectiveness or otherwise of the ECNL. If either a particular section of the ECNL, or any other part of the legal framework, requires amendment this can occur at any time.

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<sup>56</sup> See ARNECC website at <http://www.arnecc.gov.au/publications>

## 8 Definitions and terms

**ARNECC** means the Australian Registrars' National Electronic Conveyancing Council established by the Intergovernmental Agreement.

**Client Authorisation** is a document by which a client authorises a subscriber to act on their behalf in an electronic conveyancing transaction and to digitally sign documents on the client's behalf.

**COAG** means the Council of Australian Governments.

**COAG Agreement** means the National Partnership Agreement To Deliver A Seamless National Economy between the Commonwealth of Australia and the States and Territories.

**Electronic Conveyancing National Law (ECNL)** means a national law scheme agreed to be established by the Intergovernmental Agreement that will facilitate the implementation and operation of National Electronic Conveyancing in accordance with the COAG Agreement, as amended from time to time.

**Electronic Lodgment Network (ELN)** is a network established to create and electronically lodge registry instruments and other electronic documents with the jurisdiction's Land Registry.

**Electronic Lodgment Network Operator (ELNO)** is a person authorised by a jurisdiction to operate an Electronic Lodgment Network.

**Intergovernmental Agreement (IGA)** means the Intergovernmental Agreement for a National Electronic Conveyancing Law

**Land Registry** means the organisation, person or body operated by each of the jurisdictions for the registration, noting and recording of dealings in land and is the jurisdiction-based custodian of the titles register.

**Net Present Value (NPV)** is the value, as of a specified date, of future cash inflows less all cash outflows (including the cost of investment) calculated using an appropriate discount rate.

**Operating Requirements** means the requirements set by ARNECC and applied by the Registrar that, pursuant to the ECNL, an ELNO must comply with.

**Participation Rules** means the rules, set by ARNECC and applied by the Registrar that, pursuant to the ECNL and their Participation Agreement, a Subscriber must comply with.

**Registrar** means the Registrar General or similar State or Territory official having responsibility for the jurisdiction's Land Registry function as listed below:

- NSW – Registrar General;
- Vic – Registrar of Titles;
- Qld – Registrar of Titles;

- WA – Registrar of Titles and/or other member of the Western Australian Land Information Authority's (trading as Landgate) staff nominated by the Chief Executive of the Authority;
- SA – Registrar-General;
- Tas – Recorder of Titles;
- NT – Registrar-General; and
- ACT – Registrar General.

**registry instrument** means any document that may be lodged under the land titles legislation for the purpose of:

- (a) creating, transferring, disposing of, mortgaging, charging, leasing or dealing with in any other way an estate or interest in land, or
- (b) getting something registered, noted or recorded in the titles register; or
- (c) getting the registration, note or record of something in the titles register changed, withdrawn or removed.

**Subscriber** means a person who is authorised under a participation agreement to use an ELN to complete conveyancing transactions on behalf of another person or on their own behalf.

**titles register** means the public register in each jurisdiction that is maintained by the Land Registry under relevant legislation and containing information related to land.

**Verification of Identity rules** means the rules applying to Subscribers and mortgagees to be complied with when identifying parties to an electronic conveyancing transaction.



## Appendix A

# Indicative Impact Analysis of the Introduction of National Electronic Conveyancing

## 1. Introduction

Notwithstanding that the decision to introduce National Electronic Conveyancing has been made by COAG, this annexure analyses the economic impact of National Electronic Conveyancing at a national level. The economic impact of implementing National Electronic Conveyancing estimated in this analysis is indicative only.

It is based on the results identified in a KPMG report entitled Economic Appraisal of Electronic Conveyancing in NSW (2008 economic appraisal)<sup>57</sup> for Land & Property Information (LPI). These estimates were subsequently revised to reflect the 2010 cost estimates in an unpublished business case on the implementation of electronic conveyancing in New South Wales prepared by LPI in March 2010 for budgetary purposes.

These figures have been 'scaled up' to extrapolate the economic impact on a national level, based on the New South Wales share of national conveyancing and reflecting known changes in costs from 2008 to 2011. This is a valid approach given that, while there are detail differences, conveyancing across Australia is essentially very similar in all the States and Territories, which all apply the Torrens system of land title registration. Having reduced savings figures to a per transaction basis, the savings are applicable across the jurisdictions and regardless of the size of the conveyancing practice.

This section demonstrates that, in a comparison between the Do Nothing option or the implementation of National Electronic Conveyancing as proposed, the savings associated with electronic conveyancing will exceed costs by \$582.0m (in NPV terms) during the period between 2011-12 and 2027-28<sup>58</sup>.

This option will result in net savings to the private sector and to the public sector of approximately \$532.4m and \$49.6m (in NPV terms) respectively, over this period. The original New South Wales economic appraisal concluded that this would mean an average saving of approximately \$170 per transaction. The breakdown per case type is included at Table A-19 below.

### 1.1. Approach to allocation of the costs and savings of National Electronic Conveyancing

Table A-1: Key modelling assumptions

Modelling input	Assumption
Annual wage growth	3.5% per annum (nominal)
Take-up rate	Incremental growth to 100% in Year 12 <sup>59</sup>

<sup>57</sup> See [http://necnsw.lpi.nsw.gov.au/\\_data/assets/pdf\\_file/0006/143934/NECS\\_KPMG\\_final\\_report\\_Jan\\_2009.pdf](http://necnsw.lpi.nsw.gov.au/_data/assets/pdf_file/0006/143934/NECS_KPMG_final_report_Jan_2009.pdf)

<sup>58</sup> At the time the Economic Analysis was undertaken one of the assumptions made was that first ELNO would be operating in 2011-12.

<sup>59</sup> This relates to transactions in scope which is 70% of all transactions (equivalent to approximately 988 000).

Discount rate	7%
Model timeframe	17 years (15 years plus two years construction)
Year National Electronic Conveyancing is commercially operational	2013-14
Growth in transaction volumes	2% per annum

The following approach has been undertaken for the analysis in this Analysis.

## 1.2. Scaling up NSW net savings to a national level

The economic impact of the introduction of National Electronic Conveyancing is based on the results identified in the 2008 economic appraisal. The economic appraisal was undertaken by KPMG and in preparing their report, KPMG interviewed a cross-section of stakeholders including both small and large conveyancing practices. As the report estimated the economic impact of electronic conveyancing in New South Wales only, these results were 'scaled up' to determine an extrapolated national level, based on New South Wales's share of national conveyancing transactions (26.2%)<sup>60</sup>, and reflecting the revisions to the cost estimates made in 2010.

*Table A-2: Conveyancing in-scope transactions in Australia*

Jurisdiction	Number	Industry share
NSW	259,105	26.2%
Victoria	253,387	25.6%
Queensland	230,776	23.4%
Western Australia	133,895	13.6%
South Australia	67,908	6.9%
Tasmania	20,678	2.1%
ACT	13,284	1.3%
Northern Territory	8,966	0.9%
Australia	988,000	100.0%

Source: *NECO Draft Funding Model for a National Electronic Conveyancing System, March 2008*

Some minor adjustments to scaling up<sup>61</sup> have been applied taking account of differences between conveyancing processes in other jurisdictions and the use of some forms of electronic lodgment in Victoria, Queensland and Tasmania as discussed in the following sections.

<sup>60</sup> NECO, *Draft Funding Model for a National Electronic Conveyancing System* (March 2008), p.35

<sup>61</sup> See section 1.2.2 Adjustments have been made based upon the introduction of some form of electronic systems that have already allowed minor savings that would otherwise be attributed to National electronic conveyancing. However, the major savings from eliminating physical settlement, facilitating document preparation, increasing transparency and reducing errors and rework still apply to those jurisdictions.

### 1.2.1. Similarities between jurisdictions

Real property conveyancing in every Australian State or Territory operates under the principles of the Torrens title system of land title registration<sup>62</sup>. Each jurisdiction has its own Land Registry that maintains a titles register in accordance with jurisdiction-specific legislation and practices. Generally, a statutory officer appointed under that legislation, referred to in this document as the Registrar, is responsible for the administration of the titles register.

The process for updating the titles register has historically been paper-based though, over the past 25 years, there has been a movement to electronic systems and electronic registers. Similarly, financial institutions and industry practitioners have converted to electronic environments for communication and administration associated with real property transactions.

While regulatory and administrative responsibilities are State-based, as discussed above, many key industry participants (e.g. major banks, independent mortgage processors) are increasingly national in their operations.

Notwithstanding that conveyancing practices have evolved separately in each jurisdiction, the fact that, at least at a high level, property laws are very similar and all based on the Torrens system means that again conveyancing practices in all jurisdictions are all similar at the high level although there are many detail differences.

In all jurisdictions conveyancing involves an exchange of contracts, enquiries on behalf of the purchaser to confirm title, and a physical exchange followed by lodgment of documents at the relevant land registry in order to register and give effect to the transaction.

The underlying similarities in both the Torrens system and conveyancing practice means that the introduction of National Electronic Conveyancing will have a similar impact in each jurisdiction. Furthermore, as one of the principal aims of National Electronic Conveyancing is to increase consistency between jurisdictions, the legal framework and participation rules will be the same in each jurisdiction which further adds to the consistent impact of National Electronic Conveyancing in all of the Australian jurisdictions.

In order to allow the fullest use of electronic systems, the electronic gap between conveyancing industry systems and the Land Registries' systems needs to be bridged. As a result of that gap documents created electronically are required to be printed and signed by the parties, physically exchanged and largely physically lodged with the appropriate Land Registry for updating of the titles register. This means that "straight through" processing is not possible and further efficiency improvements cannot be made. A discussion highlighting the similarities between the jurisdictions follows:

#### **New South Wales**

In NSW conveyancing involves an exchange of contracts, enquiries on behalf of the purchaser to confirm title, and a physical exchange followed by lodgment of documents at the land registry, which is operated by Land and Property Information, a division of the Department of Finance and Services.

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<sup>62</sup> The Torrens Title system is a system of title by registration that is guaranteed by the State.

The medium used for conveyancing has remained largely manual and paper-based despite levels of automation in industry systems and within the land registry. The physical exchange of paper documents at settlement is required to complete the transfer of property, as is the physical lodgment of signed and witnessed paper documents to effect changes in the titles register.

It is these aspects of the conveyancing process that will be impacted by National Electronic Conveyancing, which will facilitate the preparation of documents and eliminate the need for a physical meeting to exchange documents and settle the financial aspects of the transaction and the need to then physically take the documents to be lodged at the land registry. National Electronic Conveyancing will also facilitate the registration processes within the land registry by eliminating the need for information from lodged documents to be transcribed into the land registry systems and by facilitating some levels of automated processing of that information.

## **Victoria**

In Victoria conveyancing involves an exchange of contracts, enquiries on behalf of the purchaser to confirm title, and for the most part, a physical exchange followed by lodgment of documents at the land registry, which is operated by Land Victoria within the Department of Sustainability and Environment.

While the medium used for conveyancing has mostly remained largely manual and paper-based despite levels of automation in industry systems and within the land registry, Land Victoria has introduced an electronic conveyancing system similar to that proposed for the national system. The Victorian system, Electronic Conveyancing Victoria (ECV), is the most similar to the proposed National Electronic Conveyancing system of any existing system in the world.

ECV was the first and until the introduction of National Electronic Conveyancing, continues to be the only electronic conveyancing system in the world that provides for electronic settlement of the conveyancing transaction in addition to electronic lodgment of documents with a land registry upon completion of the transaction.

Outside of ECV, and for the majority of conveyancing transactions, the physical exchange of paper documents at settlement is required to complete the transfer of property, as is the physical lodgment of signed and witnessed paper documents to effect changes in the titles register.

It is these aspects of the conveyancing process that will be impacted by National Electronic Conveyancing, which will facilitate the preparation of documents and eliminate the need for a physical meeting to exchange documents and settle the financial aspects of the transaction and the need to then physically take the documents to be lodged at the land registry. Land Victoria has also introduced a system to capture information from paper documents using Object Character Recognition (OCR) software facilitating a degree of automated processing of transactions. Accordingly, the Victorian land registry will not benefit from the lodgment of documents in electronic form to the same extent as will New South Wales.

However, adjustments were made to the impact figures due to these differences and Victoria has prepared a separate assessment of the impact of National Electronic Conveyancing in comparison to its present ECV system which is attached as Annexure G.

### **Queensland**

In Queensland conveyancing, involves an exchange of contracts, enquiries on behalf of the purchaser to confirm title, and a physical exchange followed by lodgment of documents at the land registry, which is operated by the Titles Registry within the Department of Natural Resources and Mines.

While the medium used for conveyancing has mostly remained largely manual and paper-based despite levels of automation in industry systems and within the land registry, the Queensland Titles Registry has for some years operated a system of electronic lodgment of scanned images of documents and processing using OCR technology.

The physical exchange of paper documents at settlement is still required to complete the transfer of property although the lodgment and processing of documents within the Titles registry is facilitated by the e-Lodgment and d-Lodgment systems discussed below in para 1.1.2.

The physical preparation of paper documents for exchange and settlement, and the physical settlement itself will be impacted by National Electronic Conveyancing, which will facilitate the preparation of documents and eliminate the need for a physical meeting to exchange documents and settle the financial aspects of the transaction. There will also be cost savings for industry with the removal of requirements to scan documents within set parameters for e-Lodgment. Accordingly, the Queensland land registry will not benefit from the lodgment of documents in electronic form to the same extent as will New South Wales. However, adjustments were made to the impact figures to take account of these differences.

### **Western Australia**

In Western Australia conveyancing involves an exchange of contracts, enquiries on behalf of the purchaser to confirm title, and a physical exchange followed by lodgment of documents at the land registry, which is operated by the Western Australian Land Information Authority, known as Landgate.

The medium used for conveyancing has remained largely manual and paper-based despite levels of automation in industry systems and within the land registry. The physical exchange of paper documents at settlement is required to complete the transfer of property, as is the physical lodgment of signed and witnessed paper documents to effect changes in the titles register.

It is these aspects of the conveyancing process that will be impacted by National Electronic Conveyancing, which will facilitate the preparation of documents and eliminate the need for a physical meeting to exchange documents and settle the financial aspects of the transaction and the need to then physically take the documents to be lodged at the land registry. National Electronic Conveyancing will also facilitate the registration processes within the land registry by eliminating the need for information from lodged documents to be transcribed into the land registry systems and by facilitating some levels of automated processing of that information.

### **South Australia**

In Western Australia conveyancing involves an exchange of contracts, enquiries on behalf of the purchaser to confirm title, and a physical exchange followed by lodgment of documents at the land registry, which is operated by the Land Titles Office within the Department for Planning, Transport & Infrastructure.

The medium used for conveyancing has remained largely manual and paper-based despite levels of automation in industry systems and within the land registry. The physical exchange of paper documents at settlement is required to complete the transfer of property, as is the physical lodgment of signed and witnessed paper documents to effect changes in the titles register.

It is these aspects of the conveyancing process that will be impacted by National Electronic Conveyancing, which will facilitate the preparation of documents and eliminate the need for a physical meeting to exchange documents and settle the financial aspects of the transaction and the need to then physically take the documents to be lodged at the land registry. National Electronic Conveyancing will also facilitate the registration processes within the land registry by eliminating the need for information from lodged documents to be transcribed into the land registry systems and by facilitating some levels of automated processing of that information.

### **Tasmania**

In Tasmania conveyancing, involves an exchange of contracts, enquiries on behalf of the purchaser to confirm title, and a physical exchange followed by lodgment of documents at the land registry, which is operated by the Land Titles Office within the Department of Primary Industries, Parks, Water and Environment.

While the medium used for conveyancing has mostly remained largely manual and paper-based despite levels of automation in industry systems and within the land registry, the Tasmanian Land Titles Office has for some years operated the Tasmanian Online Land Dealings (TOLD) system that facilitates the preparation of documents for lodgment and capture of data from those documents that obviates the need for data capture within the land registry, although for the most part, the physical lodgment of signed and witnessed paper documents to effect changes in the titles register is still required. The exceptions are caveats and priority notices which can be lodged electronically.

The physical exchange of paper documents at settlement and lodgment of most documents is still required to complete the transfer of property although the capture of data within the Titles registry is facilitated by the TOLD.

The physical settlement and lodgment of documents will be impacted by National Electronic Conveyancing, which will eliminate the need for a physical meeting to exchange documents and settle the financial aspects of the transaction and for the signed documents to be physically lodged.

While the Tasmanian land registry will not benefit from the lodgment of documents in electronic form to the same extent as will New South Wales, adjustments were made to the impact figures to take account of these differences.

### **Northern Territory**

In the Northern Territory conveyancing involves an exchange of contracts, enquiries on behalf of the purchaser to confirm title, and a physical exchange followed by lodgment of documents at the land registry, which is operated by the Land Titles Office within the Department of Justice.

The medium used for conveyancing has remained largely manual and paper-based despite levels of automation in industry systems and within the land registry. The physical exchange of paper documents at settlement is required to complete the transfer of property, as is the physical lodgment of signed and witnessed paper documents to effect changes in the titles register.

It is these aspects of the conveyancing process that will be impacted by National Electronic Conveyancing, which will facilitate the preparation of documents and eliminate the need for a physical meeting to exchange documents and settle the financial aspects of the transaction and the need to then physically take the documents to be lodged at the land registry. National Electronic Conveyancing will also facilitate the registration processes within the land registry by eliminating the need for information from lodged documents to be transcribed into the land registry systems and by facilitating some levels of automated processing of that information.

### **Australian Capital Territory**

The BRCWG REPORT CARD ON PROGRESS OF DEREGULATION PRIORITIES tabled at the COAG meeting on 7 December 2012<sup>63</sup> notes that the ACT has advised that, due to the disproportionate costs it faces as a small jurisdiction and its unique leasehold system, it is reserving its position on participating. ACT may participate in National Electronic Conveyancing in the future when the system is established and development costs can be better managed. In any event, while there are some inevitable differences in conveyancing due to the unique leasehold system, at a high level the conveyancing and title registration process themselves are similar to the other jurisdictions and the impact at least on the private sector should be similar to the other jurisdictions.

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<sup>63</sup> <http://www.coag.gov.au/sites/default/files/BRCWG%20report%20card%20-%20deregulation.pdf>

Accordingly, ARNECC considers that the means of estimating the impacts set out in this section based on underlying studies conducted in New South Wales by KPMG and scaled up to a national level is a sound basis for estimating the impacts of electronic conveyancing nationally. In preparing national figures based on New South Wales studies KPMG made adjustments for a number of jurisdictions that have already introduced some form of electronic lodgment.

Some service providers who currently carry out physical lodgment on behalf remote subscribers will be affected with a diminution of work over the period of take up for electronic lodgment. This market sector has been the subject of substantial consolidation in recent years and it is expected that this trend will continue as the market for these agency services contracts.

### **1.2.2. Differences between jurisdictions**

There are a number of differences in detail between the conveyancing systems of each of the jurisdictions. For example, there are varied levels of market penetration of land information brokers across the jurisdictions; in Queensland and ACT conveyancing work remains the exclusive domain of solicitors as licensed conveyancers have not been authorised. Also there are many detail differences in standard contractual arrangements for the sale of land and disclosure requirements. It is not considered that these differences will significantly affect the impact of the introduction of National Electronic Conveyancing across the jurisdictions.

The areas where adjustments were made in assessing the impact on scaling up from the New South Wales studies relate to the jurisdictions where some type of electronic lodgment has already been implemented with the most significant of these being ECV as mentioned above.

ECV enables electronic financial settlement and online lodgment of caveats, withdrawal of caveats, mortgages, discharges of mortgages, transfers of land, applications by surviving proprietor, State Revenue Office charges and discharges and a number of administrative notices. The impact of National Electronic Conveyancing as compared with ECV is separately addressed in Annexure G.

Queensland has introduced e-Lodgment and d-Lodgment. E-Lodgment is an internet based platform that gives secure and direct access to the Automated Titles System (ATS) for the electronic lodgment of land registry forms. Scanned documents are uploaded into the system where they are automatically assessed (after optical character recognition) for the applicable fees. The lodger then confirms the lodgment, with an agreement to pay the fees due. D-Lodgment offers the same capabilities and features as e-Lodgment via a web services interface instead of through a web browser. The d-Lodgment system allows lodgment of fully digital documents (i.e. as XML data, rather than scanned images).

This system in Queensland means that a small proportion of the cost savings represented by physical lodgment of the transactions in National Electronic Conveyancing are already available through these systems. However, the advantages of National Electronic Conveyancing in preparation of documents, increased transparency in the transaction by working in a common workspace and elimination of the need of attending a physical settlement still apply. In addition, the decreased costs already accrued in Queensland are in part offset by the need to prepare and scan the documents within fairly strict tolerances to allow for optical character recognition.



Overall it is considered that the impact of National Electronic Conveyancing in Queensland will be similar to the other jurisdictions and that the impact assessment based on New South Wales studies remains relevant subject to minor adjustments for local conditions made by KPMG in preparing the national impact figures.

Tasmania has introduced the Tasmanian Online Land Dealings System (TOLD), a web-based facility that enables its subscribers to access, complete, print, save and edit land dealings. It also provides the ability for subscribers to electronically lodge priority notices, caveats, withdrawal of caveats and withdrawal of priority notices.

While TOLD facilitates preparation of documents by subscribers and reduces data entry within the land registry, the advantages of National Electronic Conveyancing in increased transparency in the transaction by working in a common workspace and elimination of the need of attending a physical settlement still apply. Overall it is considered that the impact of National Electronic Conveyancing in Tasmania will be similar to the other jurisdictions and that the impact assessment based on New South Wales studies remains relevant subject to minor adjustments for local conditions made by KPMG in preparing the national impact figures.

### **1.3. Allocating net savings to the private and public sectors**

To allocate costs and savings to the private and public sectors, a line-by-line analysis was undertaken to consider the parties in the community which are likely to bear the additional costs and earn the cost savings and the approximate share of each cost/saving category (see Table A-8).

A key assumption in the modelling process was that the majority of the categories were likely to be borne either by the private sector or the public sector, with the exception of:

- Industry IT capital and other set up costs – stakeholders identified in consultations for the 2008 economic appraisal that Government agencies (other than Land Registries) would bear some costs relating to the IT infrastructure required by industry stakeholders to interface with the ELN.
- IT maintenance and training costs – stakeholders reported that IT maintenance cost would be approximately 10 to 20% of the initial capital investment per annum. An assumption of 15% has been used for the economic modelling; and
- Data entry and rework savings – assumed that the savings will be split approximately equally between the Government, banks and other financial institutions and conveyancers/solicitors.

### **1.4. Timeframe**

The estimates of the impact of National Electronic Conveyancing in this analysis have been modelled using the following key timeframe assumptions:

- the timeframe for the analysis is 17 years (15 years plus two years planning / system build);
- National Electronic Conveyancing become commercially operational over the period in 2013-14;
- the results have been presented in 2011 dollars;

- cash flows are nominal;
- a discount rate of 7% has been used for all net present value (NPV) calculations; and
- estimates of IT capital costs required for industry changes have been updated from the 2008 economic appraisal.

As the adoption of National Electronic Conveyancing by stakeholders is not mandatory, the results in this analysis are dependent on the assumed take-up rates (see Table A-3).

Table A-3: Assumed take up rates

Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10	Year 11	Year 12	Year 13 onwards
0%	0%	3%	9%	18%	29%	42%	58%	73%	85%	93%	97%	100%

Source: NECO, Draft Funding Model for a National Electronic Conveyancing System (March 2008 Unpublished)

If National Electronic Conveyancing is not used by stakeholders (either in part or in full), the impacts (both costs and benefits) identified in this analysis will not be fully realised.

## 1.5. Assumptions

The table below summarises the costs and benefits of National Electronic Conveyancing used as inputs for the modelling. These assumptions, developed in consultation with government and industry stakeholders as part of the 2008 economic appraisal, have been adjusted for the increase in the consumer price index (CPI) since the 2008 economic appraisal.

Table A-4: Summary of inputs used for modelling

Capital costs	Assumption
<b>IT and set up costs</b>	
Industry IT capital and set up costs	\$0.01m - \$6.5m per industry participant (refer Table A-6 for further detail)
ELN establishment	Approximately \$24m <sup>64</sup>

<sup>64</sup> This was an estimate made in 2008 based on the NECO draft funding model (unpublished).

<i>Recurrent costs</i>	<i>Assumption</i>
<b><i>IT maintenance and training cost</i></b>	
Industry IT maintenance cost	15% of IT capital cost per annum
Staff training	\$81.00 per user on set-up (10% per annum thereafter)
<b><i>ELNO costs</i></b>	
ELN operating cost	Approximately \$33m per annum (typical mature year)
<b><i>Administration of users and client authorisation</i></b>	
Digital Signature Certificate (DSC)	\$101.20 to \$202.50 per administrator/certifier
Subscriber administration of users	\$40.40 per user
Client authorisation	\$10.20 per counterpart
<b><i>Cleared funds approval</i></b>	
Cleared funds approval	\$10.80 per cleared funds approval
<b><i>Industry support costs</i></b>	
LSP service costs	Approximately \$11.60 per transaction
<b><i>Recurrent savings</i></b>	<b><i>Assumption</i></b>
<b><i>Data entry and re-work savings</i></b>	
Reduced duplicated data entry	\$5.40 per instrument
Reduced re-work / requisitions	\$30.20 per requisition
<b><i>Settlement and lodgment savings</i></b>	
Reduced time to organise settlement	\$40.40 per representative at settlement
Settlement agent/attendance savings	\$48.50 per representative at settlement
Lodgment agent/attendance savings	\$14.50 per lodgment
<b><i>Courier and bank cheque savings</i></b>	
Reduced courier/postage costs	\$21.50 per case (assumes 20% of cases use a courier)
Bank cheque savings	\$10.80 per cheque

<b>Certificate of Title (CT) related savings</b>	
Reduction in handling /storing CT	\$32.30 per CT
Reduction in replacement CT costs	\$278.90 per replacement CT
Production of CT	\$80.80 per CT production

Source: updated from 2008 Economic Appraisal.

Industry IT costs relate to the IT infrastructure required by industry stakeholders to interface with an ELN. The table below shows the number of national industry participants and the associated estimate of the capital costs relevant to each type of participant. The table shows that IT capital costs have been estimated to vary between \$0.01m and \$6.5m per participant. As noted in the modelling assumptions above, these estimates have been updated since the 2008 economic appraisal<sup>65</sup> and adjusted for the increase in CPI.

Table A-5: Industry IT capital cost estimates

<b>Industry Participant Category</b>	<b>Number of national industry participants</b>	<b>Capital cost per industry participant (\$m)</b>	<b>Total investment cost (\$m)</b>
Licensed Service Providers (LSPs)	12	\$1.1	\$13.0
Major retail banks	4	\$6.5	\$26.0
Other financial institutions	54	\$1.1	\$58.5
Building societies and credit unions	160	\$0.1	\$17.3
Major mortgage processors	20	\$1.1	\$21.7
Mid to large legal practices	50	\$0.4	\$21.7
Legal & conveyancing practices using case management software	2,500	\$0.02	\$54.2
Other practices, industry and government	3,200	\$0.01	\$34.7
<b>Total participants</b>	<b>6,000</b>		<b>\$246.9</b>

Source: updated from 2008 Economic Appraisal

<sup>65</sup> In 2009 LIXI, a not-for-profit company that develops open IT standards for the Australian mortgage processing industry, commissioned an independent study by Brand Management of the cost and time changes of NECS for major lenders for settlements, see the conference papers at [http://www.inassociation.com.au/images/stories/event\\_44/lixi%20presentations2009.pdf](http://www.inassociation.com.au/images/stories/event_44/lixi%20presentations2009.pdf) (pages 86-114). This identified a \$70 million investment cost nationally per major bank, however this was also accompanied by significantly higher savings than assumed in the 2008 economic appraisal of National Electronic Conveyancing in NSW. To accommodate for the updated estimate for costs to industry, the investment cost used in the 2008 economic appraisal has been doubled and adjusted to account for annual cost escalation.

The quantity assumptions used to uplift the costing assumptions are shown in the table below. These have been scaled up from the original NSW quantity assumptions used in the 2008 economic appraisal. Activity levels are assumed to increase by 2% per annum.

*Table A-6: Quantity assumptions*

Quantity type	Assumption
Total transactions	988,000
Total registry Instrument counterparts	3,341,795
Total registry instruments	2,003,692
Total settlements	809,982
Total industry representative attendances at settlement	1,913,694
Counterparts requiring client authorisation (assumes 49% of instrument counterparts)	1,636,187
Users	94,400
Number of mortgage cases	759,546
Annual applications for a replacement duplicate CT	10,887
Production of CT	108,346
Transactions affected by requisitions	6%
Number of CTs per mortgage case	1.1
Number of cheques per transaction	3.8
Number of cleared fund approvals per transaction	1.7
Number of transactions requiring a courier	20%
Proportion of transactions involving an LSP	88%

*Source: 20098 Economic Appraisal, updated for national coverage*

## 2. Impact

Table A-7 shows the detailed estimates of the economic impact of National Electronic Conveyancing. The cost and savings categories are briefly explained below.

Table A-7: Economic impact of National Electronic Conveyancing (\$m, 2011 dollars)

National Electronic Conveyancing		NPV
<b>Capital costs</b>		
Industry IT capital and other set up costs		(\$215.7)
ELN establishment costs		(\$22.1)
Land Registry IT costs		(\$21.1)
<b>Total capital costs</b>		<b>(\$258.9)</b>
<b>Recurrent costs</b>		
IT maintenance and training costs		(\$309.6)
Ongoing ELN operating costs		(\$231.9)
Administration of users and client authorisation		(\$245.8)
Cleared funds approval		(\$164.3)
Industry support costs		(\$94.3)
Land Registry ongoing costs		(\$38.1)
<b>Total recurrent costs</b>		<b>(\$1,084.1)</b>
<b>Savings</b>		
Data entry and rework savings	\$101.2	
Settlement and lodgment savings	\$1,215.9	
Courier and bank cheque savings	\$249.0	
CT related savings	\$211.1	
Land Registry savings	\$147.8	
<b>Total savings</b>	<b>\$1,924.9</b>	
<b>NPV</b>		
<b>Net Present Value (2011-12 to 2027-28)</b>		<b>\$582.0</b>

Source: Scaled up and adjusted from KPMG 2008 economic appraisal

In terms of the major cost and savings associated with National Electronic Conveyancing:

- The majority of the savings (63%) will be attributable to 'Settlement and lodgment savings' (\$1,215.9m), because National Electronic Conveyancing will remove the need to arrange and physically attend settlement and lodgment.
- The largest anticipated cost components are 'IT maintenance and training costs' (\$309.6m) and 'Administration of users and client authorisation' (\$245.8m), together comprising approximately 41% of total capital and recurrent costs during the period 2011-12 and 2027-28.
- Upfront total capital costs are estimated to be \$258.9m, with 'Industry IT capital and other set up costs' the largest component (\$215.7m).

## 2.1. Impact on private sector and public sector

To allocate the quantified costs and savings to the private sector and public sector, a line-by-line analysis was undertaken to consider which parties in the community are likely to bear the additional costs and enjoy the cost savings and to estimate the approximate share of each cost/saving category accruing to each party.

A key assumption made in the modelling for this Analysis is that all National Electronic Conveyancing costs (i.e. 'ELN establishment costs' and 'Ongoing ELN operating costs') are borne by the private sector, the private and government sector investment in the ELN is recovered through ELN user fees.

The modelling for this analysis also assumes that the private sector will bear the majority of costs relating to IT infrastructure, as this will allow industry stakeholders to interface with the ELN. However, stakeholder consultations for the 2008 economic appraisal suggested that some Government users of National Electronic Conveyancing (other than Land Registries) would incur some expenditure to develop the IT infrastructure to allow them to interface with the ELN.

Given that the overwhelming majority of users of the ELN are expected to be industry stakeholders, we have assumed that the approximate split between private sector and public sector share for 'Industry IT capital and other set up costs' will be 95% (private sector) and 5% (public sector).

These assumptions have a significant impact on the allocation of savings across the public and private sector, but not the total savings. The shares should be considered indicative only.

*Table A-8: Assumed shares of costs and savings of National Electronic Conveyancing between private and public sectors*

Cost/savings category	NPV of (costs)/savings (\$m)	Private sector share	Public sector share
<b>Capital costs</b>			
Industry IT capital and other set up costs	(\$215.7)	95%	5%
ELN establishment costs	(\$22.1)	100%	0%
Land Registry IT costs	(\$21.1)	0%	100%
<b>Recurrent costs</b>			
IT maintenance and training costs	(\$309.6)	80%	20%
Ongoing ELN operating costs	(\$231.9)	100%	0%
Administration of users and client authorisation	(\$245.8)	100%	0%
Cleared funds approval	(\$164.3)	100%	0%
Industry support costs	(\$94.3)	100%	0%
Land Registry support costs	(\$38.1)	0%	100%
<b>Savings</b>			
Data entry and rework savings	\$101.2	67%	33%

Cost/savings category	NPV of (costs)/savings (\$m)	Private sector share	Public sector share
Settlement and lodgment savings	\$1,215.9	100%	0%
Courier and bank cheque savings	\$249.0	100%	0%
CT related savings	\$211.1	100%	0%
Land Registry savings	\$147.8	0%	100%

Source: Scaled up and adjusted from KPMG 2008 economic appraisal. Note: NPV calculated over 2011-12 to 2027-28 period.

### **Capital costs**

- **Industry IT capital and other set up costs** – these costs relate to the IT infrastructure required by industry stakeholders to interface with an ELN.
- **ELN establishment costs** – capital expenditure undertaken by an ELNO to set up a network for National Electronic Conveyancing, as estimated by NECO in the unpublished *NECS Draft Funding Model*.
- **Land Registry IT costs** – these costs relate to the IT system investments and initial costs to establish legislation, practices and to communicate with stakeholders, e.g. information collection IT costs, document preparation IT costs, document lodgment IT costs, instrument registration IT costs, document publication IT costs.

### **Recurrent costs**

- **IT maintenance and training costs** – any maintenance costs incurred in operating the IT system, and any training of staff to become accustomed with National Electronic Conveyancing arrangements.
- **Ongoing ELN operating costs** – those costs incurred in delivering services through outsourced suppliers, salaries and related expenses (including directors' fees) and other expense incurred in supporting operations.
- **Administration of users and client authorisation costs** – these costs relate to the electronic authentication system required to irrefutably identify industry practitioners certifying and signing registry instruments, information reports and settlement statements on behalf of their clients, which are to be carried out through the use of government endorsed digital signature certificates.
- **Cleared funds approval costs** – these costs relate to a new activity and replace the preparation of bank cheques. They relate to the requirement for financial institutions to allocate and certify cleared funds for transactions, which provide the source of funds for the disbursement electronically, rather than in the form of a bank cheque.
- **Industry support costs** – the costs that will be incurred by licensed service providers who will provide tailored interfaces, integration and support services as an alternative to direct (retail) access to the ELN.
- **Land Registry ongoing costs** – recurrent costs incurred by Land Registries relating to information searches and collection, document preparation, document lodgment, instrument registration and document preparation.



## Savings

- **Data entry and rework savings** – the savings from reduced data entry as information populated into the ELN Workspace can be re-used, avoiding duplication and reducing the time required for preparing mortgages, transfers, discharges and other instruments.
- **Settlement and lodgment savings** – the savings relating to the reduced time to organise settlement and lodgment.
- **Courier and bank cheque savings** – the reduced time and costs of courier trips required to provide documentation to settlement agents and solicitors/ conveyancers during a transaction.
- **CT related savings** – the savings relating to the introduction of “optional no-CT” where transacting clients who are currently a subscriber to the ELN will be able to elect to not have a CT issued. The savings will be realised through a number of factors including lower transport, administration and storage costs of CTs and lower search and replacement costs for CTs.
- **Land Registry savings** – savings attributable to reduced staff time in processing electronic conveyancing transactions, in areas such as document preparation, document lodgment, instrument registration and document publication.

Table A-9 shows a more detailed breakdown of the parties, including key private sector stakeholders, who are assumed to bear the costs and realise the savings of the introduction of National Electronic Conveyancing.

*Table A-9: Anticipated attribution of costs and savings of National Electronic Conveyancing to key stakeholder*

Cost/savings category	Government	Financial institutions	Legal	Licensed service providers
<b>Capital costs</b>				
Industry IT capital and other set up costs	✓	✓	✓	✓
ELN establishment costs	x	✓	✓	✓
Land Registry IT costs	✓	x	x	x
<b>Recurrent costs</b>				
IT maintenance and training costs	✓	✓	✓	✓
Ongoing ELN operating costs	x	✓	✓	✓
Administration of users and client authorisation	x	✓	✓	x
Cleared funds approval	x	✓	x	x
Industry support costs	x	x	x	✓
Land Registry support costs	✓	x	x	x

Cost/savings category	Government	Financial institutions	Legal	Licensed service providers
<b>Savings</b>				
Data entry and rework savings	✓	✓	✓	✗
Settlement and lodgment savings	✗	✓	✓	✓
Courier and bank cheque savings	✗	✓	✓	✗
CT related savings	✗	✓	✗	✗
Land Registry savings	✓	✗	✗	✗

Source: Scaled up and adjusted from KPMG 2008 economic appraisal

The modelling of costs and savings for this analysis does not take into account end-users, or purchasers of properties, as this analysis was not undertaken in the 2008 economic appraisal. As a result, this is likely to understate the net savings realised by the public sector, as the Government is expected to pass through to end-users a portion of the costs it incurs.

Table A-10: Summary of impact of National Electronic Conveyancing on key stakeholder groups (\$m, 2011 dollars)

	NPV Total	NPV Private	NPV Public
<b>Economic appraisal results</b>			
Capital costs	(\$258.9)	(\$226.9)	(\$31.9)
Recurrent costs	(\$1,084.1)	(\$984.1)	(\$100.0)
Savings	\$1,924.9	\$1,743.4	\$181.5
<b>NPV (2010-11 to 2026-27)</b>	<b>\$582.0</b>	<b>\$532.4</b>	<b>\$49.6</b>

Source: Scaled up and adjusted from KPMG 2008 economic appraisal

Table A-11: Summary of impact of National Electronic Conveyancing on key stakeholder groups (% share)

	Share of costs and benefits	
	Private	Public
<b>Economic appraisal results</b>		
Capital costs	88%	12%
Recurrent costs	91%	9%
Savings	91%	9%

Source: Scaled up and adjusted from KPMG 2008 economic appraisal

The modelling suggests that the majority of the savings will be realised by the private sector. This is because it is assumed that most of the public sector's savings will result in limiting upward pressure on fees to end users (all other things being held equal).

### 2.1.1. Private sector

The following groups were considered in analysing the economic impact of National Electronic Conveyancing on the private sector:

- banks and other financial institutions;
- conveyancers and legal practitioners;
- mortgage processors; and
- licensed service providers of electronic conveyancing.

All of these parties have been grouped together into a general 'private sector' group.

Licensed service providers (LSPs) have been defined in the *NECS Roadmap* documents as businesses that will provide tailored interfaces, integration and support services to subscribers as an alternative to direct access to the ELN. LSPs are anticipated to be a new group in the conveyancing industry and do not currently exist. However, it seems likely that some existing parties, such as information brokers and case management software providers, may seek to enter into this activity as it will be a natural extension of their existing activities. As a result, it has not been possible to determine the change in costs or cost savings for LSPs as these are effectively largely embedded in the costs and savings for the existing parties.

The introduction of National Electronic Conveyancing will negatively impact on settlement and lodgment officers, who attend settlement and act for the mortgagees and practitioners as lodgment agents. While it is recognised that electronic conveyancing will not eliminate the need for settlement and lodgment officers as paper documents will still be required as not all instruments will be in scope, in general the volume of paper-based conveyancing transactions will be significantly reduced. This will lead to a decline in the demand for settlement and lodgment officers in the future.

Based on the analysis outlined in the below table, the net savings attributed to the Australian national private sector are estimated to be \$532.4m (NPV) over the period 2011-12 to 2027-28.

Table A-12: Detailed economic impact by category on private sector (\$m, 2011 dollars)

National Electronic Conveyancing	NPV
<b>Capital costs</b>	
Industry IT capital and other set up costs	(\$204.9)
ELN establishment costs	(\$22.1)
Land Registry IT costs	\$0.0
<b>Total capital costs</b>	<b>(\$226.9)</b>
<b>Recurrent costs</b>	
IT maintenance and training costs	(\$247.7)
Ongoing ELN operating costs	(\$231.9)
Administration of users and client authorisation	(\$245.8)
Cleared funds approval	(\$164.3)
Industry support costs	(\$94.3)
Land Registry ongoing costs	\$0.0
<b>Total recurrent costs</b>	<b>(\$984.1)</b>
<b>Savings</b>	
Data entry and rework savings	\$67.5
Settlement and lodgment savings	\$1,215.9
Courier and bank cheque savings	\$249.0
CT related savings	\$211.1
Land Registry savings	\$0.0
<b>Total savings</b>	<b>\$1,743.4</b>
<b>NPV</b>	
<b>Net Present Value (2011-12 to 2027-28)</b>	<b>\$532.4</b>

Source: Scaled up and adjusted from KPMG 2008 economic appraisal

### 2.1.2. Public sector

Based on the analysis, the net savings attributed to the Australian national public sector is estimated to be \$49.6m (NPV terms) between 2011-12 and 2027-28.

The consideration of the economic impact of National Electronic Conveyancing on the public sector includes the various Land Registries in each jurisdiction and the Offices of State Revenue (or equivalent).

Table A-13: Detailed economic impact by category on public sector (\$m, 2011 dollars)<sup>66</sup>

NPV National Electronic Conveyancing	
<b>Capital costs</b>	
Industry IT capital and other set up costs	(\$10.8)
ELN establishment costs	\$0.0
Land Registry IT costs	(\$21.1)
<b>Total capital costs</b>	<b>(\$31.9)</b>
<b>Recurrent costs</b>	
IT maintenance and training costs	(\$61.9)
Ongoing ELN operating costs	\$0.0
Administration of users and client authorisation	\$0.0
Cleared funds approval	\$0.0
Industry support costs	\$0.0
Land Registry ongoing costs	(\$38.1)
<b>Total recurrent costs</b>	<b>(\$100.0)</b>
<b>Savings</b>	
Data entry and rework savings	\$33.7
Settlement and lodgment savings	\$0.0
Courier and bank cheque savings	\$0.0
CT related savings	\$0.0
Land Registry savings	\$147.8
<b>Total savings</b>	<b>\$181.5</b>
<b>NPV</b>	
<b>Net Present Value (2011-12 to 2027-28)</b>	<b>\$49.6</b>

Source: Scaled up and adjusted from KPMG 2008 economic appraisal

### 3. Sensitivity analysis

Sensitivity analysis has been undertaken to quantify the impact on the NPV calculations of varying a number of assumptions:

- discount rates of 5, 7 and 10 percent;
- take up rate: +/- 10 percent of the base annual take up rate assumptions (up to a maximum of 100% take up);
- costs: +/- 10 percent of the capital and recurrent cost estimates;
- savings: +/- 10 percent of the recurrent savings estimates; and
- capital costs: increasing the IT and set up capital costs for industry and government by 50 percent.

<sup>66</sup> The positive net economic benefit to the public sector is not necessarily equivalent to the financial impact on the public sector (i.e. the impacts on the LPI). The results of the 2008 economic appraisal, which included a financial appraisal, outlined the financial impacts of the project for the LPI based on information available at the time.

Table A-14 Impact of varying discount rate on Economic Impact – National Electronic Conveyancing (\$m, 2011 dollars)

Economic appraisal results	Discount rate		
	5%	7%	10%
Capital costs	(\$268.5)	(\$258.9)	(\$245.3)
Recurrent costs	(\$1,288.0)	(\$1,084.1)	(\$852.7)
Savings	\$2,409.9	\$1,924.9	\$1,395.4
<b>Net Present Value (2011-12 to 2027-28)</b>	<b>\$853.4</b>	<b>\$582.0</b>	<b>\$297.4</b>

Table A-15: Impact of varying take up rate on Economic Impact – National Electronic Conveyancing (\$m, 2011 dollars)

Economic appraisal results	Take up rate		
	10% lower than base in each year	Base	10% higher than base in each year
Capital costs	(\$258.9)	(\$258.9)	(\$258.9)
Recurrent costs	(\$1,084.1)	(\$1,084.1)	(\$1,084.1)
Savings	\$1,747.2	\$1,924.9	\$2,005.9
<b>Net Present Value (2011-12 to 2027-28)</b>	<b>\$404.3</b>	<b>\$582.0</b>	<b>\$662.9</b>

Table A-16 Impact of varying costs by +/-10 percent on Economic Impact – National Electronic Conveyancing (\$m, 2011 dollars)

Economic appraisal results	Costs		
	10% lower	Base	10% higher
Capital costs	(\$233.0)	(\$258.9)	(\$284.7)
Recurrent costs	(\$975.7)	(\$1,084.1)	(\$1,192.5)
Savings	\$1,924.9	\$1,924.9	\$1,924.9
<b>Net Present Value (2011-12 to 2027-28)</b>	<b>\$716.3</b>	<b>\$582.0</b>	<b>\$447.7</b>

Table A-17: Impact of varying savings by +/-10 percent on Economic Impact – National Electronic Conveyancing (\$m, 2011 dollars)

Economic appraisal results	Savings		
	10% lower	Base	10% higher
Capital costs	(\$258.9)	(\$258.9)	(\$258.9)
Recurrent costs	(\$1,084.1)	(\$1,084.1)	(\$1,084.1)
Savings	\$1,732.4	\$1,924.9	\$2,117.4
<b>Net Present Value (2011-12 to 2027-28)</b>	<b>\$389.5</b>	<b>\$582.0</b>	<b>\$774.5</b>

Table A-18: Impact of varying capital costs by +50 percent on Economic Impact – National Electronic Conveyancing (\$m, 2011 dollars)

Economic appraisal results	Capital costs		
	Base	50% higher	100% higher
Capital costs	(\$258.9)	(\$388.3)	(\$517.7)
Recurrent costs	(\$1,084.1)	(\$1,084.1)	(\$1,084.1)
Savings	\$1,924.9	\$1,924.9	\$1,924.9
<b>Net Present Value (2011-12 to 2027-28)</b>	<b>\$582.0</b>	<b>\$452.6</b>	<b>\$323.1</b>

## Appendix B

### Consultation conducted since 2004

*The broader National Electronic Conveyancing consultation program*

Year	Consultation Strategy	Description
2004-2011	Various consultation methods	All jurisdictions have undertaken consultation with State and Territory based stakeholders.
2005 to 2010	National Electronic Conveyancing Office (NECO)	States and Territories agree to the formation of the National Electronic Conveyancing Office (NECO) in Melbourne.  NECO initiates and coordinates consultation on electronic conveyancing from August 2005 to June 2010. NECO information is published at <a href="http://www.necs.gov.au">www.necs.gov.au</a>
2005 to 2009	National Steering Committee (NSC)	Agreement on formation of National Steering Committee (NSC) with representatives from each jurisdiction and key industry bodies <sup>67</sup> . First NSC meeting held in February 2006 approves NECO forward work program plan. Summary of meeting available at <a href="http://www.necs.gov.au/National-Steering-Committee-Progress/default.aspx">http://www.necs.gov.au/National-Steering-Committee-Progress/default.aspx</a>  The last NSC meeting occurred in the month following COAG adopting National Electronic Conveyancing as a national initiative under governance supervision of Business Regulation and Competition Working Group (BRCWG)
2005	Draft NECS Roadmap documents published	Versions of National Business Model (NBM), National Governance Arrangements (NGA), and National Implementation Strategy (NIS) published to jurisdictions and NSC for feedback and comment.
2006 - 2010	NECO website and <i>NECSpress</i>	NECO website established to provide information on National Electronic Conveyancing development progress and consultation information. The website provides access to NECS Roadmap documents, independent advice reports and records of consultation forums. The website is available at <a href="http://www.necs.gov.au">www.necs.gov.au</a> .  The <i>NECSpress</i> newsletter was launched in January 2006 to keep all interested stakeholders aware of developments of the National Electronic Conveyancing program. It also invited stakeholders to provide feedback on published Roadmap documents and raise any issues or concerns they may have with National Electronic Conveyancing development.

<sup>67</sup> Details of the membership of the National Steering Committee are available at <http://www.necs.gov.au/National-Steering-Committee/default.aspx>

Year	Consultation Strategy	Description
July 2006	NECS Roadmap documents updated and published	National Roadmap documents updated and re-published on NECO website as a result of feedback from stakeholders.  The NECS Operations Description (NOD) published to provide industry and government with an overview of how National Electronic Conveyancing will work. This provided stakeholders information about the practicalities of electronic conveyancing.
August 2006	SPT Forum initiated	State Project Team of jurisdictions formed to consult on Land Registry requirements
2006-07	National Roadshows, Online and Open Forums	In each jurisdiction, NEC Roadshows were held to directly acquaint stakeholders with electronic conveyancing as well as gaining specific insight from stakeholders in identifying barriers to adoption and any other risks or issues.  Online forum topics were established as a consultation tool with all stakeholders able to provide feedback on the proposed program.  Industry stakeholder groups were invited to comment on jurisdictional uniformity issues addressed by the State Project Teams  Open forums were held in Sydney, Brisbane, Melbourne and Adelaide to enable stakeholders to discuss issues and debate concerns.
2006 to February 2007	NECS Risk Assessment	Meetings and workshops conducted in extensive stakeholder consultation by Clayton Utz to complete the risk assessment of the National Electronic Conveyancing program. <sup>68</sup>  The Final Report for Risk Assessment of the National Electronic Conveyancing System to the National Steering Committee is published at <a href="http://www.necs.gov.au/NECS-Independent-Expert-Advice-Reports/default.aspx">http://www.necs.gov.au/NECS-Independent-Expert-Advice-Reports/default.aspx</a>
2006 to February 2007	NECS Ongoing Governance Arrangements	Stakeholder meetings and workshops in stakeholder consultation for NECS Ongoing Governance Arrangements. Final report Stage 4 - Recommended Governance Arrangements is published at <a href="http://www.necs.gov.au/NECS-Independent-Expert-Advice-Reports/default.aspx">http://www.necs.gov.au/NECS-Independent-Expert-Advice-Reports/default.aspx</a>
2006 to March 2007	Regulatory Review	Consultation and publication of independent advice report by the Allen Consulting Group and Gilbert and Tobin providing a review of the regulatory environment in which the National Electronic Conveyancing will operate.  The Regulatory Review Report dated March 2007 is published at <a href="http://www.necs.gov.au/NECS-Independent-Expert-Advice-Reports/default.aspx">http://www.necs.gov.au/NECS-Independent-Expert-Advice-Reports/default.aspx</a>

<sup>68</sup> Clayton Utz, *Risk assessment of the national electronic conveyancing system*, 2007, p.4.



Year	Consultation Strategy	Description
June 2007	NECS Roadmap documents updated	Updated National Roadmap documents re-published as a result of feedback from stakeholders.  The final versions of NECS Roadmap Documents are published at <a href="http://www.necs.gov.au/NECS-Roadmap-Documents/default.aspx">http://www.necs.gov.au/NECS-Roadmap-Documents/default.aspx</a>
August 2007	NECS Requirements Definition (NRD)	Draft NRD published for consultation purposes to defines the functions and features of the software application and its supporting capabilities necessary for a facility that will achieve electronic conveyancing in Australia
2006 – 2010	Independent Expert Advice Reports	Additional independent expert advice reports have been prepared and released for public comment on a range of topics including:  scope for Jurisdiction Legal Liability for Losses From Authorising an ELNO;  Risk Assessment of DSC Types for Authorised Officers and Certifiers; and  Report on Consistent Business Practice Issues.
2008 – 2010	National Project Team (NPT) meetings	The National Project Team was formed as a working group of industry and government stakeholder representatives for input nationally from those stakeholder groups.  The National Project Team considered the feedback from stakeholders in response to issues papers released by the NECO.  The NPT had 19 meetings to consider issues and negotiate industry compromises regarding the development of National Electronic Conveyancing. Details of the NPT and their meetings are published at <a href="http://www.necs.gov.au/National-Project-Team/default.aspx">http://www.necs.gov.au/National-Project-Team/default.aspx</a>
May to November 2008	Economic Appraisal of NECS in NSW	An independent economic appraisal of the planned National Electronic Conveyancing System (NECS) commissioned by NSW Land Registry from KPMG of the costs and savings of introducing the electronic conveyancing in NSW. The appraisal involved extensive consultation with industry participants. The report is published at <a href="http://necsnsw.lands.nsw.gov.au/data/assets/pdf_file/0012/100056/NECS_KPMG_final_report_Jan_2009.pdf">http://necsnsw.lands.nsw.gov.au/data/assets/pdf_file/0012/100056/NECS_KPMG_final_report_Jan_2009.pdf</a>
August 2008	NECS Requirements Definition (NRD) update	Revised version of the NRD published as a result of initial feedback received from jurisdictions and industry stakeholders.
2008 – 2011	National Electronic Conveyancing Data Standard	Consultation arrangements effected through LIXI (Lending Industry XML Initiative) relationship, including NECDS Working Group and the NECS Vocabulary wiki for developing and sharing a national vocabulary.

Year	Consultation Strategy	Description
2009-2010	NECS Glossary	The development and successive re-publication of the NECS Glossary as part of the National Roadmap to produce a uniform national solution. The NECS Glossary was published as a separate document from 2009. The latest version of the NECS Glossary is published at <a href="http://www.necs.gov.au/Publications/NECS-Glossary/default.aspx">http://www.necs.gov.au/Publications/NECS-Glossary/default.aspx</a>
May 2009-February 2010	NECS Legal Framework	Extensive stakeholder consultation regarding the national legal framework for National Electronic Conveyancing undertaken by Clayton Utz.  The final NECS Legal Framework report is in two volumes and is published at <a href="http://www.necs.gov.au/NECS-Independent-Expert-Advice-Reports/default.aspx">http://www.necs.gov.au/NECS-Independent-Expert-Advice-Reports/default.aspx</a>
November 2009 – March 2010	Regulators and insurance forum	NECO held a forum for regulators and insurers to discuss the development of National Electronic Conveyancing, especially the legal framework.
2010-2011	Project consultation	A single Client Identity Verification (CIV) Standard and Application procedure for property transactions for all jurisdictions is currently being undertaken involving extensive stakeholder consultation.
June 2010	National Business Model (NBM)	Revised version of the NBM published as a result of feedback received from jurisdictions and industry stakeholders. The latest version of the NRD is published at: <a href="http://www.necs.gov.au/NECS-Roadmap-Documents/default.aspx">http://www.necs.gov.au/NECS-Roadmap-Documents/default.aspx</a>
December 2010	NECS Requirements Definition (NRD) update	Revised version of the NRD published containing content that has been reviewed with all key stakeholder groups through the National Project Team. The NRD is published at: <a href="http://www.necs.gov.au/NECS-Requirements-Definition/default.aspx">http://www.necs.gov.au/NECS-Requirements-Definition/default.aspx</a>
2011 -	ARNECC	Consulted with peak bodies including the Australian Bankers Association, Australian Institute of Conveyancers and Law Council of Australia
March 2012	ARNECC	Release of the draft MOR, draft MPR and draft ECNL to peak bodies including the Australian Bankers Association, Australian Institute of Conveyancers and Law Council of Australia
Jul 2012	ARNECC	Release of the Consultation RIS for a 4 week consultation period
Jul 2012 -	ARNECC	Meetings with peak bodies to discuss the draft MOR, draft MPR and draft ECNL.

## Appendix C

### List of persons who provided a submission in response to the Consultation RIS

- Australian Finance Conference
- Institute of Legal Executives - Victoria
- Law Council of Australia
- Legal Practitioners' Liability Committee
- Legal Services Commissioner - Victoria
- Sandstone Technology

## Appendix D

### Table of comments received in response to the Consultation RIS that do not relate to the draft ECNL and ARNECC's response

Part	Comment	ARNECC response/action
Performance-based Requirements	In relation to the principle concerning effective guidance suggests that a less prescriptive approach should be adopted in relation to requirements in the Model Operating Requirements (MORs) and Model Participation Requirements (MPRs), which are made pursuant to the National Law.	A less prescriptive approach has been adopted based on 'reasonable steps'.
Reduction of discrepancies between regulators, reduction of uncertainty and lower compliance costs	National Law should provide for as much consistency as possible with the minimisation of jurisdiction specific requirements. A greater emphasis on consistency in the National Law should result in the reduction of discrepancies between regulators and the lowering of compliance costs. Uncertainty could be reduced by incorporating relevant criteria to guide Registrars' discretions etc.	<p>The Electronic Conveyancing National Law (ECNL) in conjunction with the Intergovernmental Agreement for an Electronic Conveyancing National Law (IGA) promotes consistency and the minimisation of jurisdiction specific requirements which will lead to a reduction of jurisdiction differences and lowering compliance costs.</p> <p>The Australian Registrars National Electronic Conveyancing Council (ARNECC) believes that the introduction of electronic conveyancing will assist in driving national consistency in conveyancing practices and the members of ARNECC are committed to working collaboratively through the IGA. The IGA has been signed by all jurisdictions except ACT and is published at <a href="http://www.arnecc.gov.au/publications">http://www.arnecc.gov.au/publications</a>.</p> <p><b>Section 1.6 (Section 3. 6 in the Consultation RIS) Why is government action needed to address the problem has been amended to reflect ARNECCs commitment to keeping jurisdictional variations to a minimum and its belief that national consistency in conveyancing practices can be assisted by the introduction of electronic conveyancing.</b></p>

Part	Comment	ARNECC response/action
	<p>Compliance with certain provisions in National Law and MPRs as currently drafted is likely to increase costs of conveyancing. Experience in NZ has been that there are a number of hidden costs in addition to registration and licence costs for access to network – including training costs, administrative costs, IT costs, accounting costs, and managerial costs. Acknowledge off set by savings to some extent through not having to attend a physical settlement – they are still significant costs.</p>	<p>Each Registrar is appointed as a statutory officer pursuant to the relevant legislation in their jurisdiction and it is not permissible to fetter the statutory discretion of the Registrar in relation to their powers under the national law and the determination of the Participation Rules or Operating Requirements in their jurisdiction. However, in the IGA all participating jurisdictions have agreed to implement the MPRs and MORs as the applicable rules in their jurisdiction and to cooperate, through ARNECC, to coordinate amendments to the rules and to endeavour to maintain national consistency to the greatest extent possible.</p> <p><b>Section 1.1 (Section 3.1 in the Consultation RIS) Need for a National Regulatory Framework has been amended to include reference to not fettering the Registrar’s statutory discretion whilst creating an environment in which Registrars cooperate to develop a national framework.</b></p> <p>The economic analysis shows that the costs to access and use the electronic conveyancing system are significantly outweighed by the savings.</p> <p>The costs and savings provided in the RIS are estimates based on an independent economic analysis undertake on behalf of NSW and scaled up to a national level. The costs included IT capital and set up costs, IT maintenance, staff training and other administrative costs. There is insufficient evidence provided in the submission upon which to amend the costs and savings provided in the RIS.</p>
<p>Regulation remaining relevant and effective over time</p>	<p>Notes IGA provides for review of the National Law after 7 years but considers it would be preferable to include a review provision in the National Law itself and that shorter time period between 1 and 3 years should be specified.</p>	<p>A time period of 1 to 3 years does not provide the Registrars sufficient time to determine if the legal framework as a whole is performing as intended. Nor does it provide an operator certainty regarding the legal framework within which they operate. Further, not all jurisdictions will be participating within 1 to 3 years. The IGA provides for the review of the ECNL after 7 years, or at such</p>

Part	Comment	ARNECC response/action
		<p>earlier time as may be agreed between the parties to the IGA</p> <p>The ECNL can of course be amended as and when needed before a full review is undertaken.</p> <p><b>Section 7.3 (Section 9.3 in the Consultation RIS) Review of Performance and the Executive Summary have been amended by adding an explanation as to why 7 years has been chosen as the appropriate period for review and noting that this can be amended by agreement.</b></p>
<p>Other features of good regulation – compatibility with international standards and practice</p>	<p>The attribution rule in the National Law should be reviewed so that it is consistent with the international model laws and the relevant UN Convention.</p>	<p>As a result of feedback during consultation on the draft ECNL the attribution rule has been amended to provide that a Subscriber cannot repudiate a digital signature:</p> <ul style="list-style-type: none"> <li>• created by: <ul style="list-style-type: none"> <li>○ the Subscriber itself</li> <li>○ an employee, agent, contractor or officer of the Subscriber who had the Subscriber’s express or implied authority to sign using the Subscriber’s digital signature; or</li> </ul> </li> <li>• where the signer did not have the Subscriber’s express or implied authority to sign and was able to sign due to: <ul style="list-style-type: none"> <li>○ a failure by the Subscriber, its employees, agents, contractors or officers to comply with the Participation Rules; or</li> <li>○ a failure by the Subscriber, its employees, agents, contractors or officers to take reasonable care.</li> </ul> </li> </ul> <p>Under the amended attribution rule a Subscriber would not be liable for:</p> <ul style="list-style-type: none"> <li>• the fraudulent use of a digital signature by an employee, agent, contractor or officer who <i>was not</i> authorised to use a digital signature</li> <li>• the fraudulent use of a digital signature by an unauthorised person (whether an employee, agent contractor or officer, or not) where the signing was not enabled by a failure to comply with the Participation</li> </ul>

Part	Comment	ARNECC response/action
<p>Costs and the nature of the economic analysis</p>	<p>The costs in the Appendix have not been adequately detailed in the RIS. Some of the cost assumptions may be under-estimated and some of the savings assumptions may be over-estimated in the economic analysis.</p> <p>Eg Client Authorisation (CA) estimate of \$10.20 per counterpart. Considers that the estimate substantially undervalues the anticipated cost associated with Client Authorisations.</p> <p>Identity Verification costs are likely to be significant and appear not to have been included in cost assumptions unless they are included as part of the CA assumptions in which case that assumption appears to even more of an underestimate than noted above.</p>	<p>Rules or to otherwise take reasonable care.</p> <p>The costs and savings provided in the RIS are estimates based on an independent economic analysis undertaken on behalf of NSW after consultation with practitioners and scaled up to a national level. The costs included IT capital and set up costs, IT maintenance, staff training and other administrative costs. There is insufficient evidence provided in the submission upon which to amend the costs and savings provided in the RIS.</p> <p>A prudent solicitor should be undertaking appropriate identity verification of their clients already in the paper medium with the associated costs of doing so. Verification of identity costs would therefore be incurred in either a paper or electronic transaction.</p> <p>No evidence is provided in the submission to substantiate the claim that Identity Verification costs are likely to be significant.</p> <p>The Verification of Identity Rules in the MPR enable third party providers to undertake VOI on behalf of a Subscriber. The WA Registrar of Titles and Commissioner of Titles have introduced a requirement to conduct Verification of Identity in relation to some paper transactions. A third party provider of Verification of Identity is offering of Identity services and is currently charging approximately \$40 for that service. The WA Verification of Identity requirements are comparable to the Verification of Identity Rules</p>
	<p>Notes that the economic analysis does not appear to take into account all of the costs the Subscribers will</p>	<p>A prudent solicitor should be undertaking appropriate identity verification of</p>

Part	Comment	ARNECC response/action
	<p>incur re Identity Verification.</p> <p>Considers that there will be increased costs associated with document retention requirements under the MPRs.</p>	<p>their clients already in the paper medium with an associated cost.</p> <p>There is insufficient evidence provided in the submission upon which to amend the costs and savings provided in the RIS.</p> <p>It would currently be prudent practice in the paper environment to retain documents that are required to be retained under the MPR. Where there are any additional costs, for example in retaining the client authorisation, they are insignificant, especially when compared to the value of retaining them.</p> <p>The costs incurred in relation to document retention will differ between Subscribers depending on how they choose to retain documents.</p>
	<p>Questions some of the assumed economic benefits in the analysis given cost and time implications presented by the proposed Identify Verification requirements and the CA requirements.</p> <p>Also notes there will be significant costs in the set up and maintenance of suitable IT programs and equipment and in the training of staff to use the Network.</p> <p>Suggests that the calculation of cost savings may not be realistic.</p>	<p>A prudent solicitor should be undertaking appropriate identity verification of their clients already in the paper-based system.</p> <p>A Client Authorisation is required to provide the authority for a subscriber to undertake certain actions such as signing on behalf of a client and lodging Registry Instruments electronically. The Client Authorisation is not intended to replace any retainer agreements rather it is intended to sit beside them where a transaction is to be completed electronically.</p> <p>The costs and savings provided in the RIS are estimates based on an independent economic analysis undertaken on behalf of NSW and scaled up to a national level. There is insufficient evidence provided in the submission</p>



Part	Comment	ARNECC response/action
	<p>Also questions identified CT cost savings particularly the assumptions in Table A-4 re replacement CT costs. Experience of LIV members replacement CTs are rarely required and the cost-saving may be over-estimated.</p> <p>Notes Table A-4 identifies recurrent Network operating costs as approx. \$33m per annum and Table A-7 identifies recurrent Network maintenance costs of \$309m and recurrent ongoing Land Registry costs of \$38.1m over the 17 year period of the economic analysis. Queries which of these figures allows for maintenance of a database of electronic titles in each jurisdiction. The explanatory text in Appendix A does not appear to conclusively specify this.</p> <p>Concerned the economic analysis does include increased PI insurance costs.</p> <p>Queries why no separate national quantitative analysis has been undertaken and why the only analysis is based on 2008 NSW figures. Considers that a national analysis should be undertaken as the economic impact of the system will affect its take up.</p>	<p>upon which to amend the costs and savings provided in the RIS.</p> <p>The costs savings in Table A4 are evidence of the savings that would be realised where a replacement certificate of title was required in paper. Whilst conveyancing practitioners rarely require a replacement certificate of title it is a more common occurrence for the banking industry.</p> <p><b>The maintenance of electronic titles are costs that are currently borne by each jurisdiction and are not new costs.</b></p> <p>Overall the risk related to undertaking a conveyance in the electronic environment is expected to be comparable to that for a conveyance undertaken in paper. There is no evidence of increased risk. All effort is being made to ensure that the electronic environment is more secure than the paper environment. No information has been provided to indicate that there will be a change in PI insurance costs.</p> <p>The economic appraisal contained in the RIS is based on the best available information at the time the RIS was prepared. Further, the scaling up of the New South Wales analysis is appropriate given that the business of conveyancing is fundamentally the same across jurisdictions, with the real difference lying in the volume of transactions.</p>

Part	Comment	ARNECC response/action
	<p>Also queries the extrapolation used in the 2008 NSW economic appraisal. These figures relate to the period prior to the Global Financial Crisis (GFC) and are not likely to accurately reflect the post GFC environment.</p> <p>Even Figure 3-1 in the Impact Statement relating to the number of Registry Instruments lodged continuing to increase over time is based solely on NSW data rather than data from each jurisdiction, which would seem to be available.</p> <p>The Impact Statement does not make it totally clear that the proposed system is not a complete electronic conveyancing system, but rather an electronic settlement and lodgment system. Lack of clarity leads to an assumption that discrepancies in the regulatory frameworks for conveyancing in each State and Territory will be overcome and will deliver savings in conveyancing generally. This assumption may not be borne out.</p>	<p>There is an underlying assumption in this comment that lodgments in the period post the GFC will not return to the pre-GFC levels. History shows that there are cycles of property booms. It is possible that the levels of lodgment may return to pre-GFC levels and may increase beyond those levels.</p> <p>The economic appraisal contained in the RIS is based on the best available information at the time the RIS was prepared. Further, the scaling up of the New South Wales analysis is appropriate given that business of conveyancing is fundamentally the same across jurisdictions with the real difference lying in the volume of transactions.</p> <p>ARNECC believes that the National Law is explicit in what it covers and includes a clear statement of objectives.</p> <p>ARNECC believes that the introduction of electronic conveyancing will assist in driving national consistency in conveyancing practices and the members of ARNECC are committed, through the IGA, to working collaboratively. ARNECC anticipates that consistency in an electronic environment is the first step to realising consistency in other areas including the regulatory frameworks for conveyancing in each State and Territory.</p>
<p>The problem and the need for government action</p>	<p>Query how the inefficiencies and complexities of having 8 differing regimes will be fully addressed by a proposed system which only involves electronic settlement and lodgment</p>	<p>ARNECC believes that the introduction of electronic conveyancing will assist in driving national consistency in conveyancing practices and the members of ARNECC, through the IGA, are committed to working collaboratively. ARNECC anticipates that consistency in an electronic environment is the first step to realising consistency in other areas including the regulatory frameworks for conveyancing in each State and Territory.</p>
<p>The baseline comparison</p>	<p>A risk identified with paper conveyancing is a failure to settle or delay in settlement due to the conduct of one party. Suggestion that such conduct could also</p>	<p>The risk of failure to settle or delay in settlement exists in both the paper and electronic environment, however the likelihood of the risk being realised is less in the electronic environment. Access to a shared workspace allows all</p>

Part	Comment	ARNECC response/action
	occur in the electronic environment.	participating subscribers to monitor progress in relation to a transaction and to be aware of any risk of delay in a settlement in advance. Immediate action can be taken to address any risk of delay that arises.
	<p>Reference is made to a risk with paper conveyancing due to an inability to retain Land Registry staff with the requisite skills for compliance assurance of transactions before registration.</p> <p>Suggest that such staff will be needed in the electronic environment even if their role is different and any ability to maintain sufficient staff resources would appear to be a constant factor in both systems rather than a specific risk for paper conveyancing</p>	<p>The risk referred to is related to rising costs affecting the ability to retain Land Registry staff with the requisite skills for compliance assurance of transactions before registration. The status quo option is based in the current paper-based conveyancing system being retained.</p> <p>Land Registries generally have ageing workforces. Under the status quo option significant recruitment and training will need to be undertaken to ensure skills of retiring staff are transferred to new staff, whilst allowing sufficient time to train new recruits.</p> <p>Part of the savings component for government is a decrease in manual handling of lodgments. The resourcing issue in an electronic environment is less about the skills required in a paper environment and more about having sufficient staff to deal with those transactions that remain in paper.</p> <p><b>A new dot point has been added between the 6<sup>th</sup> and 7<sup>th</sup> dot points in 4.1.1 (6.1.1 in the Consultation RIS) Risk.</b></p>
Consultation	Considers that it is important to acknowledge that the nature of the proposed system has changed significantly over the time period from 2004 to present, particularly as more detailed requirements have been developed. Matters which have been agreed in principle or as part a framework may need refinement or to be revisited as detailed requirements are developed.	<p>The nature of the proposed system has not changed significantly. The legal framework is in line with that recommended in the Clayton Utz Legal Framework Report</p> <p>The development of the Consultation RIS and the release of the draft Model Participation Rules and Model Operating Requirements combined with the ongoing consultation undertaken by ARNECC with key stakeholders have been key to this process.</p>

Part	Comment	ARNECC response/action
Section 5 - Options	<p>Supports conclusion that Option 5 – Government Controlled Regulation is most likely to meet the Performance Objectives identified in the NECS Legal Framework Development Report in 2010.</p> <p>Any jurisdictional difference should solely relate to matters such as Land Registry requirements for document templates and data content, and to conveyancing practices specific to a jurisdiction.</p> <p>Every effort should be made in the future to reduce and, ideally, eliminate such differences in order that the maximum benefits may be achieved from the national electronic conveyancing system.</p>	<p>Agree.</p> <p>The first Performance Objective sets out the intention for jurisdictional differences being limited to certain jurisdiction specific matters noted in footnote 20 (Land Registry requirements for document templates and data content to be provided by ELNOs to Land Registry and business rules for ELNO workspaces in preparing such documents and data for a Land Registry in respect of land in that jurisdiction, and requirements of ELNOs arising from conveyancing practices specific to that jurisdiction), and those that are required because of local legislative provisions.</p> <p>ARNECC believes that the introduction of electronic conveyancing will assist in driving national consistency in conveyancing practices and the members of ARNECC are committed to working collaboratively through the IGA. ARNECC anticipates that consistency in an electronic environment is the first step to realising consistency in other areas including the regulatory frameworks for conveyancing in each State and territory.</p>
Section 6 – Impact Analysis	<p>Supports the establishment of a national electronic conveyancing system, in particular due to the benefits it will provide to users such as mortgagees and to consumers such as individuals and small businesses who provide real estate security re personal and business borrowings.</p> <p>Suggest that section 6.2 include mortgagees (both incoming and outgoing/discharging mortgagees) as key stakeholders in electronic conveyancing. This will reflect the statement in section 3.1 that approximately 60% of real property transactions processed and recorded each year involved mortgages. Alternatively, the examples of “Clients” should include incoming and outgoing/discharging mortgagees.</p>	<p>Noted.</p> <p>In section 6.2 of the Consultation RIS (now 4.2) the key stakeholders have been described in their roles within electronic conveyancing as opposed to their roles in a conveyancing transaction. Therefore incoming and outgoing/discharging mortgagees are subscribers. A client is a person who a subscriber represents. Most mortgagees would be subscribers and thus representing themselves rather than being a client of a subscriber.</p>

Part	Comment	ARNECC response/action
	<p>Believe that some aspects of Document Retention and Verification of Identity Rules are too prescriptive and unnecessarily inconsistent with equivalent national, state and territory laws.</p> <p>Table 4 in section 6.4 should include in the “Factor” column a reference to the upfront and ongoing compliance costs associated with the MPRs. Reasons to opt in could include streamlining of processes insofar as the Rules provide for national consistency in place of current inconsistent national, state and territory requirements (eg for document retention and verification of identity). Reasons to opt out could include unduly prescriptive requirements imposed on participants.</p> <p>The documents published to date do not refer in any detail to how the financial aspects of the system will be addressed. Suggest that at the very least the Consultation RIS refer to how and where this will be covered.</p>	<p>The Document Retention requirements have been clarified in the MPRs. They were not intended to be as broad as they had been interpreted. A less prescriptive approach to VOI has been adopted based on ‘reasonable steps’.</p> <p><b>Table 4-2 (Table 6-2 in the Consultation RIS) in section 4.4 (6.4 in the Consultation RIS) has been amended as suggested.</b></p> <p>The role of the Registrars is to implement and manage the regulatory framework for National Electronic Conveyancing to the extent that it enables or relates to the lodgement of documents with the Registrar and the relationship between the Registrar and an ELNO.</p> <p>The Registrar, under the Torrens title legislation in each jurisdiction, is responsible for the integrity of the titles register and its administration (other than in WA where the administrative functions lie with a statutory authority).</p> <p>The Registrar's statutory functions and powers are confined, under the Torrens title legislation, to matters relating to the administration of the titles register and the registration of interests in land.</p> <p>The Registrar has no statutory power to regulate financial settlement in relation to transactions lodged in the paper medium. It is not appropriate for the ECNL to confer on the Registrar statutory powers to regulate financial settlement in relation to transactions lodged in the electronic medium.</p>

Part	Comment	ARNECC response/action
		Accordingly the focus of the Consultation RIS is the implementation and management of the regulatory framework for National Electronic Conveyancing to the extent that it enables or relates to the lodgment of documents with the Registrar and the relationship between the Registrar and an ELNO.
Conclusion	<p>Supports the Conclusion set out in section 1.7 ie that there will be positive Net Present Value from a National Electronic Conveyancing system.</p> <p>Also supports the Recommended Option of implementation of a common legal framework that enables documents in electronic form to be lodged and dealt with under the land titles legislation of each jurisdiction.</p>	<p>Noted.</p> <p>Noted.</p>

## Appendix E

### List of persons who provided a response to the 30 March 2012 release of the draft ECNL

- Australian Bankers' Association
- Australian Finance Conference
- Australian Institute of Conveyancers (National)
- Australian Institute of Conveyancers (South Australian Division Inc.)
- Information Brokers & Law Stationers Association
- Law Council of Australia
- Legal Practitioners Liability Committee
- Roushi Low (Queensland University of Technology)
- National Electronic Conveyancing Development Limited (NECDL)
- Queensland Law Society

## Appendix F

### Consolidated Table of comments received in response to the draft ECNL and ARNECC's response

Section	Comment	ARNECC response/action
5	<b>Object of this Law</b>	
5		<b>Clause 5(1)(b) has been added to clarify that the ECNL does not derogate from the fundamental principles of the Torrens system (as incorporated in the land titles legislation), such as the principle of indefeasibility.</b>
5	<p>Section 5(1) and (2) appear too limited in their scope focusing more on the electronic lodgment and dealing aspects of documents but omitting mention of a key element of the national system, the electronic financial settlement function. Concern was also raised that the Electronic Conveyancing National Law does not address the time of settlement.</p> <p>Further, s5 should reflect the objective of national consistency in law and practice and not simply the more general aspect of national efficiency. Specific mention of the objective of having a single national system is also desirable.</p>	<p>The role of the Registrars is to implement and manage the regulatory framework for National Electronic Conveyancing to the extent that it enables or relates to the lodgment of documents with the Registrar and the relationship between the Registrar and the Electronic Lodgment Network Operator. The Registrar under the Torrens title legislation in each jurisdiction is responsible for the administration of the titles register.</p> <p>The Registrar's statutory functions and powers are confined, under the Torrens title legislation, to matters relating to the administration of the titles register and the registration of interests in land. The Registrar has no statutory power to regulate financial settlement in relation to transactions lodged in the paper medium. It is not appropriate for the Electronic Conveyancing National Law to confer on the Registrar statutory power to regulate financial settlement in relation to transactions lodged in the electronic medium.</p> <p>In relation to the time of settlement, this is not currently regulated through the Torrens title legislation in the paper medium and it is not proposed that the Electronic Conveyancing National Law address this for the electronic medium.</p>



Section	Comment	ARNECC response/action
5	The same concern is evident when considering the definition of “participating jurisdiction” which is defined to include any jurisdiction which introduces a law that “substantially corresponds” to the Electronic Conveyancing National Law. Minimisation of jurisdictional differences is an important element of the national scheme.	The reference to “substantially corresponds” is a reference to corresponding or model law, rather than “applied law”, as a corresponding/model law is the preferred option in some jurisdictions. However, it is intended that the legislation will be nationally uniform and the IGA commits the jurisdictions to work towards national consistency and creates ARNECC to coordinate implementation of National Electronic Conveyancing. The IGA has been signed by all jurisdictions except ACT and is published at: <a href="http://www.arnecc.gov.au/publications">http://www.arnecc.gov.au/publications</a> .
<b>7</b>	<b>Documents may be lodged electronically</b>	
7	When does a lodgment happen in the electronic environment? Do we need a definition of “lodgment” particularly when documents are lodged simultaneously? How do people find out the “exact” lodgment time (eg in court to prove one document was lodged before another)?	“Lodgment” is defined in Torrens title legislation in most jurisdictions and will be the same for electronic and paper documents; no further definition is required in the Electronic Conveyancing National Law. Regardless of the lodgment channel, once lodged, electronic and paper documents will be dealt with by the Land Registries according to their respective lodgment priority.
7(1)	It is assumed the Registrar in each jurisdiction may prescribe its own form for documents. It would assist in delivering the objectives for the national system if the Registrar had a duty to consider the objective of having a single national system in exercising such discretion.	Each Registrar is appointed as a statutory officer pursuant to the relevant legislation in their jurisdiction and it’s not permissible to fetter the statutory discretion of the Registrar to make decisions such as which forms must be prescribed. However, the IGA deals with national consistency and commits the Registrars to ensuring that, as far as practicable, business practices for National Electronic Conveyancing are consistent.

Section	Comment	ARNECC response/action
<b>8</b>	<b>Registrar to process documents lodged electronically</b>	
8	The Electronic Conveyancing National Law is silent on how requisitions will be handled in the electronic environment. While we appreciate that electronic processes should reduce the incidence of requisitions, we would welcome ARNECC's advice on whether requisitions are intended to be the responsibility of the responsible subscriber or will have any other effect on an electronic transaction.	It is expected that Requisitions will be rare in electronically lodged documents because of the application of new Lodgment Support Services to provide greater certainty as to the compliance of cases prior to settlement. Requisitions will be dealt with by the Land Registry in the normal way; it will be the responsibility of the Responsible Subscribers to deal with requisitions in the same way as in the current system for paper lodgments.  <b>Note that clause 8(b) has been deleted to clarify that all documents lodged electronically will be received and processed, although they may be subject to requisition if they do not comply with the requirements of the land titles legislation.</b>
<b>9</b>	<b>Status of electronic registry instruments</b>	
9	This section should be clarified to specify the consequences of not complying with the Model Participation Rules.	Non compliance potentially results in suspension and/or termination of a Subscriber's access to an Electronic Lodgment Network. This is set out in the Model Participation Rules. Non compliance with the Model Participation Rules has no effect on a registered document.
9	The Electronic Conveyancing National Law does not specify what registry instruments are intended to be executed by a Subscriber as a Subscriber such as a mortgage. The pro forma Client Authorisation is also broad. Section 9(b) and the Client Authorisation need to be reviewed in light of the National Credit Code s199(2) which is an offence provision breach of which could result in a bank's mortgage being declared void or unenforceable.	There will be no Client Authorisation between a Bank and its customer, because the Bank will not act on behalf of or sign documents on behalf of the customer. This is clarified in the amended Model Participation Rules (see clause 6.13). The only situation where a lender will be a party to a Client Authorisation is where they engage a Subscriber, for example a panel solicitor, to act for them in a transaction.
9	This section relates to State law only because of the words "law	No change is considered necessary as Commonwealth laws

Section	Comment	ARNECC response/action
	<p>of this jurisdiction.” This means that a requirement under a State law for someone’s signature on a document to be witnessed, does not apply to a digitally signed Registry Instrument. What is the status of a digitally signed Registry Instrument that is signed under the authority of a Cth law, eg the Corporations Act 2001 (Cth)?</p>	<p>apply in all jurisdictions with regard to their subject matter. Parliamentary Counsel has advised it is not constitutionally possible for a State law to determine what constitutes compliance with a Commonwealth law. The Electronic Conveyancing National Law has no bearing on whether or not a Commonwealth Law has been complied with.</p>
9	<p>Section 9(3) operates 'If a registry instrument is digitally signed in accordance with the participation rules applicable to that instrument'. This pre-condition is uncertain as it is not clear from the Model Participation Rules which element it refers to, the requirement to use a digital signature, or the requirement to have an authorization or the requirement to be a solicitor or the fact that the person who owns the digital signature signs it. It may be that all these elements must be met to enliven the section, which raises the issue of what should occur if one or all of the requirements are not met?</p>	<p>All the Model Participation Rules relating to digital signing will need to be met. Once a document is registered, any non compliance with the Participation Rules would not affect the indefeasibility of that document.</p>
9	<p>We note that there are also no rules in this section or part of the Electronic Conveyancing National Law for the time at which an electronic document is considered lodged. This needs to be clarified, especially for the purposes of determining priority when there are simultaneous lodgments.</p>	<p>The existing rules/procedures in each jurisdiction for determining time of lodgment and priority will continue to apply.</p>
9	<p>The Electronic Conveyancing National Law should explicitly state that a mortgagee’s execution of the lodgment mortgage is exclusively on its own behalf and not on behalf of the mortgagor. The Client Authorisation should be amended to remove any implication that the mortgagee’s execution of the mortgage instrument for lodgment and its actual lodgment is as agent of the client. The Electronic Conveyancing National Law should include a clause by which the customer/client is bound by the electronic mortgage despite its not having been executed on behalf of the</p>	<p>This is clarified in the amended Model Participation Rules – the Bank signs and lodges a Mortgage only on its own behalf and not on behalf of its customer. No amendment to the section is necessary as there will be no Client Authorisation between the lender and the borrower. The only time that a bank will enter into a Client Authorisation is where it is engaging a subscriber as a representative, such as a panel solicitor, to act on the lender's behalf in electronic conveyancing. It is up to the Bank to ensure</p>

Section	Comment	ARNECC response/action
	customer/client.	that it holds a mortgage executed by the Mortgagor.
9	<p>Given the effect of section 9 (3), this means a digitally signed instrument would meet any legislative requirements regarding the witnessing of such signature. This approach should also be reflected in any requirements of a Registrar in relation to any underlying mortgage documents which a bank must obtain before it can correctly lodge its interest.</p>	<p>For electronic documents that are digitally signed under the Electronic Conveyancing National Law, no witnessing is required. Paper documents remain subject to existing laws regarding execution and witnessing.</p>
9	<p>Section 9 is designed to accord electronic instruments digitally signed by a subscriber the same legal status as a signed paper instrument.</p> <p>The manner in which section 9 is drafted makes its operation conditional upon the subscriber's signature being "in accordance with the participation rules" (refer sub-sections (2) and (3)). It is therefore open to conclude that a registry instrument not signed in accordance with the Model Participation Rules will not be given paper equivalent status and in such circumstances a query may well arise as to the status of such non-compliant instruments prior to registration and after registration.</p> <p>To enshrine this objective and to avoid later interpretation to the contrary, it was suggested that the Electronic Conveyancing National Law incorporate a separate and new provision 'for the avoidance of doubt' that nothing in the Electronic Conveyancing National Law alters any law relating to indefeasibility of title.</p>	<p>The principles of indefeasibility will apply to registered electronic instruments. Parliamentary Counsel has advised that there is no possibility of the Electronic Conveyancing National Law being interpreted as overriding indefeasibility.</p> <p><b>Nevertheless, the objects of the Bill in clause 5 have been amended to try to address those concerns – clause 5(1)(b) has been added to expressly state that the ECNL does not derogate from the fundamental principles of the Torrens system (as incorporated in the land titles legislation), such as indefeasibility.</b></p>

Section	Comment	ARNECC response/action
10	Client authorisations	
		<p><b>Note that clause 10 has been amended to provide that a Client Authorisation is “a document in the form required by the participation rules...” to clarify that a Client Authorisation must be in the prescribed form.</b></p>
10	<p>Client Authorisations are covered under s10 so as to provide for completion of an electronic transaction, which arguably carries with it the client’s authorisation for the mortgagee to sign on its own behalf and lodge the mortgagee’s counterpart. It is assumed that the proposed procedure whereby a mortgagee will obtain and retain a physical or electronic mortgage counterpart signed by the customer and lodge the electronic counterpart signed by the mortgagee Subscriber is designed to overcome the legal aspects of the Electronic Transactions Regulations (Cth) which exclude certain provisions of the Electronic Transactions Act from applying to certain provisions under the NCC. Combined, it would seem the ETR and the NCC could prevent utilisation of the customer’s counterpart electronically.</p>	<p>Client Authorisations are not relevant between the Bank and its customer because the Bank is not acting on behalf of the customer or signing on behalf of the customer, so no Client Authorisation is required as authority for a mortgagor to lodge an electronic mortgage.</p> <p>Only the mortgage digitally signed by the Bank needs to be lodged electronically. The Bank must ensure that it holds a mortgage signed by the customer, but this will not be lodged.</p>
10(2)	<p>Section 10(2) gives examples of things with which a subscriber may ask a client to authorise (eg the client authorises the subscriber to digitally sign registry instruments on its behalf). Reference could usefully be made at this point to privacy authorisations, such as:</p> <ul style="list-style-type: none"> <li>• "(d) to make incidental use, or to authorise an Electronic Lodgment Network Operator to make incidental use, of information (including personal information) relating to a transaction for the purpose of completing anonymised statistical analyses and like activity".</li> </ul>	<p>Not amended as this is not considered appropriate for inclusion in the Electronic Conveyancing National Law. Any authorisation for an Electronic Lodgment Network Operator to make use of information would be a contractual matter between the Electronic Lodgment Network Operator and the Subscriber/their Client, and would be dealt with outside of the terms of the Client Authorisation (which must be in the form required by the Participation Rules, and thus could not include any such authority).</p>

Section	Comment	ARNECC response/action
10(2)	The Client Authorisation should provide for matters that must be included as a minimum in the Client Authorisation. The Client Authorisation should be redrafted in close consultation with legal practitioners and licensed conveyancers.	ARNECC looks forward to working collaboratively with stakeholders to refine the proposed Client Authorisation to address stakeholder needs. It is not considered necessary to specify in the Electronic Conveyancing National Law what must be included as a minimum as the Client Authorisation must be in the form set out in the Participation Rules. In any event, subclause 10(2) provides examples of the types of matters that should be included in the Client Authorisation.
<b>11</b>	<b>Effect of Client Authorisation</b>	
11	Clarification should be provided as to whether the threshold of a 'properly completed' Client Authorisation refers to mere completion and signature by the client or whether it also includes completion of verification of identity. A definition of the term "properly completed" would be beneficial.	Completion of the Client Authorisation and Verification of Identity are two separate issues – the Model Participation Rules require Verification of Identity to be undertaken at or before the signing of the Client Authorisation.  "Properly completed" has its ordinary meaning, in this case, meaning completed in accordance with the requirements of the participation rules and the terms of the Client Authorisation.
11	Section 11(2) deals with compliance with legislative requirements for execution, signing, witnessing, attestation or sealing of documents under State law, but does not apply to Commonwealth law and therefore does not extend to the Corporations Act 2001. This may leave authorisations made by a corporation, consistent with the participation rules but contrary to section 127 of the Corporations Act 2001, capable of being denied.	As noted above in relation to clause 9, Commonwealth legislation such as the Corporations Act applies in all jurisdictions with respect to its subject matter and the Electronic Conveyancing National Law has no bearing on its operation. Where the Corporations Act is relevant to the execution of a Client Authorisation, then its requirements must be complied with (in addition to the requirements of the Model Participation Rules.
11	This section deals with properly completed client authorisations in the prescribed form. The drafting of this section may leave open questions as to the legal effect under the Electronic	<b>Clause 10 has been amended to make it clear that it clear that a Client Authorisation must be in the form required by the participation rules.</b>

Section	Comment	ARNECC response/action
	<p>Conveyancing National Law of:</p> <ul style="list-style-type: none"> <li>• a properly completed client authorisation that is not in accordance with the prescribed form;</li> <li>• an improperly completed client authorisation that is in accordance with the prescribed form; and</li> <li>• the registry instruments derived from those non-conforming client authorisation forms (and in turn whether registered instruments achieve indefeasibility of title).</li> </ul>	<p>Issues arising from departures from the form of a Client Authorisation may give rise to a direction to the Subscriber or other action under the participation rules, or to an action as between the Subscriber and their Client, but will have no effect on a registered instrument.</p>
<b>12</b>	<b>Reliance on Digital Signatures</b>	
12	<p>A number of stakeholders expressed concerns about the attribution rule set out in clause 12 of the draft Electronic Conveyancing National Law. In general the comments proposed review of the attribution rule in relation to liability allocation, clarity and certainty, and consistency with electronics transactions legislation.</p> <p>In particular, issues were raised in relation to the extension of subscriber liability beyond the position at common law, which may mean that subscribers would face a risk of uninsured liability because of the 'contractual undertaking' exclusion which appears in professional indemnity policies for lawyers and conveyancers in this country. Although the attribution rule will have a statutory expression, any liability for damages imposed on a subscriber in a particular case will be based on a breach of contract, namely the participation agreement entered into with the Electronic Lodgment Network Operator which binds a subscriber into compliance with the Model Participation Rules.</p>	<p>The intent of clause 12 is to allow all parties to a transaction to rely on a digital signature that is affixed to a Registry Instrument or Document.</p> <p>Clause 12 is not intended to prevent a Subscriber from removing a digital signature from a Registry Instrument or Document (unsigning) where the system allows this. Amendments have been made to the Model Operating Requirements to require an Electronic Lodgment Network Operator to provide the ability for Subscribers to remove a digital signature from a Registry Instrument or Document (unsign) up until the workspace is locked.</p> <p><b>A new clause 12(3) has been added to clarify that the provisions regarding repudiation do not prevent a document being unsigned.</b></p> <p>Clause 12 does not affect the principle of indefeasibility. The Electronic Conveyancing National Law should be read together with the land titles legislation of each jurisdiction.</p>

Section	Comment	ARNECC response/action
	<p>Concerns were also raised that the provision is a “strict liability” provision under which it is virtually impossible to repudiate a signature, even where the Subscriber has taken reasonable care and the use of the digital signature was unauthorised</p>	<p><b>After consultation with a number of stakeholders who expressed concerns with some aspects of the attribution rule ARNECC has decided that the rule in clause 12 of the draft Electronic Conveyancing National Law should be amended</b> to provide that a Subscriber cannot repudiate a digital signature:</p> <ul style="list-style-type: none"> <li>• of the Subscriber itself, or</li> <li>• of an employee, agent, contractor or officer of the Subscriber who had the subscriber’s express or implied authority to digitally sign documents; or</li> <li>• where the signer did not have the Subscriber’s express or implied authority to digitally sign and was able to sign due to: <ul style="list-style-type: none"> <li>▪ a failure by the Subscriber, its employees, agents, contractors or officers to comply with the Participation Rules; or</li> <li>▪ a failure by the Subscriber, its employees, agents, contractors or officers to take reasonable care.</li> </ul> </li> </ul> <p>A Subscriber would be liable for:</p> <ul style="list-style-type: none"> <li>• its own use of a digital signature</li> <li>• the fraudulent use of a digital signature by an employee etc. where the employee etc was authorised to use a digital signature (by the issuance of a digital certificate to the employee or the granting of express or implied authority to the employee to use another person’s digital certificate).</li> </ul>



Section	Comment	ARNECC response/action
		<p>A Subscriber would not be liable for:</p> <ul style="list-style-type: none"> <li>• the fraudulent use of a digital signature by an employee etc who was not authorised (expressly or impliedly) to use a digital signature.</li> <li>• the fraudulent use of a digital signature by an unauthorised person (whether an employee etc or not),</li> </ul> <p>provided that there was no failure to comply with the Participation Rules or to otherwise take reasonable care that had enabled the signing.</p>
12	<p>Concern was raised that the Bill does not outline the consequences of a signature being repudiated. One stakeholder recommended that, given the significance of a Subscriber's repudiation, section 12(3) should provide for how a right of repudiation is to be exercised, including possibly a prescribed form of notice.</p>	<p>Repudiation of a digital signature in electronic conveyancing will have the same consequences under common law as those that apply in paper conveyancing. In relation to the process for repudiation, a signature can be "unsigned" up until settlement (or lodgment, where there is no settlement). After that, a signature would be repudiated in the same way as a wet signature on a paper document would be repudiated. <b>As noted above, a new clause 12(3) has been added to clarify that the provisions regarding repudiation do not prevent a document from being unsigned.</b></p>
12	<p>Attribution rule may be inconsistent with the international convention (the UN Convention on the use of Electronic Communications in International Contracts, to which Australia is a party) that requires that the purported originator of a digital communication is only bound if they actually did send it.</p>	<ul style="list-style-type: none"> <li>• The UN Convention applies to international contracts so it is not directly relevant to the Electronic Conveyancing National Law</li> <li>• SCAG has agreed to the drafting of a model Bill to implement the obligations under the Convention.</li> <li>• In 2010 NSW amended the Electronic Transactions Act (ETA) to implement the Model Bill.</li> <li>• Section 14 of the ETA deals with the attribution of electronic communications and is at least in part based on</li> </ul>

Section	Comment	ARNECC response/action
		<p>the obligation under the Convention.</p> <ul style="list-style-type: none"> <li>• Section 14(1) provides that, unless otherwise agreed between the purported originator and addressee the purported originator is bound by the communication only if the communication is sent by the purported originator or with his or her authority.</li> <li>• While on its face the Electronic Conveyancing National Law attribution rule contradicts 14(1) section 14(2) provides that this does not affect the operation of a law that makes provision for conduct engaged by a person within the scope of the person's actual or apparent authority to be attributed to another person or for a person to be bound by conduct engaged in by another person within the scope of another person's actual or apparent authority.</li> <li>• Clause 12 of the Electronic Conveyancing National Law is such a provision as catered for under section 14(2).</li> </ul> <p><b>Clause 12 has been amended to modify the proposed attribution rule (see above).</b></p> <p>This amendment to clause 12 will minimise the differences between the rule and the Electronic Transactions Act to those considered necessary for electronic conveyancing.</p>
12	<p>The possibility of a claim against the Torrens Assurance Fund where a Subscriber's employee commits fraud and an instrument is registered needs to be clarified in the context of the attribution rule. It appears that the Subscriber could not repudiate this transaction and the claim by the affected party would be directed at the subscriber or if the claim was covered by the Torrens Assurance Fund, recovery from the Subscriber would be sought.</p>	<p>See the note above concerning the amendment of the attribution rule in clause 12. Indefeasibility of title will not be affected and claims on the various State and Territory assurance funds will continue to be subject to the same rules as they are at present.</p>

Section	Comment	ARNECC response/action
	The operation of the attribution rule in these circumstances needs to be clarified.	
12(2)	Will this create a right to deny compensation to an aggrieved party on the basis of the Electronic Lodgment Network's contributory negligence for failing to detect a fraudulent transaction?	No, but depending on the circumstances there may also be a claim against the Electronic Lodgment Network Operator.
<b>14</b>	<b>Registrar may provide and operate Electronic Lodgment Network</b>	
14	Section 14 should specify the circumstances in which a Registrar can establish and operate its own Electronic Lodgment Network. Section 14 should reflect the object of providing a single national system to ensure Registrars' powers are limited in this respect. The circumstances in which this power can be exercised by a Registrar should be specified to ensure the power is not exercised so as to compete with a private sector Electronic Lodgment Network Operator or create a monopoly.	<p>Clause 14 provides for systems already in existence that are operated by the Registrar in some jurisdictions, and may cover future systems that provide for documents outside the scope of other Electronic Lodgment Networks such as electronic plan lodgment.</p> <p>It is not intended that Land Registries set up general operation Electronic Lodgment Network Operators to compete with any commercially available Electronic Lodgment Network.</p>
<b>15</b>	<b>Registrar may approve Electronic Lodgment Network Operator to provide and operate Electronic Lodgment Network</b>	
15(1)	<p>Section 13 defines what an Electronic Lodgment Network Operator is.</p> <p>Section 15(1) deals with the approval of an Electronic Lodgment Network Operator to provide and operate an Electronic Lodgment Network but is silent on the other functional aspects of the national system, for example financial settlement which we raised in relation to the objects clause of the Electronic Conveyancing</p>	As noted above in relation to clause 5, settlement is outside the scope of the Registrars' regulation of National Electronic Conveyancing. The Registrars do not regulate settlement now and do not consider that they can or should be regulating settlement in electronic conveyancing

Section	Comment	ARNECC response/action
	National Law. The Electronic Conveyancing National Law should make it clear throughout that the national system is wider in scope than merely a lodgment system.	
15(2)	Section 15(2) prohibits a Registrar from approving an Electronic Lodgment Network Operator unless the applicant satisfies the Model Operating Requirements qualifications. Model Operating Requirements 5.2 states that an Electronic Lodgment Network Operator is required to operate an Electronic Lodgment Network nationally. Section 27(2) of the Electronic Conveyancing National Law deals with waiver of compliance with the Model Operating Requirements but it is unclear if this extends to waiving the requirement to meet the "qualifications" for approval as an Electronic Lodgment Network Operator. If it is intended that a Registrar have the power to waive Model Operating Requirements this could create a fragmented approach to a single national system.	<p>Clause 27 is a general power of waiver that is unlikely to be applied to the obligation to have a national system. However, it is likely that there will be a phased start up and that any system will not be national for some time.</p> <p>The IGA also deals with the concept of a single national system and national consistency.</p> <p>The IGA commits the jurisdictions to work towards national consistency and creates ARNECC to coordinate implementation of National Electronic Conveyancing. The IGA has been signed by all jurisdictions except ACT and is published at <a href="http://www.arnecc.gov.au/publications">http://www.arnecc.gov.au/publications</a>.</p>
<b>16</b>	<b>Conditions of approval as Electronic Lodgment Network Operator</b>	
16(1)	Section 16(1) entitles the Registrar to attach conditions to an approval of a person as an Electronic Lodgment Network Operator. Consider whether there should be some parameters placed around such conditions. The following words could be inserted at the start of section 16(1): "To the extent necessary to promote the public interest and to ensure compliance by the Registrar with pre-existing legal obligations, the Registrar may attach conditions to an approval ...".	Not amended; it is not considered appropriate to limit the Registrar's power in this way. The Registrar needs discretion to deal with any issues that may arise.
16(2)	Section 16(2) states that the Registrar may at any time vary, revoke or introduce new or additional or conditions of approval.	Not amended. The Registrar must retain this discretion in its role as the regulator of an approved Electronic Lodgment Network

Section	Comment	ARNECC response/action
	<p>Given that an Electronic Lodgment Network Operator will be basing its business case on the assumption that conditions specified by the Registrars at the time of approval will remain reasonably constant during the term of the engagement of the Electronic Lodgment Network Operator, it would be preferable if section 16(2) were amended so that the conditions could only be varied by agreement with the Electronic Lodgment Network Operator.</p>	<p>Operator.</p>
<b>19</b>	<b>Renewal of approval as Electronic Lodgment Network Operator</b>	
19	<p>Concern was raised that the Registrar has discretion not to renew an Electronic Lodgment Network Operator's approval, but the Bill does not contain any criteria for the application of this discretion. The appeal process would not adequately deal with this.</p>	<p>Not amended; it is not considered appropriate to list criteria in the Electronic Conveyancing National Law as they would be many and varied and may change over time. The Registrar is a creature of statute, and in exercising a decision to approve or not renew would be bound by administrative law principles. In addition there is a right of appeal against a decision not to renew an approval.</p>
<b>20</b>	<b>Revocation or suspension of approval as Electronic Lodgment Network Operator</b>	
20	<p>If one Registrar suspends or terminates an Electronic Lodgment Network Operator, this would impact on other jurisdictions. Consider making it mandatory or at least preferable for an ARNECC meeting to take place before a decision to revoke an Electronic Lodgment Network Operator is made.</p>	<p>Not amended. While the Registrars are committed to a coordinated approach and it is likely that this would occur, it is not agreed that it should be mandatory, as there may be circumstances where it is necessary for one jurisdiction to make an urgent decision to suspend or revoke an Electronic Lodgment Network Operator.</p>
20	<p>While s28 of the Electronic Conveyancing National Law provides for a right of appeal where an Electronic Lodgment Network Operator's ability to operate has been suspended or revoked by</p>	<p>Not amended, as it is not appropriate to deal with this issue in the Electronic Conveyancing National Law. Clause 21.4 of the Model Operating Requirements deals with the Business and Services</p>

Section	Comment	ARNECC response/action
	<p>the Registrar, there is no transitional provision in the Electronic Conveyancing National Law or the Model Operating Requirements to provide for continuity of service other than under an Electronic Lodgment Network Operator's Business and Services Disengagement Plan the details of which are presently unknown. In the Model Participation Rules, if a Subscriber's participation is terminated or suspended, the Subscriber is obliged to complete or arrange to have completed any Outstanding Conveyancing Transaction.</p> <p>Either the Electronic Conveyancing National Law or the Model Operating Requirements should be expanded to cover an appropriate time period between the decision to suspend or revoke an Electronic Lodgment Network Operator and the actual service disengagement so that any pending transactions can be transferred to another Electronic Lodgment Network Operator to allow settlements to occur without delay</p>	<p>Disengagement Plan. It is necessary for a Registrar to have the power to suspend an Electronic Lodgment Network Operator immediately (although this is unlikely to occur), so a transition period may not be possible. The process for finalising any incomplete transactions in these circumstances should be discussed between an Electronic Lodgment Network Operator and potential subscribers. Note that it is anticipated that should this circumstance arise, the transactions could proceed in the paper medium.</p> <p>Termination of an Electronic Lodgment Network Operator is a remedy of last resort. The Model Operating Requirements has been amended to provide for a show cause procedure to apply in all except extreme circumstances before any termination.</p>
<b>21</b>	<b>Monitoring of activities in Electronic Lodgment Network</b>	
21(1)	<p>It is stipulated that the Registrar may monitor activities in an Electronic Lodgment Network for any purpose, especially for the purpose of maintaining the integrity of the titles register. The draft Model Operating Requirements then contains a rather burdensome and potentially cumbersome reporting regime, accompanied by the use of Independent Experts for a range of purposes. Perhaps the issue could be addressed by limiting section 21(1) so that only reports reasonably necessary for the Registrar to monitor activities could be required.</p>	<p>The power to "monitor" activities in the Electronic Lodgment Network is a broad power which may relate to a variety of matters, in respect of both the Electronic Lodgment Network Operator and Subscribers. The reporting obligations in the Model Operating Requirements relate specifically to compliance with the particular obligations of the Electronic Lodgment Network Operator under the Model Operating Requirements, which is a separate issue to "monitoring" activities in the Electronic Lodgment Network. In relation to the particular concern regarding the number of reports required, the draft Model Operating Requirements has been amended and the number of reports to be provided has been streamlined considerably.</p>

Section	Comment	ARNECC response/action
22	<b>Operating requirements for Electronic Lodgment Network Operators</b>	
23	<b>Participation rules</b>	
24	<b>Registrar to have regard to nationally agreed model operating requirements and participation rules</b>	
22(2)	It should be clear that in the event of inconsistency between the terms of a participation agreement and the Model Participation Rules, the Model Participation Rules prevails.	The Model Participation Rules provides that in the event of inconsistency, the Model Participation Rules prevail over any other provision of the Participation Agreement.
22, 23, 24	Stakeholders queried why the Registrars were not compelled by the Electronic Conveyancing National Law to adopt the nationally agreed participation rules and operating requirements, rather than just to “have regard” to the desirability of maintaining consistency with any model provisions. It was also suggested that section 24 should be amended to provide for a general duty to take reasonable steps to ensure the Registrar will act cooperatively and consistently in administering the national system and with respect to the Law, and also to apply to the exercise of an individual jurisdiction’s discretion with respect to its own land titles legislation.	<p>Each Registrar is appointed as a statutory officer pursuant to the relevant legislation in their jurisdiction and it is not permissible to fetter the statutory discretion of the Registrar by legislating that the Registrar must adopt the nationally agreed Model Participation Rules or Model Operating Requirements.</p> <p>Accordingly it is not appropriate to include such a provision in the Electronic Conveyancing National Law. However, in the IGA that has been signed by all jurisdictions except ACT and is published at <a href="http://www.arnecc.gov.au/publications">http://www.arnecc.gov.au/publications</a>, at clause 5.3 each jurisdiction has agreed to implement the Australian Registrars’ Operating Requirements and Australian Registrars’ Participation Rules (and any amendments made to them) as the operating requirements and participation rules applicable in that jurisdiction. The IGA also commits the Registrars to ensuring, as far as practicable, that business practices are consistent. The usual consultation procedures would apply in relation to any proposed changes to the Electronic Conveyancing National Law; the Model Operating Requirements and Model Participation Rules contain a schedule setting out the process for their amendment, including consultation. This is supported by ARNECC’s published <i>Stakeholder Engagement and Consultation Policy</i>.</p>

Section	Comment	ARNECC response/action
22, 23, 24	<p>There is a large emphasis in the Electronic Conveyancing National Law and the Model Participation Rules on the Subscriber's obligations. It is accepted that this is an unavoidable consequence of moving to an electronic system such that the obligations of each party to this system need to be spelt out clearly and achieving this via the Electronic Conveyancing National Law is preferable to a contractual-based model. However, Subscribers may find these obligations, many of which do not exist in the current system, onerous and this may deter uptake of the national electronic system.</p>	<p>Feedback from stakeholders in relation to the Model Participation Rules has been taken into consideration and substantial amendments have been made to address the concerns of stakeholders.</p>
<b>25</b>	<b>Publication of Operating Requirements</b>	
25	<p>Sections 25(3) and (4) would require an Electronic Lodgment Network Operator to immediately comply with amendments to the Model Operating Requirements and Model Participation Rules which in the circumstances may not be possible.</p> <p>Section 25(2) states that proposed changes to the Model Operating Requirements/Model Participation Rules must be published 20 business days before they take effect. This will be insufficient time for large organisations, or where technology changes are required, particularly given that the Registrar has the ability to make changes in their own jurisdiction.</p> <p>Section 25(3) provides for urgent changes to be made to the Model Operating Requirements/Model Participation Rules. The lack of ability to make "immediate" changes may still have significant impact on stakeholders. The determination of an "emergency" situation could be better defined by objective standards of impact, rather than at the discretion of the relevant Registrar.</p>	<p>The Electronic Conveyancing National Law sets 20 working days as a minimum notice period.</p> <p>Prior to the amendment being published, consultation will have occurred in accordance with the procedure in Schedule 2 of the Model Participation Rules, and the commencement date of the amendment wherever possible will reflect a reasonable time for stakeholders to implement changes in order to comply with the amendment.</p>



Section	Comment	ARNECC response/action
25	<p>The method of making the documents available is too broadly expressed and lacks clarity and certainty. A common method of notification is by publication in government gazettes and that some jurisdictions have online and email notifications of such publications.</p> <p>The method of notification of changes to the Model Participation Rules should involve direct notification of Subscribers if possible.</p>	<p>With respect to notice to Subscribers – the Model Operating Requirements has been amended to require Electronic Lodgment Network Operator to give notice to Subscribers of changes to Model Participation Rules (at direction of ARNECC). Section 25 of the Electronic Conveyancing National Law also sets out how publication may occur – it is anticipated that changes would be published on the ARNECC website and notified through the Electronic Lodgment Network Operator as a minimum.</p>
25	<p>It would appear that some of the examples which might constitute 'any emergency situation' would likely be covered in any and all relevant BCP/DRP's, or does this clause refer to situations outside of these requirements? This should be clear.</p>	<p>"Emergency situations" may be anticipated or unanticipated and both are dealt with under this section of the Electronic Conveyancing National Law.</p>
<b>26</b>	<b>Subscribers required to comply with participation rules</b>	
26(2)	<p>The sub-section is expressed too broadly: it allows restriction, suspension or termination for any contravention of the Participation Rules. There should be some specification of the type of contravention that would warrant such action. The Subscriber should also have an adequate opportunity to rectify some types of breaches that are not so serious so as to result in termination.</p>	<p>A general head of power is appropriate. Schedule 7 to the Model Participation Rules sets out the circumstances in which a Subscriber's registration may be suspended or terminated. The Model Participation Rules also now include a "show cause" procedure. The default position would be that, except in extreme circumstances, there would always be a suspension followed by a show cause procedure before termination action is taken.</p>
<b>27</b>	<b>Waiving Compliance with operating Requirements or Participation Rules</b>	
27	<p>This is a very broad discretion. Some statutory guidance on its application should be provided. For example, cl 27(1) could provide that the Registrar may waive compliance with all or any provisions of the operating requirements or participation rules "where it is reasonable to do so in the circumstances" (or</p>	<p><b>Clause 27 has been amended to require the Registrar to be satisfied that the granting of a waiver is reasonable in all the circumstances.</b></p> <p>It was not considered appropriate to list criteria in the Electronic Conveyancing National Law, as these would be many and varied</p>

Section	Comment	ARNECC response/action
	something similar). Alternatively it was suggested that relevant criteria to guide the exercise of the Registrar's discretion should be included.	and may change over time. The Registrar is creature of statute and is bound by the usual administrative law principles.
27	What is the definition of 'waive compliance' in this context? The Subscriber will require some parameters around which operating requirements or participation rules the Registrar may waive compliance with at their discretion.	The possible scope/application of a waiver is set out in clause 27(2).
<b>28</b>	<b>Appeal Against Decisions of Registrar</b>	
28	Section 28 specifies circumstances in which a decision of the Registrar can be appealed to a court. Whilst appellable decisions include decisions by the Registrar to restrict, suspend or terminate an Electronic Lodgment Network Operator's activity, they do not include the right to appeal the exercise by the Registrar of a discretion under the Model Operating Requirements or the Model Participation Rules. It was suggested that this right be added as a new section 28(h).	The exercise of discretion is covered by the usual administrative law procedures in each jurisdiction and it is not necessary to add an extra appeal right in the Electronic Conveyancing National Law in relation to this issue.
28	The section should be amended to include a right to appeal against decisions by the Electronic Lodgment Network Operator concerning restrictions, suspensions and terminations in the absence of any direction by the Registrar.	The relationship between the Electronic Lodgment Network Operator and Subscribers will be based in contract under the Participation Agreement and as such is not appropriate to include an appeal right against decisions of the Electronic Lodgment Network Operator.
28	The section should be amended to include a right to appeal in relation to a decision by the Registrar to request information or documents as part of a compliance examination. It was also noted that there is no express mechanism to protect client legal privilege in the circumstances of a request under section 34.	Not amended. The compliance examination procedure in the Model Participation Rules has been amended to deal with this issue. The compliance examination procedure also provides that a Subscriber may have reasonable cause to refuse to provide documents – for example, where the documents are the subject of legal professional privilege.

Section	Comment	ARNECC response/action
28	Section 28 details certain decisions of the Registrar which may be appealed 'to the responsible tribunal'. This should actually reference a 'court or tribunal as nominated by regulation' to permit each jurisdiction to set the appropriate review forum.	The Responsible Tribunal for a jurisdiction will be nominated in each jurisdiction's application law. See for example the NSW application Law included in the Draft Electronic Conveyancing National Law which nominates the NSW Supreme Court as the Responsible Tribunal for NSW.
28	What is to prevent frivolous or vexatious appeals against the Registrar?	<b>Clause 28 has been amended to provide that a person who is the subject of an appellable decision may, where they have not already been provided, require the Registrar to provide in writing the grounds for the Registrar's decision and that only a person who has received written grounds from the Registrar under may appeal against the decision to the responsible tribunal.</b> The ability of the Court to award costs against an unsuccessful party will also deter frivolous or vexatious appeals (see clause 30).
<b>33</b>	<b>Compliance Examinations</b>	
33	Will there be a requirement to provide an annual certificate of compliance by Subscribers pursuant to this clause, or will this (broad definition) of compliance examinations be the only compliance mechanism used to evidence compliance?	No, there is no requirement for an annual certificate of compliance to the Registrar, but the Electronic Lodgment Network Operator may have its own requirements for Subscribers to provide certification. Compliance examinations would only be conducted by the Registrar as necessary.
33	The threshold for the conduct of a compliance examination is too broad and should include some specification of the type of request or complaint which the Registrar should consider in exercising his or her discretion to conduct a compliance examination.  The request or complaint should be directly relevant to the operation of the Electronic Lodgment Network.	This power needs to be broad as the Registrar may not have full details of the alleged breach of misconduct, hence the need to investigate further by carrying out a compliance examination.  The power is already limited to investigating compliance with the Model Operating Requirements/Model Participation Rules or suspected or alleged misconduct in relation to operation of the Electronic Lodgment Network in the case of an Electronic Lodgment Network Operator, and in relation to the use of an

Section	Comment	ARNECC response/action
	<p>The person making the request or complaint should have some interest or right affected by the operation of the Electronic Lodgment Network rather than 'any person'.</p> <p>The type of 'suspected or alleged misconduct' should be defined so that the actions being investigated are clear and certain.</p>	<p>Electronic Lodgment Network in the case of a Subscriber.</p> <p>It is not possible to define suspected or alleged misconduct in advance of carrying out the compliance examination to determine the nature of the misconduct but it is already "in relation to the use of the Electronic Lodgment Network".</p>
<b>34</b>	<b>Obligations to Cooperate with Examination</b>	
34	<p>It should be clear that a "reasonable excuse" not to comply with a compliance examination includes documents protected under legal professional privilege and information that is subject to the banker's duty of confidentiality unless it is clear that this duty is specifically relieved under a duty to provide information as authorised or required under this Law. Concerns were also raised regarding commercially sensitive documents.</p> <p>It was also suggested that a Subscriber should have a right of appeal in respect to the provision of the requested documents.</p>	<p>Any documents that may be requested must relate to the subject of the compliance examination which is limited in section 33 (a) with respect to an Electronic Lodgment Network Operator and 33(b) with respect to a subscriber. The Electronic Conveyancing National Law is not intended to override existing laws regarding legal professional privilege, and the existence of privilege may be a "reasonable excuse" to not provide documents. Depending on the circumstances of the matter, a document which is commercially sensitive may also be an example of a document which a Subscriber has a "reasonable excuse" not to produce.</p> <p><b>However, section 34 has been amended to provide that it is NOT a reasonable excuse to fail produce a document merely because the production of the document might incriminate the person or make the person liable to penalty. The privilege against self-incrimination still applies in criminal proceedings, except in relation to documents that are required to be kept under the ECNL, the land titles legislation, the operating requirements or the participation rules.</b></p> <p>In relation to the right of appeal, the usual administrative law principles would apply in this situation and it is not necessary to add a further statutory right of appeal in the Electronic Conveyancing National Law.</p>

Section	Comment	ARNECC response/action
34	What is the time period to be for the subscriber to provide the requirements (a) and (b) from the time the compliance examination notice is issued? Will a time period be prescribed or the more appropriate “reasonable time”?	The compliance examination period in the Model Participation Rules provides for a period of not less than 14 days. The actual time period would be stated in the request from the Registrar and the request overall needs to be “reasonable”.
<b>35</b>	<b>Registrar May Refer Matter to Appropriate Authority</b>	
35	There should be some specification of the types of matters that can be referred to an appropriate authority rather than ‘any matter’, and some specification of the ‘other’ action that can be taken by the authority in relation to the referral.	<p>The reference to “any matter” can only mean a matter in relation to which a compliance examination can be conducted (which is clearly specified in clause 33). <b>The clause has been amended to change “any matter” to “a matter” to reduce the scope for misinterpretation.</b></p> <p>The action that may be taken by the authority will depend upon the nature of the authority and its powers in the circumstances. The Electronic Conveyancing National Law does not grant any new jurisdiction or powers to any existing authority.</p>
35	Some justification for referring matters outside the particular jurisdiction and some reference to the power to do so should also be provided.	The relevant authority may be based in another jurisdiction – eg a Victorian lawyer carrying out a transaction in NSW may be referred to the Victorian Law Institute if there was a case of misconduct.
<b>37</b>	<b>Delegation by Registrar</b>	
37	Concerns were raised with this provision as it allows for delegation of regulatory functions and powers to bodies or officers outside of the public sector. It was suggested that the bodies who may be the subject of such delegations should be specified.	Not amended. In practice the person carrying out a compliance examination is likely to be a public servant, former public servant, or professional regulatory authority acting as agent for the Registrar. However, the delegation power needs to remain broad to allow for the possibility that the Registrar may require additional or specialist resources to assist in carrying out compliance examinations.

Section	Comment	ARNECC response/action
<b>38</b>	<b>Registrar not obliged to monitor Electronic Lodgment Network or conduct compliance examination</b>	
38	The Registrar is not obliged to monitor an Electronic Lodgment Network or conduct a compliance examination. Therefore, it appears that all compliance responsibility is allocated to the Electronic Lodgment Network and subscriber. Does it then follow that the Registrar will assume all information is true and correct when receiving it?	As in the paper environment, the Registrar will accept a document – and rely on the certification that it is true and correct – unless the Registrar has reason to believe that the document is not true and correct.
<b>41</b>	<b>Other laws Relating to Electronic Transactions Not Affected</b>	
41	<p>While this clause provides that it is in addition to and not in substitution for the laws of the jurisdiction relating to electronic transactions, one stakeholder was concerned that the Electronic Conveyancing National Law is in fact inconsistent with electronic transactions legislation in the States and Territories and therefore cannot in its current form be ‘in addition’ to that legislation.</p> <p>The UN electronic commerce and electronic signature laws and the UN convention operate on the premise that a purported originator of an electronic message is bound only if that message was in fact sent by or with the authority of that purported originator, which is inconsistent with the proposed attribution rule in section 12.</p>	See comment on clause 12 in relation to the UN CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS.
	<b>General</b>	
	It is anticipated that electronic conveyancing will introduce a “paperless” title system. Accordingly, specific provisions should be introduced to address where paper titles are still used, and the lack of need to retain paper titles where parties are seeking to	It is not possible to deal with the issue of paper titles in the Electronic Conveyancing National Law; this will be dealt with in the Torrens legislation in each jurisdiction as that is the legislation that provides for paper titles/abolition of paper titles and the legislative changes and transitional arrangements may be slightly

Section	Comment	ARNECC response/action
	rely on the electronic title within the applicable land registry.	different in each jurisdiction.
	One professional body was concerned that the Law and the Model Participation Rules place much greater onus and responsibility on its members than exists in the current paper regime. They saw this shift as a potential deterrent to take up and were concerned that there is an intentional movement of risk away from the various State jurisdictional assurance funds or indemnity funds (which are funded by various methods but generally by an additional transactional charge eg in South Australia from the interest earned on the trust accounts of licensed agents and registered conveyancers).	<p>It is not intended that the Electronic Conveyancing National Law will change the current liability arrangements. Amendments have been made to the Model Participation Rules and to the attribution rule to clarify liability issues.</p> <p>It is considered that various risk mitigation features in electronic conveyancing will mean that it is at least as secure, if not more so, than paper conveyancing.</p>
	The definition of “financial year” in the interpretation schedule to the Electronic Conveyancing National Law was noted by one stakeholder group and the comment was made that If it will relate to accounts or information of a subscriber, banks have different financial years to 1 July to 30 June.	The definition is included in a standard interpretation schedule for national applied law schemes. It is not considered that this will have any effect as the term is not actually used in the Electronic Conveyancing National Law.
	Provision should be made in the Electronic Conveyancing National Law, the Model Operating Requirements or Model Participation Rules for the Registrar or an Electronic Lodgment Network Operator to provide information to appropriate authorities of any decision regarding restrictions, suspensions or terminations, provided appropriate protections are also included in relation to the sharing of this information.	It is not appropriate to include this type of power in the Electronic Conveyancing National Law.. Should the Registrar become aware of any matter that should be reported to a police or regulatory body it is not necessary to provide a right to do so. Also, clause 35 allows the Registrar to refer matters raised or discovered in a compliance examination to an appropriate authority.
	The Electronic Conveyancing National Law, the Model Operating Requirements and the Model Participation Rules should be consistent in relation to the use of the terms ‘digital signature’ and ‘digital certificate’.	Changes have been made to ensure consistency.

Section	Comment	ARNECC response/action
	<p>Key documents referred to in the Electronic Conveyancing National Law, the Model Operating Requirements and the Model Participation Rules be made available as part of the consultation process on the Model Operating Requirements and the Model Participation Rules.</p>	<p>The Intergovernmental Agreement has been published on the ARNECC website (<a href="http://www.arnecc.gov.au">www.arnecc.gov.au</a>), and other documents will be published as they become available. The terms of the Participation Agreement between an Electronic Lodgment Network Operator and potential Subscribers is for those parties to negotiate and agree.</p>
	<p>Concern was raised that the costs associated with the creation of liabilities through the operation of the Electronic Conveyancing National Law, the Model Operating Requirements and the Model Participation Rules, such as those associated with the Verification of Identity rules, will outweigh the benefits of electronic settlement and lodgment.</p>	<p>It is not intended that the Electronic Conveyancing National Law will change the current liability arrangements. Amendments have been made to the Model Participation Rules and clause 12 of the Electronic Conveyancing National Law to clarify liability issues. It is important to note that verification of identity is not solely an electronic conveyancing cost, it is a general cost in relation to mitigation of identity fraud and in future will apply in the paper environment as well as the electronic environment.</p>
	<p>A review provision should be inserted in the Electronic Conveyancing National Law. A shorter time than that specified in the IGA (7 years) is preferable. A period of between 1 and 3 years was suggested.</p>	<p>The IGA provides for a review of the Electronic Conveyancing National Law after 7 years or such shorter period as the parties to the IGA may agree.</p>
	<p>It was suggested that if fees charged by an Electronic Lodgment Network Operator for use of an Electronic Lodgment Network are not intended to be regulated, the Electronic Conveyancing National Law should prohibit users and operators from requiring other parties to use any particular network or operator, whether directly or indirectly.</p>	<p>Anti-competitive behaviour of any user or particular network operator would be likely to breach Competition and Consumer Laws and it is not considered necessary to insert the suggested provision in the Electronic Conveyancing National Law.</p>



## Appendix G

### Impacts on Victoria of the ECNL

While Electronic Conveyancing (EC) has been available in Victoria since 2007, the new National EC System (NEC) that the EC National Law will facilitate will lead to an increased use of EC within Victoria. Overall, the benefits to Victoria of adopting the EC National Law and utilising the NEC outweigh the benefits were Victoria to instead continue to use its own EC System (ECV).

#### *Benefits of EC in Victoria*

The key benefits of EC in Victoria are the removal of the inefficiencies for the current paper-based conveyancing systems, which include:

- reduced data entry and rework of paper transaction documents following lodgement refusal (currently eight per cent of transaction documents are refused due to errors);
- reduced time to organise and attend settlement to exchange transaction documents;
- eliminate the need to attend and lodge transaction documents with Land Victoria;
- reduced courier costs, lodgement fees and costs associated with bank cheques.

The RIS projects the impact of the EC National Law and implementing NEC by applying NSW estimates on an Australia wide basis. As Victoria processes 27.3 per cent of transactions it can expect that the benefits to Victoria would be of a similar percentage. Further, the Victorian Department of Sustainability and Environment has independently produced estimates on the effect of the introduction of the EC National Law and NEC in Victoria.

*Analyses conducted in 2004 by Opticon Australia and Dench McClean Carlson, following industry consultation, identified savings of \$235-\$395 per Victorian property settlement through the use of EC. These savings would accrue in the first instance to purchasers, vendors and financial institutions, with the savings to financial institutions expected to accrue ultimately to vendors and purchasers through reduced fees and charges. While these analyses were based on the ECV system, they are considered to be equally applicable to the use of NEC in Victoria as the NEC has similar functionality to ECV and there has been little, if any change in conveyancing practices over the last eight years.*

Applying CPI and using the midpoint of the above benefit estimate of \$380 for a typical four party settlement, savings comprise \$60 for each party's bank, plus \$130 saving for each vendor and purchaser representative per settlement, broken down as follows:

- \$42 for paying a settlement agent to attend settlement
- \$18 for removal of need for extra bank cheques
- \$14 for a courier to collect and deliver documentation
- \$56 in time spent having to organise settlement

*Further, in 2007 Land Victoria introduced differential lodgement fees for the lodgement of paper and electronic transactions. For a typical four party settlement the Land Victoria fees for the electronic transactions are \$45 cheaper.*

#### *Adopting NEC in Victoria*

Victoria proposes to adopt NEC and its facilitating EC National Law. ECV currently has 410 subscribers and in 2011-12 processed 7,500 EC transactions. However, this represents just over one per cent of transactions processed in 2011-12.

The first release of the NEC is scheduled for early 2013 and will provide functionality for mortgages and discharges of mortgage and on-boarding of financial institutions. In the first year of operation this will include the four major financial institutions and some second tier lenders. The second release, scheduled for the second quarter of 2014, will provide added functionality including land transfers, caveats and withdrawal of caveats and commence the on-boarding of lawyers and conveyancers. It is intended that, at the time of the second release, existing subscribers in ECV will be transitioned to NEC and ECV decommissioned.

It is expected that, overall, more benefits will accrue were Victoria to adopt NEC as take up of NEC in Victoria will significantly exceed that of ECV.

The four major financial institutions (who are parties to the vast majority of conveyancing transactions in Victoria) do not currently, and will not in the future, use ECV as they have stated they will only use a national EC system. The major financial institutions not using ECV has limited the number of transactions that can be processed, as EC can only be used for a conveyancing transaction if all parties to the transaction agree to use the relevant EC System. The four major financial institutions have committed to using NEC.

If Victoria were to continue using ECV, then only a minority of Victorian conveyancing transactions would be performed via EC and thus accrue the cost savings that result. By contrast, if Victoria adopted NEC, the vast majority of conveyancing transactions would be eligible to be performed via EC and thus accrue the cost savings that result. For example, ECV currently process approximately 7,500 transactions per year and by 2016 it is estimated that it could be processing 20,000 transactions per year. By 2016, it is estimated that NEC will be processing 180,000 transactions per year in Victoria. This is an increase of 160,000 transactions comprising 40,000 settlements. As the benefit for a four party settlement is \$380, the overall benefit to industry in 2016 will be in the order of \$15 million (based on \$2012 savings).

The introduction through NEC of nationally uniform conveyancing practices will enable Victorian businesses that engage in conveyancing activities interstate to benefit from not having to adopt different conveyancing practices for their interstate transactions.

No significant disadvantages will accrue to Victorian conveyancing related businesses as a result of Victoria adopting NEC rather than continuing to use ECV. Financial institutions, law firms and conveyancing firms that are already subscribers to ECV can become subscribers to NEC. The process of migrating subscribers from ECV to NEC is not yet known. It may only involve signing new contracts however it could also require a new registration and identification taking up to two to three hours (\$150 to \$250 in salaries). Using the mid-point of \$200 and assuming there are 600 ECV subscribers when they are migrated to NEC in 2014, the total cost would be in the order of \$120,000. Following registration with NEC the costs to subscribers of using NEC are expected to be comparable to using ECV.

For parties to conveyancing transactions, the costs of a conveyancing transaction through NEC will be comparable to that of using ECV but because a greater proportion of conveyancing transactions will be eligible for EC were NEC used rather than ECV, there is a greater likelihood of being able to access the costs savings that EC offers.

The following table shows the cost comparisons between ECV and NEC.

<b>Cost comparisons between ECV and NEC</b>			
<b>Activity</b>	<b>ECV</b>	<b>NEC</b>	<b>Cost Comparison</b>
Subscriber registration	Register with Land Victoria	Register with NEC operator	Same
Digital signature registration	Must be gate keeper compliant service provider	Must be gate keeper compliant service provider	Same
Compliance with participation rules	Require insurance, client identification, digital signing, certifications, document retention	Requirements similar	Same
Client authorisation	Form to be completed	Similar form to be completed	Same
Verification of identity	100 point check	Similar process	Same
Workspace creation and pre-population of data	\$7.30	\$7.30. Existing statutory search fee.	Same
Instrument completion (operational requirements)	Data entered into workspace and instrument digitally signed	Data entered into workspace and instrument digitally signed	Same
Instrument Fee	No fee charged	Not available. NEC operator fees will be commercial fees charged to the subscriber	Not known

Cost comparisons between ECV and NEC			
Activity	ECV	NEC	Cost Comparison
Title activity check (TAC) and lodgement verification (LV)	TAC fee per request per subscriber is \$0.88.	\$4.33 for unlimited number of TACs and \$3.44 for unlimited number of LVs with results available to all subscribers. These are existing Land Victoria user charges.	Same for most common transaction type of Discharge of Mortgage, Transfer and Mortgage
Financial settlement	\$24.75	Not available. NEC operator fees will be commercial fees charged to the subscriber	Not known
Lodgement	Statutory fee	Existing statutory lodgement fee	Same
Subscriber usage	Voluntary. Paper lodgement available.	Voluntary. Paper lodgement available.	Same
Set up and operational requirements	Registration, acquisition of digital signature, subscriber training, limited IT changes as uses web browser	Registration, acquisition of digital signature, subscriber training, limited IT changes as uses web browser	Same
Subscriber participation	Mainly single party transactions. Not used by major financial institutions	Single and multi party transactions expected. Major financial institutions to use NEC	Significant increase in subscribers and transactions expected for NEC. Set up costs for NEC expected to be significantly less per transactions due to higher volume.
Compliance examination	Call in documents	Call in documents	Same

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## Appendix H

Note: During the approval process for this Decision Regulation Impact Statement the ECNL was introduced into and has been passed by the NSW Parliament.

New South Wales

DRAFT

### Electronic Conveyancing National Law Bill 2012

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**CONFIDENTIAL**

**This draft has been prepared as a NSW Bill.**

New South Wales

LEGISLATIVE ASSEMBLY/COUNCIL

## **Electronic Conveyancing National Law Bill 2012**

**A Bill for**

**An Act to make provision for a national law relating to electronic conveyancing.**

**The Legislature of New South Wales enacts:**

**Part 1 — Preliminary**

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**1. Name of Act**

This Act is the *Electronic Conveyancing National Law Act 2012*.

**2. Commencement**

This Act commences as follows —

- (a) sections 1 and 2 — on the date of assent,
- (b) the rest of the Act — on a day or days to be appointed by proclamation.

**3. Definitions**

- (1) For the purposes of this Act, the *local application provisions of this Act* are the provisions of this Act other than the Electronic Conveyancing National Law set out in Schedule 1.
- (2) In the local application provisions of this Act:  
*Electronic Conveyancing National Law (NSW)* means the provisions applying in this jurisdiction because of section 4.

1 **Part 2 — Application of Electronic Conveyancing**  
2 **National Law**

3 **4. Application of Electronic Conveyancing National Law**

4 The Electronic Conveyancing National Law set out in  
5 Schedule 1:

- 6 (a) applies as a law of this jurisdiction; and  
7 (b) as so applying may be referred to as the *Electronic*  
8 *Conveyancing National Law (NSW)*; and  
9 (c) applies as if it were an Act.

10 **5. Meaning of generic terms in Electronic Conveyancing**  
11 **National Law for purposes of this jurisdiction**

12 In the *Electronic Conveyancing National Law (NSW)*:

13 ***land titles legislation***:

- 14 (a) means the following Acts:  
15 (i) the *Community Land Development Act 1989*,  
16 (ii) the *Conveyancing Act 1919*,  
17 (iii) the *Real Property Act 1900*,  
18 (iv) the *Strata Schemes (Freehold Development) Act*  
19 *1973*,  
20 (v) the *Strata Schemes (Leasehold Development) Act*  
21 *1986*,  
22 (vi) any other Act prescribed by the regulations for  
23 the purposes of this definition, and  
24 (b) includes any regulations made under any of those Acts,  
25 and  
26 (c) also includes any other law of this jurisdiction that  
27 authorises or requires something to be registered, noted  
28 or recorded in the titles register.

29 ***Registrar*** means the Registrar-General.

1            **registry instrument** means any document that may be lodged  
2 under the land titles legislation for the purpose of:

- 3            (a) creating, transferring, disposing of, mortgaging,  
4            charging, leasing or dealing with in any other way an  
5            estate or interest in land, or  
6            (b) getting something registered, noted or recorded in the  
7            titles register; or  
8            (c) getting the registration, note or record of something in  
9            the titles register changed, withdrawn or removed.

10          **this jurisdiction** means New South Wales.

11          **titles register** means:

- 12            (a) the Register required to be maintained by section 31B(1)  
13            of the *Real Property Act 1900*, or  
14            (b) any other register prescribed by the regulations for the  
15            purposes of this definition.

16          **6. Responsible tribunal for *Electronic Conveyancing National***  
17          ***Law (NSW)***

18            The Supreme Court is the responsible tribunal for this  
19            jurisdiction for the purposes of the *Electronic Conveyancing*  
20            *National Law (NSW)*.

21          **7. Exclusion of interpretation legislation of this jurisdiction**

22            The *Interpretation Act 1987* does not apply to the *Electronic*  
23            *Conveyancing National Law (NSW)* or to the instruments made  
24            under that Law.

25          **8. Regulations**

26            The Governor may make regulations, not inconsistent with this  
27            Act, for or with respect to any matter that by this Act is required  
28            or permitted to be prescribed or that is necessary or convenient  
29            to be prescribed for carrying out or giving effect to this Act.

=====

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**Schedule 1 — Electronic Conveyancing National Law**

[s. 4]



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## Part 1 — Preliminary

1  
2 **1. Short title**

3 This Law may be cited as the Electronic Conveyancing National Law.

4 **2. Commencement**

5 This Law commences in a participating jurisdiction as provided by the  
6 application law of that jurisdiction.

7 **3. Definitions**

8 (1) In this Law:

9 *application law* means a law of a participating jurisdiction that:

- 10 (a) applies this Law, either with or without modifications, as a  
11 law of the participating jurisdiction, or  
12 (b) is a corresponding law.

13 *ARNECC* means the Australian Registrars' National Electronic  
14 Conveyancing Council established by the Intergovernmental  
15 Agreement.

16 *associated financial transaction* means a transaction of a financial  
17 nature that is associated with a conveyancing transaction.

18 **Examples**

- 19 1. The payment of the purchase price for the sale and purchase of an interest in land.  
20 2. The advancing of money in return for the granting of a mortgage or charge over an interest in  
21 land.  
22 3. The payment of any tax, duty (for example, stamp duty), fee or charge payable in respect of the  
23 conveyancing transaction.

24 *client authorisation* has the meaning given in section 10.

25 *compliance examination* has the meaning given in section 33.

26 *conveyancing transaction* means a transaction that involves one or  
27 more parties and the purpose of which is:

- 28 (a) to create, transfer, dispose of, mortgage, charge, lease or deal  
29 with in any other way an estate or interest in land, or  
30 (b) to get something registered, noted or recorded in the titles  
31 register, or  
32 (c) to get the registration, note or record of something in the titles  
33 register changed, withdrawn or removed.

- 1           **corresponding law:**
- 2           (a) means a law of a jurisdiction that corresponds to this Law,  
3           and
- 4           (b) includes a law of a jurisdiction that is prescribed by  
5           regulations made under a law of this jurisdiction as a  
6           corresponding law.  
7
- 15           **digitally sign**, in relation to an electronic communication or a  
16           document, means create a digital signature for the communication or  
17           document.
- 18           **digital signature** means encrypted electronic data intended for the  
19           exclusive use of a particular person as a means of identifying that  
20           person as the sender of an electronic communication or the signer of a  
21           document.
- 22           **ELN** means Electronic Lodgment Network — see section 13.
- 23           **ELNO** means Electronic Lodgment Network Operator — see  
24           section 15.
- 25           **Intergovernmental Agreement** means the Intergovernmental  
26           Agreement for a National Electronic Conveyancing Law between the  
27           State of New South Wales, the State of Victoria, the State of  
28           Queensland, the State of Western Australia, the State of South  
29           Australia, the State of Tasmania and the Northern Territory of  
30           Australia, that came into operation on 21 November 2011 and as in  
31           force from time to time:
- 32           **jurisdiction** means State.
- 33           **land titles legislation**, for the purposes of the application of this Law  
34           as a law of a participating jurisdiction, has the meaning given by the  
35           application law of the jurisdiction.
- 36           **law**, in relation to a Territory, means a law of, or in force in, that  
37           Territory.

- 1            **law of this jurisdiction** includes the principles and rules of common  
2            law and equity to the extent that they have effect in this jurisdiction  
3            from time to time.
- 4            **lodge** includes deposit, present and file.
- 5            **operating requirements** means the requirements determined under  
6            section 22.
- 7            **participating jurisdiction** means a jurisdiction that is a party to the  
8            Intergovernmental Agreement and in which:
- 9            (a)    this Law applies as a law of the jurisdiction, either with or  
10           without modifications, or
- 11           (b)    there is a corresponding law.
- 12           **participation agreement**, in relation to an ELN, means:
- 13           (a)    if an ELNO provides and operates the ELN, an agreement  
14           between the ELNO and another person under which the other  
15           person is authorised to use that ELN, or
- 16           (b)    if the Registrar provides and operates the ELN, an agreement  
17           between the Registrar and another person under which the  
18           other person is authorised to use that ELN.
- 19           **participation rules** means the rules determined under section 23.
- 20           **Registrar**, for the purposes of the application of this Law as a law of a  
21           participating jurisdiction, has the meaning given by the application  
22           law of the jurisdiction.
- 23           **registry instrument**, for the purposes of the application of this Law as  
24           a law of a participating jurisdiction, has the meaning given by the  
25           application law of the jurisdiction.
- 26           **responsible tribunal**, for the purposes of the application of this Law  
27           as a law of a participating jurisdiction, has the meaning given by the  
28           application law of the jurisdiction.
- 29           **State** includes a Territory.
- 30           **subscriber** means a person who is authorised under a participation  
31           agreement to use an ELN to complete conveyancing transactions on  
32           behalf of another person or on their own behalf.
- 33           **Territory** means the Australian Capital Territory or the Northern  
34           Territory of Australia.

1            *titles register*, for the purposes of the application of this Law as a law  
2            of a participating jurisdiction, has the meaning given by the  
3            application law of the jurisdiction.

4            (2) A term used in this Law or a statutory instrument and also in the land  
5            titles legislation has the same meaning in this Law or the statutory  
6            instrument as it has in that legislation, unless the term is defined in  
7            this Law or the statutory instrument or the context requires otherwise.

#### 8            **4. Interpretation generally**

9            Schedule 1 applies in relation to this Law.

#### 10          **5. Object of this Law**

11          (1) The object of this Law is to promote efficiency throughout Australia  
12          in property conveyancing by providing a common legal framework  
13          that:

- 14                  (a) enables documents in electronic form to be lodged and  
15                  processed under the land titles legislation of each  
16                  participating jurisdiction, but  
17                  (b) does not derogate from the fundamental principles of the  
18                  Torrens system of land title as incorporated in the land titles  
19                  legislation of each participating jurisdiction, such as  
20                  indefeasibility of title.

21          (2) In order to achieve this object, this Law, among other things,  
22          authorises the Registrar in each participating jurisdiction to operate or  
23          authorise the operation of an Electronic Lodgment Network, and  
24          provides for the making of rules relating to the operation of the  
25          Electronic Lodgment Network.

#### 26          **6. Law binds the State**

27          (1) This Law binds the State.

28          (2) In this section:

29          *State* means the Crown in right of this jurisdiction, and includes:

- 30                  (a) the Government of this jurisdiction, and  
31                  (b) a Minister of the Crown in right of this jurisdiction, and

- 1 (c) a statutory corporation, or other entity, representing the  
2 Crown in right of this jurisdiction.

**Part 2 — Electronic Conveyancing**

**Division 1 — Electronic lodgment**

**7. Documents may be lodged electronically**

(1) A document may be lodged electronically for the purposes of the land titles legislation if the document is lodged:

(a) in a form approved by the Registrar, and

(b) by means of an ELN provided and operated under this Law.

(2) An approval for the purposes of subsection (1)(a) may be given under the land titles legislation or in some other way that the Registrar considers appropriate.

**8. Registrar to process documents lodged electronically**

(1) If a document is lodged electronically in accordance with section 7, the Registrar must receive and process the document in accordance with the land titles legislation.

(2) This section does not limit or affect the need for the document to comply with the requirements of the land titles legislation, this Law or any other law of this jurisdiction.

**9. Status of electronic registry instruments**

(1) A registry instrument that is in a form in which it can be lodged electronically under section 7 has the same effect as if that instrument were in the form of a paper document.

(2) A registry instrument that is digitally signed by a subscriber in accordance with the participation rules applicable to that instrument has the same effect as if a paper document having the equivalent effect had been executed by:

(a) if the subscriber signs under a client authorisation, each person for whom the subscriber signs in accordance with the client authorisation, or

(b) the subscriber in any other case.

- 1       (3) If a registry instrument is digitally signed in accordance with the  
2 participation rules applicable to that instrument:  
3           (a) the instrument is to be taken to be in writing for the purposes  
4 of every other law of this jurisdiction, and  
5           (b) the requirements of any other law of this jurisdiction relating  
6 to the execution, signing, witnessing, attestation or sealing of  
7 documents must be regarded as having been fully satisfied .

8                   **Division 2 — Client authorisations and digital signatures**

9                           **Subdivision 1 — Client authorisations**

10       **10. Client authorisations**

- 11       (1) A *client authorisation* is a document:  
12           (a) that is in the form required by the participation rules, and  
13           (b) by which a party to a conveyancing transaction authorises a  
14 subscriber to do one or more things on that party's behalf in  
15 connection with the transaction so that the transaction, or part  
16 of the transaction, can be completed electronically.
- 17       (2) The following are examples of the things that a client authorisation  
18 may authorise a subscriber to do:  
19           (a) to digitally sign registry instruments or other documents,  
20           (b) to present registry instruments or other documents for  
21 lodgment electronically,  
22           (c) to authorise or complete any associated financial transaction.

23       **11. Effect of client authorisation**

- 24       (1) A properly completed client authorisation:  
25           (a) has effect according to its terms, and  
26           (b) is not a power of attorney for the purposes of any other law of  
27 this jurisdiction relating to powers of attorney.
- 28       (2) If a client authorisation is properly completed, the requirements of  
29 any other law of this jurisdiction relating to the execution, signing,  
30 witnessing, attestation or sealing of documents must be regarded as  
31 having been fully satisfied.

- 1 (3) Subsections (1) and (2) do not limit or affect the application of any  
2 law of this jurisdiction relating to powers of attorney in relation to:  
3 (a) the execution of a client authorisation under a power of  
4 attorney, or  
5 (b) a client authorisation executed under a power of attorney.

6 **Subdivision 2 — Digital signatures**

7 **12. Reliance on, and repudiation of, digital signatures**

- 8 (1) If a subscriber's digital signature is created for a registry instrument  
9 or other document in connection with a conveyancing transaction,  
10 then:  
11 (a) unless that subscriber repudiates that digital signature, that  
12 registry instrument or other document is to be taken to be  
13 signed by that subscriber, and  
14 (b) unless that subscriber repudiates that digital signature, that  
15 digital signature is binding, in relation to that registry  
16 instrument or other document, on:  
17 (i) that subscriber, and  
18 (ii) all other persons (if any) for whom that subscriber  
19 acts under a client authorisation with respect to that  
20 conveyancing transaction, and  
21 (c) unless that subscriber repudiates that digital signature, that  
22 digital signature is binding, in relation to that registry  
23 instrument or other document, for the benefit of:  
24 (i) each of the parties to that conveyancing transaction,  
25 and  
26 (ii) each subscriber who acts under a client authorisation  
27 with respect to that conveyancing transaction, and  
28 (iii) any person claiming through or under any person to  
29 whom subparagraph (i) applies, and  
30 (iv) the Registrar, once that registry instrument or other  
31 document is lodged electronically in accordance with  
32 section 7, and  
33 (d) that subscriber cannot repudiate that digital signature except  
34 in the circumstances set out in subsection (4).



- 1       (2) Subsection (1) applies regardless of:  
2           (a) who created the subscriber's digital signature, and  
3           (b) the circumstances (including fraud) in which the subscriber's  
4           digital signature was created.
- 5       (3) Subsection (1) does not prevent the unsigned of a registry instrument  
6       or other document.
- 7       (4) Despite subsections (1) and (2), a subscriber can repudiate the  
8       subscriber's digital signature with respect to a registry instrument or  
9       other document if the subscriber establishes:  
10           (a) that the digital signature was not created by the subscriber,  
11           and  
12           (b) that the digital signature was not created by a person who, at  
13           the time the subscriber's digital signature was created for the  
14           registry instrument or other document:  
15               (i) was an employee, agent, contractor or officer  
16               (however described) of the subscriber, and  
17               (ii) had the subscriber's express or implied authority to  
18               create the subscriber's digital signature for any  
19               document or documents, and  
20           (c) that neither of the following enabled the subscriber's digital  
21           signature to be created for the registry instrument or other  
22           document:  
23               (i) a failure by the subscriber, or any of the subscriber's  
24               employees, agents, contractors or officers, to fully  
25               comply with the requirements of the participation  
26               rules,  
27               (ii) a failure by the subscriber, or any of the subscriber's  
28               employees, agents, contractors or officers, to take  
29               reasonable care.
- 30       (5) For the purposes of subsection (4)(b)(ii), it does not matter whether  
31       the authority was:  
32           (a) general, or  
33           (b) limited or restricted to documents of a particular class or to a  
34           particular document or in any other way.

**Part 3 — Electronic Lodgment Networks**

**Division 1 — Preliminary**

**13. Electronic Lodgment Network**

- (1) An Electronic Lodgment Network (*ELN*) is an electronic system that enables the lodging of registry instruments and other documents in electronic form for the purposes of the land titles legislation.
- (2) An ELN may also enable the preparation of registry instruments and other documents in electronic form for lodging under the land titles legislation.

**Division 2 — Operation of Electronic Lodgment Networks**

**14. Registrar may provide and operate ELN**

The Registrar may provide and operate an ELN.

**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.

**16. Conditions of approval as ELNO**

- (1) The Registrar may attach conditions to an approval under section 15, and those conditions must be specified in the approval.
- (2) The Registrar may at any time, by notice in writing to the ELNO, vary or revoke the conditions attached to the approval of that ELNO or attach new or additional conditions.

- 1     **17.     Effect of approval as ELNO**
- 2           (1)    A person who is approved as an ELNO under section 15 may provide  
3           and operate an ELN:
- 4               (a)   for the period stated in the approval, and  
5               (b)   subject to the conditions (if any) attached to the approval, and  
6               (c)   in accordance with the operating requirements.
- 7           (2)   Subsection (1) is subject to sections 19 and 20.
- 8           (3)   In performing functions as an ELNO, a person approved under  
9           section 15 is not and does not represent the State, and is not an agent  
10           of the State.
- 11          (4)   The approval of a person as an ELNO does not restrict or prevent the  
12          provision, by that person, of services additional to those provided by  
13          the ELN.
- 14          (5)   Subsection (4) is subject to the operating requirements.
- 15     **18.     ELNO required to comply with operating requirements**
- 16           A person approved as an ELNO under section 15 must comply with  
17           the operating requirements.
- 18     **19.     Renewal of approval as ELNO**
- 19          (1)   The Registrar may renew an approval of a person as an ELNO under  
20          section 15 if the Registrar is satisfied that the person continues to  
21          meet the qualifications for approval set out in the operating  
22          requirements.
- 23          (2)   The renewal of an approval under this section must be in writing and  
24          must state the period for which the renewal is to have effect.
- 25          (3)   In renewing an approval, the Registrar may exercise the powers in  
26          section 16 to attach conditions to the approval or vary or revoke  
27          conditions attached to the approval.
- 28     **20.     Revocation or suspension of approval as ELNO**
- 29           The Registrar may revoke or suspend the approval of a person as an  
30           ELNO in the circumstances set out in the operating requirements.

1   **21.     Monitoring of activities in ELN**

- 2       (1)   The Registrar may monitor activities in an ELN for any purpose,  
3       including (without limitation) for the purpose of maintaining the  
4       integrity of the titles register.
- 5       (2)   This section does not limit Division 5.

6       **Division 3 — Operating requirements and participation rules**

7   **22.     Operating requirements for ELNOs**

- 8       (1)   The Registrar may determine, in writing, requirements (*operating*  
9       *requirements*) relating to:
- 10       (a)   the operation of an ELNO, and  
11       (b)   the provision and operation, by an ELNO, of an ELN.
- 12       (2)   The operating requirements may (without limitation) include  
13       provisions relating to the following matters:
- 14       (a)   the financial standing of an ELNO,  
15       (b)   compliance with the participation rules, including (without  
16       limitation):
- 17           (i)   requiring an ELNO to use a participation agreement  
18           when authorising persons to use an ELN, and  
19           (ii)  requiring participation agreements to incorporate the  
20           participation rules,
- 21       (c)   the technical and operational requirements for an ELN,  
22       (d)   the insurance cover to be held by an ELNO,  
23       (e)   the circumstances in which the Registrar may suspend or  
24       revoke the approval of a person as an ELNO,  
25       (f)   the giving of directions to an ELNO by the Registrar, for  
26       example a direction to restrict, suspend or terminate a  
27       subscriber's or other person's use of an ELN.

28   **23.     Participation rules**

- 29       (1)   The Registrar may determine, in writing, rules relating to the use of an  
30       ELN (*participation rules*).

- 1           (2) The participation rules may (without limitation) include provisions  
2 relating to the following matters:
- 3           (a) the eligibility criteria for subscribers,  
4           (b) the obligations of subscribers, including (without limitation)  
5                 any representations or warranties they are required to give,  
6           (c) the circumstances in which a subscriber's authority to use the  
7                 ELN may be restricted, suspended or terminated,  
8           (d) client authorisations,  
9           (e) the obligations of subscribers to verify the identity of their  
10                 clients,  
11           (f) the certification of registry instruments and other documents  
12                 for use in connection with the ELN,  
13           (g) digital signing,  
14           (h) the retention of documents created or obtained in connection  
15                 with a subscriber's use of an ELN,  
16           (i) compliance by subscribers with the participation rules,  
17                 including (without limitation) how subscribers demonstrate  
18                 compliance with the rules, the procedures for notifying non-  
19                 compliance and how non-compliance may be remedied.

20 **24. Registrar to have regard to nationally agreed model operating**  
21 **requirements and participation rules**

- 22           (1) In this section:  
23                 *model provisions* means any model operating requirements or model  
24                 participation rules from time to time developed and published by  
25                 ARNECC.
- 26           (2) In determining operating requirements and participation rules under  
27                 this Law, and in determining changes to those requirements or rules,  
28                 the Registrar must have regard to the desirability of maintaining  
29                 consistency with any model provisions.

30 **25. Publication of operating requirements and participation rules**

- 31           (1) The Registrar must ensure that the following are publicly available:  
32                 (a) the current operating requirements and participation rules,

- 1           (b) all superseded versions of the operating requirements and  
2           participation rules.
- 3           (2) The operating requirements and participation rules, and any changes  
4           to either of them, must be made publicly available at least 20 business  
5           days before the operating requirements or participation rules or, as the  
6           case requires, the changes to them take effect.
- 7           (3) However, changes to the operating requirements or participation rules  
8           may take effect within a shorter period (including immediately on  
9           being made publicly available), if the Registrar is satisfied that the  
10          changes need to take effect urgently because an emergency situation  
11          exists.
- 12          (4) For the purposes of subsection (3), an emergency situation exists if  
13          the Registrar considers that, because of the occurrence of an event or  
14          the existence of particular circumstances, the operation, security,  
15          integrity or stability of an ELN or the titles register or the land titles  
16          system is being, or is likely to be, jeopardised.
- 17          (5) Documents may be made publicly available in accordance with this  
18          section in any manner the Registrar considers appropriate, including  
19          (without limitation) by means of a website.
- 20          (6) It is sufficient compliance with subsection (1)(b) if a superseded  
21          version of the operating requirements or participation rules (other than  
22          the most recently superseded version) is publicly available only on  
23          request made to the Registrar.
- 24   **26.       Subscribers required to comply with participation rules**
- 25          (1) A subscriber who is authorised under a participation agreement to use  
26          an ELN must comply with the participation rules relating to that ELN.
- 27          (2) If a subscriber contravenes those participation rules, the Registrar  
28          may:
- 29               (a) if the Registrar operates the ELN, restrict, suspend or  
30               terminate the subscriber's use of the ELN,
- 31               (b) if an ELNO operates the ELN, direct the ELNO to restrict,  
32               suspend or terminate the subscriber's use of the ELN.

- 1 (3) Subsection (2) does not limit or affect any right, power, authority or  
2 remedy that the Registrar or an ELNO has under the operating  
3 requirements, the participation rules, a participation agreement or any  
4 other law of this jurisdiction in relation to contravention of the  
5 participation rules.

6 **27. Waiving compliance with operating requirements or participation**  
7 **rules**

- 8 (1) The Registrar may waive compliance with all or any provisions of the  
9 operating requirements or participation rules if the Registrar is  
10 satisfied that granting the waiver is reasonable in all the  
11 circumstances.

- 12 (2) A waiver under this section may —

- 13 (a) be total or partial, and  
14 (b) apply generally to all persons, or be limited in its application  
15 to particular persons or particular classes of persons, and  
16 (c) apply generally or be limited in its application by reference to  
17 specified exceptions or factors, and  
18 (d) apply indefinitely or for a specified period, and  
19 (e) be unconditional or subject to conditions or restrictions.

20 **Division 4 — Appeals**

21 **28. Appeal against decisions of Registrar**

- 22 (1) A person who is the subject of any of the following decisions (an  
23 *appellable decision*) may require the Registrar to provide, in writing,  
24 the grounds for the decision:  
25 (a) a decision by the Registrar to refuse to approve the person as  
26 an ELNO,  
27 (b) a decision by the Registrar to refuse to renew the person's  
28 approval as an ELNO,  
29 (c) a decision by the Registrar to suspend the person's approval  
30 as an ELNO,  
31 (d) a decision by the Registrar to revoke the person's approval as  
32 an ELNO,

- 1 (e) a decision by the Registrar to attach a condition to the  
2 person's approval as an ELNO, or to vary or revoke a  
3 condition of the person's approval as an ELNO, if the  
4 attachment, variation or revocation of the condition is done  
5 without the person's agreement,
- 6 (f) a decision by the Registrar to restrict, suspend or terminate  
7 the person's use, as a subscriber, of an ELN operated by the  
8 Registrar,
- 9 (g) a decision by the Registrar to direct an ELNO to restrict,  
10 suspend or terminate the person's use, as a subscriber, of the  
11 ELN operated by the ELNO.
- 12 (2) A person who is the subject of an appellable decision and who has  
13 received written grounds for the decision from the Registrar under  
14 subsection (1) or otherwise may appeal against the decision to the  
15 responsible tribunal.

16 **29. Determination of appeal**

- 17 (1) After hearing the appeal, the responsible tribunal may:
- 18 (a) confirm the appellable decision, or  
19 (b) amend the appellable decision, or  
20 (c) substitute another decision for the appellable decision.
- 21 (2) In substituting another decision for the appellable decision, the  
22 responsible tribunal has the same powers as the Registrar under this  
23 Law.

24 **30. Costs**

- 25 (1) The responsible tribunal may make any order about costs it considers  
26 appropriate for the proceedings under this Division.
- 27 (2) This section does not apply if the responsible tribunal has power  
28 under another law of this jurisdiction to make an order about costs for  
29 proceedings under this Division.



1   **31. Relationship with Act establishing responsible tribunal**

2           This Division applies despite any provision to the contrary of the Act  
3           that establishes or continues the responsible tribunal, but does not  
4           otherwise limit that Act.

5                           **Division 5 — Compliance examinations**

6   **32. Definitions**

7           In this Division:

8           *ELNO* includes a former ELNO.

9           *subscriber* includes a former subscriber.

10   **33. Compliance examinations**

11           The Registrar may, on receiving a request or complaint from any  
12           person or on the Registrar's own initiative, conduct an investigation  
13           (*compliance examination*) under this Part:

14           (a) in relation to an ELNO for either or both of the following  
15           purposes:

16                   (i) ascertaining whether or not the operating  
17                   requirements are being, or have been, complied with,

18                   (ii) investigating any suspected or alleged case of  
19                   misconduct with respect to the operation of an ELN,

20           (b) in relation to a subscriber for either or both of the following  
21           purposes:

22                   (i) ascertaining whether or not the participation rules are  
23                   being, or have been, complied with,

24                   (ii) investigating any suspected or alleged case of  
25                   misconduct with respect to the use of an ELN.

26   **34. Obligation to cooperate with examination**

27           (1) An ELNO or a subscriber in relation to whom a compliance  
28           examination is being conducted must cooperate fully with the person  
29           conducting the compliance examination for the purpose of ensuring  
30           that the person is able to conduct a proper compliance examination.

- 1 (2) In particular, an ELNO or a subscriber must comply with any  
2 reasonable request by the person conducting the compliance  
3 examination:
- 4 (a) to furnish specified information or to produce specified  
5 documents, or
- 6 (b) to take specified action for the purposes of the compliance  
7 examination.
- 8 (3) If an ELNO fails, without reasonable excuse, to cooperate as required  
9 by this section, the Registrar may take any action that the Registrar is  
10 authorised to take under the operating requirements and that the  
11 Registrar considers appropriate, which may include (without  
12 limitation) the suspension or revocation of the ELNO's approval  
13 under section 20.
- 14 (4) If a subscriber fails, without reasonable excuse, to cooperate as  
15 required by this section, the Registrar may take any action that the  
16 Registrar is authorised to take under the operating requirements, the  
17 participation rules or the land titles legislation and that the Registrar  
18 considers appropriate.
- 19 (5) For the purposes of subsections (3) and (4), it is a reasonable excuse  
20 for an individual to fail to give stated information, answer a question  
21 or to produce a document, if giving the information, answering the  
22 question or producing the document might tend to incriminate the  
23 individual.

24 **35. Registrar may refer matter to appropriate authority**

- 25 (1) In this section:
- 26 ***appropriate authority:***
- 27 (a) means a person, body or organisation who or which is  
28 empowered by a law of this jurisdiction or of another State or  
29 the Commonwealth to take investigatory, disciplinary or  
30 other action, and
- 31 (b) includes (without limiting paragraph (a)):
- 32 (i) a law enforcement agency, and
- 33 (ii) a regulatory or disciplinary body for persons engaged  
34 in any profession, occupation, calling or business.

1       (2) Instead of conducting a compliance examination in relation to a  
2       matter, or at any time during a compliance examination or after the  
3       completion of a compliance examination in relation to a matter, the  
4       Registrar may refer the matter to an appropriate authority.

5       (3) If the Registrar refers a matter to an appropriate authority, the  
6       Registrar is not obliged to take any other action in relation to the  
7       matter.

8       **36. Land titles legislation not limited**

9       Nothing in this Division limits or affects any provision of the land  
10      titles legislation that authorises or permits any investigation, inquiry  
11      or examination of any kind.

1 **Part 4 — Miscellaneous**

2 **Division 1 — Delegation**

3 **37. Delegation by Registrar**

4 The Registrar may delegate to any other person:

- 5 (a) the power conferred by section 21 to monitor activities in an  
6 ELN,  
7 (b) any function under Part 3 Division 5.

8 **Division 2 — Liability of Registrar**

9 **38. Registrar not obliged to monitor ELN or conduct compliance**  
10 **examination**

11 The Registrar is not obliged:

- 12 (a) to monitor activities in an ELN under section 21; or  
13 (b) to conduct or complete a compliance examination under  
14 Part 3 Division 5.

15 **39. No compensation**

16 No person is entitled to receive compensation for any loss or damage  
17 arising out of anything done or omitted in good faith in, or in  
18 connection with, the monitoring of activities in an ELN under  
19 section 21 or the conduct of a compliance examination under Part 3  
20 Division 5, including (without limitation):

- 21 (a) any decision made, in good faith, not to monitor activities in  
22 an ELN or not to conduct a compliance examination, and  
23 (b) any decision made, in good faith, as to how activities in an  
24 ELN are to be monitored or how a compliance examination is  
25 to be conducted.

26 **40. Registrar not responsible for additional services provided by**  
27 **ELNO**

28 The mere fact that an ELNO provides services that are additional to  
29 those provided by the ELN operated by that ELNO does not make the

1 Registrar responsible for the regulation or operation of those  
2 additional services.

3 **Division 3 — Relationship with other laws**

4 **41. Other laws relating to electronic transactions not affected**

5 This Law is in addition to, and not in substitution for:

- 6 (a) the laws of this jurisdiction in relation to electronic  
7 transactions, and  
8 (b) any other law of this jurisdiction that authorises or permits  
9 the use of electronic documents for the purposes of the land  
10 titles legislation.

11 *[Note: Jurisdictions applying or enacting this Law will need to consider*  
12 *whether other laws of their jurisdiction are inconsistent with it, and how any*  
13 *inconsistency should be resolved.]*

14 **42. Powers may be exercised for purposes of this Law**

15 If any provision of the land titles legislation empowers the making of  
16 an instrument of a legislative or administrative character, or the doing  
17 of any other act or thing, that power is to be construed (with all  
18 necessary changes) as including a general power to make instruments  
19 of that character, or to do that act or thing, for the purposes of this  
20 Law.

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**Schedule 1 — Miscellaneous provisions relating to interpretation**

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**Part 1 — Preliminary**

**1. Displacement of Schedule by contrary intention**

The application of this Schedule may be displaced, wholly or partly,  
by a contrary intention appearing in this Law.

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**Part 2 — General**

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**2. Law to be construed not to exceed legislative power of Legislature**

- (1) This Law is to be construed as operating to the full extent of, but so as not to exceed, the legislative power of the Legislature of this jurisdiction.
- (2) If a provision of this Law, or the application of a provision of this Law to a person, subject matter or circumstance, would, but for this clause, be construed as being in excess of the legislative power of the Legislature of this jurisdiction:
  - (a) it is a valid provision to the extent to which it is not in excess of the power, and
  - (b) the remainder of this Law, and the application of the provision to other persons, subject matters or circumstances, is not affected.
- (3) This clause applies to this Law in addition to, and without limiting the effect of, any provision of this Law.

**3. Every section to be a substantive enactment**

Every section of this Law has effect as a substantive enactment without introductory words.

**4. Material that is, and is not, part of this Law**

- (1) The heading to a Part, Division or Subdivision into which this Law is divided is part of this Law.
- (2) A Schedule to this Law is part of this Law.
- (3) Punctuation in this Law is part of this Law.
- (4) A heading to a section or subsection of this Law does not form part of this Law.
- (5) Notes included in this Law (including footnotes and endnotes) do not form part of this Law.



1 **5. References to particular Acts and to enactments**

2 In this Law:

- 3 (a) an Act of this jurisdiction may be cited:
- 4 (i) by its short title, or
- 5 (ii) by reference to the year in which it was passed and its
- 6 number, and
- 7 (b) a Commonwealth Act may be cited:
- 8 (i) by its short title, or
- 9 (ii) in another way sufficient in a Commonwealth Act for
- 10 the citation of such an Act,
- 11 together with a reference to the Commonwealth, and
- 12 (c) an Act of another jurisdiction may be cited:
- 13 (i) by its short title, or
- 14 (ii) in another way sufficient in an Act of the jurisdiction
- 15 for the citation of such an Act,
- 16 together with a reference to the jurisdiction.

17 **6. References taken to be included in Act or Law citation etc.**

- 18 (1) A reference in this Law to an Act includes a reference to:
- 19 (a) the Act as originally enacted, and as amended from time to
- 20 time since its original enactment, and
- 21 (b) if the Act has been repealed and re-enacted (with or without
- 22 modification) since the enactment of the reference, the Act as
- 23 re-enacted, and as amended from time to time since its
- 24 re-enactment.
- 25 (2) A reference in this Law to a provision of this Law or of an Act
- 26 includes a reference to:
- 27 (a) the provision as originally enacted, and as amended from
- 28 time to time since its original enactment, and
- 29 (b) if the provision has been omitted and re-enacted (with or
- 30 without modification) since the enactment of the reference,
- 31 the provision as re-enacted, and as amended from time to
- 32 time since its re-enactment.

- 1       (3) Subclauses (1) and (2) apply to a reference in this Law to a law of the  
2       Commonwealth or another jurisdiction as they apply to a reference in  
3       this Law to an Act and to a provision of an Act.

4       **7. Interpretation best achieving Law's purpose**

- 5       (1) In the interpretation of a provision of this Law, the interpretation that  
6       will best achieve the purpose or object of this Law is to be preferred  
7       to any other interpretation.
- 8       (2) Subclause (1) applies whether or not the purpose is expressly stated in  
9       this Law.

10      **8. Use of extrinsic material in interpretation**

- 11      (1) In this clause:  
12      *extrinsic material* means relevant material not forming part of this  
13      Law, including, for example:
- 14          (a) material that is set out in the document containing the text of  
15          this Law as printed by the Government Printer, and
- 16          (b) a relevant report of a Royal Commission, Law Reform  
17          Commission, commission or committee of inquiry, or a  
18          similar body, that was laid before the Parliament of this  
19          jurisdiction before the provision concerned was enacted, and
- 20          (c) a relevant report of a committee of the Parliament of this  
21          jurisdiction that was made to the Parliament before the  
22          provision was enacted, and
- 23          (d) a treaty or other international agreement that is mentioned in  
24          this Law, and
- 25          (e) an explanatory note or memorandum relating to the Bill that  
26          contained the provision, or any relevant document, that was  
27          laid before, or given to the members of, the Parliament of this  
28          jurisdiction by the member bringing in the Bill before the  
29          provision was enacted, and
- 30          (f) the speech made to the Parliament of this jurisdiction by the  
31          member in moving a motion that the Bill be read a second  
32          time, and

- 1 (g) material in the Votes and Proceedings of the Parliament of  
2 this jurisdiction or in any official record of debates in the  
3 Parliament of this jurisdiction, and  
4 (h) a document that is declared by this Law to be a relevant  
5 document for the purposes of this clause.

6 *ordinary meaning* means the ordinary meaning conveyed by a  
7 provision having regard to its context in this Law and to the purpose  
8 of this Law.

- 9 (2) Subject to subclause (3), in the interpretation of a provision of this  
10 Law, consideration may be given to extrinsic material capable of  
11 assisting in the interpretation:  
12 (a) if the provision is ambiguous or obscure, to provide an  
13 interpretation of it, or  
14 (b) if the ordinary meaning of the provision leads to a result that  
15 is manifestly absurd or is unreasonable, to provide an  
16 interpretation that avoids such a result, or  
17 (c) in any other case, to confirm the interpretation conveyed by  
18 the ordinary meaning of the provision.
- 19 (3) In determining whether consideration should be given to extrinsic  
20 material, and in determining the weight to be given to extrinsic  
21 material, regard is to be had to:  
22 (a) the desirability of a provision being interpreted as having its  
23 ordinary meaning, and  
24 (b) the undesirability of prolonging proceedings without  
25 compensating advantage, and  
26 (c) other relevant matters.

27 **9. Effect of change of drafting practice**

28 If:

- 29 (a) a provision of this Law expresses an idea in particular words;  
30 and  
31 (b) a provision enacted later appears to express the same idea in  
32 different words for the purpose of implementing a different  
33 legislative drafting practice, including, for example:  
34 (i) the use of a clearer or simpler style, or

1                   (ii) the use of gender-neutral language,  
2                   the ideas must not be taken to be different merely because different  
3                   words are used.

4   **10. Use of examples**

5                   If this Law includes an example of the operation of a provision:

- 6                   (a) the example is not exhaustive, and  
7                   (b) the example does not limit, but may extend, the meaning of  
8                   the provision, and  
9                   (c) the example and the provision are to be read in the context of  
10                  each other and the other provisions of this Law, but, if the  
11                  example and the provision so read are inconsistent, the  
12                  provision prevails.

13   **11. Compliance with forms**

14                  (1) If a form is prescribed or approved by or for the purpose of this Law,  
15                  strict compliance with the form is not necessary and substantial  
16                  compliance is sufficient.

17                  (2) If a form prescribed or approved by or for the purpose of this Law  
18                  requires:

- 19                  (a) the form to be completed in a specified way, or  
20                  (b) specified information or documents to be included in,  
21                  attached to or given with the form, or  
22                  (c) the form, or information or documents included in, attached  
23                  to or given with the form, to be verified in a specified way,

24                  the form is not properly completed unless the requirement is complied  
25                  with.

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## Part 3 — Terms and references

### 12. Terms used

(1) In this Law:

*Act* means an Act of the Legislature of this jurisdiction.

*adult* means an individual who is 18 or more.

*affidavit*, in relation to a person allowed by law to affirm, declare or promise, includes affirmation, declaration and promise.

*amend* includes:

(a) omit or omit and substitute, or

(b) alter or vary, or

(c) amend by implication.

*appoint* includes reappoint.

*Australia* means the Commonwealth of Australia but, when used in a geographical sense, does not include an external Territory.

*business day* means a day that is not:

(a) a Saturday or Sunday, or

(b) a public holiday, special holiday or bank holiday in the place in which any relevant act is to be or may be done.

*calendar month* means a period starting at the beginning of any day of one of the 12 named months and ending:

(a) immediately before the beginning of the corresponding day of the next named month, or

(b) if there is no such corresponding day, at the end of the next named month.

*calendar year* means a period of 12 months beginning on 1 January.

*commencement*, in relation to this Law or an Act or a provision of this Law or an Act, means the time at which this Law, the Act or provision comes into operation.

*Commonwealth* means the Commonwealth of Australia but, when used in a geographical sense, does not include an external Territory.

*confer*, in relation to a function, includes impose.

*contravene* includes fail to comply with.

- 1           **country** includes:
- 2           (a) a federation, or
- 3           (b) a state, province or other part of a federation.
- 4           **date of assent**, in relation to an Act, means the day on which the Act
- 5           receives the Royal Assent.
- 6           **definition** means a provision of this Law (however expressed) that:
- 7           (a) gives a meaning to a word or expression, or
- 8           (b) limits or extends the meaning of a word or expression.
- 9           **document** means any record of information however recorded, and
- 10          includes:
- 11          (a) anything on which there is writing, or
- 12          (b) anything on which there are marks, figures, symbols or
- 13          perforations having a meaning for persons qualified to
- 14          interpret them, or
- 15          (c) anything from which sounds, images or writings can be
- 16          reproduced with or without the aid of anything else, or
- 17          (d) a map, plan, drawing or photograph, or
- 18          (e) any record of information that exists in a digital form and is
- 19          capable of being reproduced, transmitted, stored and
- 20          duplicated by electronic means.
- 21          **expire** includes lapse or otherwise cease to have effect.
- 22          **external Territory** means a Territory, other than an internal Territory,
- 23          for the government of which as a Territory provision is made by a
- 24          Commonwealth Act.
- 25          **fail** includes refuse.
- 26          **financial year** means a period of 12 months beginning on 1 July.
- 27          **foreign country** means a country (whether or not an independent
- 28          sovereign State) outside Australia and the external Territories.
- 29          **function** includes a power, authority or duty.
- 30          **Gazette** means the Government Gazette of this jurisdiction.
- 31          **gazetted** means published in the Gazette.
- 32          **Gazette notice** means notice published in the Gazette.

- 1           **Government Printer** means the Government Printer of this  
2           jurisdiction, and includes any other person authorised by the  
3           Government of this jurisdiction to print an Act or instrument.
- 4           **individual** means a natural person.
- 5           **insert**, in relation to a provision of this Law, includes substitute.
- 6           **instrument** includes a statutory instrument.
- 7           **internal Territory** means the Australian Capital Territory, the Jervis  
8           Bay Territory or the Northern Territory.
- 9           **Jervis Bay Territory** means the Territory mentioned in the *Jervis Bay*  
10          *Territory Acceptance Act 1915* (Cwlth).
- 11          **make** includes issue or grant.
- 12          **minor** means an individual who is under 18.
- 13          **modification** includes addition, omission or substitution.
- 14          **month** means a calendar month.
- 15          **named month** means 1 of the 12 months of the year.
- 16          **Northern Territory** means the Northern Territory of Australia.
- 17          **number** means:
- 18           (a) a number expressed in figures or words, or
- 19           (b) a letter, or
- 20           (c) a combination of a number so expressed and a letter.
- 21          **oath**, in relation to a person allowed by law to affirm, declare or  
22          promise, includes affirmation, declaration or promise.
- 23          **office** includes position.
- 24          **omit**, in relation to a provision of this Law or an Act, includes repeal.
- 25          **party** includes an individual or a body politic or corporate.
- 26          **penalty** includes forfeiture or punishment.
- 27          **person** includes an individual or a body politic or corporate.
- 28          **power** includes authority.
- 29          **printed** includes typewritten, lithographed or reproduced by any  
30          mechanical or electronic means.
- 31          **proceeding** means a legal or other action or proceeding.

- 1           **provision**, in relation to this Law or an Act, means words or other  
2 matter that form or forms part of this Law or the Act, and includes:
- 3           (a) a Chapter, Part, Division, Subdivision, section, subsection,  
4 paragraph, subparagraph, sub-subparagraph or Schedule of o r  
5 to this Law or the Act, or
- 6           (b) a section, clause, subclause, item, column, table or form of o r  
7 in a Schedule to this Law or the Act, or
- 8           (c) the long title and any preamble to the Act.
- 9           **record** includes information stored or recorded by means of a  
10 computer.
- 11          **repeal** includes:
- 12           (a) revoke or rescind, or
- 13           (b) repeal by implication, or
- 14           (c) abrogate or limit the effect of this Law or the instrument  
15 concerned, or
- 16           (d) exclude from, or include in, the application of this Law or the  
17 instrument concerned any person, subject matter or  
18 circumstance.
- 19          **sign** includes the affixing of a seal or the making of a mark.
- 20          **statutory declaration** means a declaration made under an Act, or  
21 under a Commonwealth Act or an Act of another jurisdiction, that  
22 authorises a declaration to be made otherwise than in the course of a  
23 judicial proceeding.
- 24          **statutory instrument** means an instrument made or in force under or  
25 for the purposes of this Law, and includes an instrument made or in  
26 force under any such instrument.
- 27          **swear**, in relation to a person allowed by law to affirm, declare or  
28 promise, includes affirm, declare or promise.
- 29          **word** includes any symbol, figure or drawing.
- 30          **writing** includes any mode of representing or reproducing words in a  
31 visible form.
- 32          (2) In a statutory instrument:
- 33          **the Law** means this Law.



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- 1    **13.    Provisions relating to defined terms and gender and number**
- 2       (1)   If this Law defines a word or expression, other parts of speech and
- 3       grammatical forms of the word or expression have corresponding
- 4       meanings.
- 5       (2)   Definitions in or applicable to this Law apply except so far as the
- 6       context or subject matter otherwise indicates or requires.
- 7       (3)   In this Law, words indicating a gender include each other gender.
- 8       (4)   In this Law:
- 9           (a)   words in the singular include the plural, and
- 10          (b)   words in the plural include the singular.
- 11    **14.    Meaning of “may” and “must” etc.**
- 12       (1)   In this Law, the word *may*, or a similar word or expression, used in
- 13       relation to a power indicates that the power may be exercised or not
- 14       exercised, at discretion.
- 15       (2)   In this Law, the word *must*, or a similar word or expression, used in
- 16       relation to a power indicates that the power is required to be
- 17       exercised.
- 18       (3)   This clause has effect despite any rule of construction to the contrary.
- 19    **15.    Words and expressions used in statutory instruments**
- 20       (1)   Words and expressions used in a statutory instrument have the same
- 21       meanings as they have, from time to time, in this Law, or relevant
- 22       provisions of this Law, under or for the purposes of which the
- 23       instrument is made or in force.
- 24       (2)   This clause has effect in relation to an instrument except so far as the
- 25       contrary intention appears in the instrument.
- 26    **16.    Effect of express references to bodies corporate and individuals**
- 27       In this Law, a reference to a person generally (whether the expression
- 28       “person”, “party”, “someone”, “anyone”, “no-one”, “one”, “another”
- 29       or “whoever” or another expression is used):

- 1 (a) does not exclude a reference to a body corporate or an  
2 individual merely because elsewhere in this Law there is  
3 particular reference to a body corporate (however expressed),  
4 and  
5 (b) does not exclude a reference to a body corporate or an  
6 individual merely because elsewhere in this Law there is  
7 particular reference to an individual (however expressed).

8 **17. Production of records kept in computers etc.**

- 9 (1) If a person who keeps a record of information by means of a  
10 mechanical, electronic or other device is required by or under this  
11 Law:  
12 (a) to produce the information or a document containing the  
13 information to a court, tribunal or person, or  
14 (b) to make a document containing the information available for  
15 inspection by a court, tribunal or person,  
16 then, unless the court, tribunal or person otherwise directs:  
17 (c) the requirement obliges the person to produce or make  
18 available for inspection, as the case may be, a document that  
19 reproduces the information in a form capable of being  
20 understood by the court, tribunal or person, and  
21 (d) the production to the court, tribunal or person of the  
22 document in that form complies with the requirement.

23 **18. References to this jurisdiction to be implied**

- 24 In this Law:  
25 (a) a reference to an officer, office or statutory body is a  
26 reference to such an officer, office or statutory body in and  
27 for this jurisdiction, and  
28 (b) a reference to a locality or other matter or thing is a reference  
29 to such a locality or other matter or thing in and of this  
30 jurisdiction.

1 **19. References to officers and holders of offices**

2 In this Law, a reference to a particular officer, or to the holder of a  
3 particular office, includes a reference to the person for the time being  
4 occupying or acting in the office concerned.

5 **20. Reference to certain provisions of Law**

6 If a provision of this Law refers:

- 7 (a) to a Part, section or Schedule by a number and without  
8 reference to this Law, the reference is a reference to the Part,  
9 section or Schedule, designated by the number, of or to this  
10 Law, or
- 11 (b) to a Schedule without reference to it by a number and without  
12 reference to this Law, the reference, if there is only one  
13 Schedule to this Law, is a reference to the Schedule, or
- 14 (c) to a Division, Subdivision, subsection, paragraph,  
15 subparagraph, sub-subparagraph, clause, subclause, item,  
16 column, table or form by a number and without reference to  
17 this Law, the reference is a reference to:
- 18 (i) the Division, designated by the number, of the Part in  
19 which the reference occurs, and
- 20 (ii) the Subdivision, designated by the number, of the  
21 Division in which the reference occurs, and
- 22 (iii) the subsection, designated by the number, of the  
23 section in which the reference occurs, and
- 24 (iv) the paragraph, designated by the number, of the  
25 section, subsection, Schedule or other provision in  
26 which the reference occurs, and
- 27 (v) the paragraph, designated by the number, of the  
28 clause, subclause, item, column, table or form of or in  
29 the Schedule in which the reference occurs, and
- 30 (vi) the subparagraph, designated by the number, of the  
31 paragraph in which the reference occurs, and
- 32 (vii) the sub-subparagraph, designated by the number, of  
33 the subparagraph in which the reference occurs, and

- 1 (viii) the section, clause, subclause, item, column, table or  
2 form, designated by the number, of or in the Schedule  
3 in which the reference occurs,  
4 as the case requires.

5 **21. Reference to provisions of this Law or an Act is inclusive**

6 In this Law, a reference to a portion of this Law or an Act includes:

- 7 (a) a reference to the Chapter, Part, Division, Subdivision,  
8 section, subsection or other provision of this Law or the Act  
9 referred to that forms the beginning of the portion, and  
10 (b) a reference to the Chapter, Part, Division, Subdivision,  
11 section, subsection or other provision of this Law or the Act  
12 referred to that forms the end of the portion.

13 **Example:** A reference to "sections 5 to 9" includes both section 5 and section 9.  
14 It is not necessary to refer to "sections 5 to 9 (both inclusive)" to ensure that the reference is given  
15 an inclusive interpretation.

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**Part 4 — Functions and powers**

**22. Performance of statutory functions**

(1) If this Law confers a function or power on a person or body, the function may be performed, or the power may be exercised, from time to time as occasion requires.

(2) If this Law confers a function or power on a particular officer or the holder of a particular office, the function may be performed, or the power may be exercised, by the person for the time being occupying or acting in the office concerned.

(3) If this Law confers a function or power on a body (whether or not incorporated), the performance of the function, or the exercise of the power, is not affected merely because of vacancies in the membership of the body.

**23. Power to make instrument or decision includes power to amend or repeal**

If this Law authorises or requires the making of an instrument or decision:

- (a) the power includes power to amend or repeal the instrument or decision, and
- (b) the power to amend or repeal the instrument or decision is exercisable in the same way, and subject to the same conditions, as the power to make the instrument or decision.

**24. Matters for which statutory instruments may make provision**

(1) If this Law authorises or requires the making of a statutory instrument in relation to a matter, a statutory instrument made under this Law may make provision for the matter by applying, adopting or incorporating (with or without modification) the provisions of:

- (a) an Act or statutory instrument, or
- (b) another document (whether of the same or a different kind),

as in force at a particular time or as in force from time to time.

- 1 (2) If a statutory instrument applies, adopts or incorporates the provisions  
2 of a document, the statutory instrument applies, adopts or incorporates  
3 the provisions as in force from time to time, unless the statutory  
4 instrument otherwise expressly provides.
- 5 (3) A statutory instrument may:
- 6 (a) apply generally throughout this jurisdiction or be limited in  
7 its application to a particular part of this jurisdiction, or
- 8 (b) apply generally to all persons, matters or things or be limited  
9 in its application to:
- 10 (i) particular persons, matters or things, or
- 11 (ii) particular classes of persons, matters or things, or
- 12 (c) otherwise apply generally or be limited in its application by  
13 reference to specified exceptions or factors.
- 14 (4) A statutory instrument may:
- 15 (a) apply differently according to different specified factors, or
- 16 (b) otherwise make different provision in relation to:
- 17 (i) different persons, matters or things, or
- 18 (ii) different classes of persons, matters or things.
- 19 (5) A statutory instrument may authorise a matter or thing to be from time  
20 to time determined, applied or regulated by a specified person or  
21 body.
- 22 (6) If this Law authorises or requires a matter to be regulated by statutory  
23 instrument, the power may be exercised by prohibiting by statutory  
24 instrument the matter or any aspect of the matter.
- 25 (7) If this Law authorises or requires provision to be made with respect to  
26 a matter by statutory instrument, a statutory instrument made under  
27 this Law may make provision with respect to a particular aspect of the  
28 matter despite the fact that provision is made by this Law in relation  
29 to another aspect of the matter or in relation to another matter.
- 30 (8) A statutory instrument may provide for the review of, or a right of  
31 appeal against, a decision made under the statutory instrument, or this  
32 Law, and may, for that purpose, confer jurisdiction on any court,  
33 tribunal, person or body.

- 1       (9) A statutory instrument may require a form prescribed by or under the  
2       statutory instrument, or information or documents included in,  
3       attached to or given with the form, to be verified by statutory  
4       declaration.

5       **25. Presumption of validity and power to make**

- 6       (1) All conditions and preliminary steps required for the making of a  
7       statutory instrument are presumed to have been satisfied and  
8       performed in the absence of evidence to the contrary.
- 9       (2) A statutory instrument is taken to be made under all powers under  
10      which it may be made, even though it purports to be made under this  
11      Law or a particular provision of this Law.

12      **26. Appointments may be made by name or office**

- 13      (1) If this Law authorises or requires a person or body:  
14          (a) to appoint a person to an office, or  
15          (b) to appoint a person or body to exercise a power, or  
16          (c) to appoint a person or body to do another thing,  
17      the person or body may make the appointment by:  
18          (d) appointing a person or body by name, or  
19          (e) appointing a particular officer, or the holder of a particular  
20          office, by reference to the title of the office concerned.
- 21      (2) An appointment of a particular officer, or the holder of a particular  
22      office, is taken to be the appointment of the person for the time being  
23      occupying or acting in the office concerned.

24      **27. Acting appointments**

- 25      (1) If this Law authorises a person or body to appoint a person to act in an  
26      office, the person or body may, in accordance with this Law, appoint:  
27          (a) a person by name, or  
28          (b) a particular officer, or the holder of a particular office, by  
29          reference to the title of the office concerned,  
30      to act in the office.

- 1       (2) The appointment may be expressed to have effect only in the  
2       circumstances specified in the instrument of appointment.
- 3       (3) The appointer may:
- 4             (a) determine the terms and conditions of the appointment,  
5             including remuneration and allowances, and  
6             (b) terminate the appointment at any time.
- 7       (4) The appointment, or the termination of the appointment, must be in,  
8       or evidenced by, writing signed by the appointer.
- 9       (5) The appointee must not act for more than one year during a vacancy  
10       in the office.
- 11       (6) If the appointee is acting in the office otherwise than because of a  
12       vacancy in the office and the office becomes vacant, then, subject to  
13       subclause (2), the appointee may continue to act until:
- 14             (a) the appointer otherwise directs, or  
15             (b) the vacancy is filled, or  
16             (c) the end of a year from the day of the vacancy,  
17       whichever happens first.
- 18       (7) The appointment ceases to have effect if the appointee resigns by  
19       writing signed and delivered to the appointer.
- 20       (8) While the appointee is acting in the office:
- 21             (a) the appointee has all the powers and functions of the holder  
22             of the office, and  
23             (b) this Law and other laws apply to the appointee as if the  
24             appointee were the holder of the office.
- 25       (9) Anything done by or in relation to a person purporting to act in the  
26       office is not invalid merely because:
- 27             (a) the occasion for the appointment had not arisen, or  
28             (b) the appointment had ceased to have effect, or  
29             (c) the occasion for the person to act had not arisen or had  
30       ceased.



1 (10) If this Law authorises the appointer to appoint a person to act during a  
2 vacancy in the office, an appointment to act in the office may be made  
3 by the appointer whether or not an appointment has previously been  
4 made to the office.

5 **28. Powers of appointment imply certain incidental powers**

6 (1) If this Law authorises or requires a person or body to appoint a person  
7 to an office:

- 8 (a) the power may be exercised from time to time as occasion  
9 requires, and
- 10 (b) the power includes:
- 11 (i) power to remove or suspend, at any time, a person  
12 appointed to the office, and
- 13 (ii) power to appoint another person to act in the office if  
14 a person appointed to the office is removed or  
15 suspended, and
- 16 (iii) power to reinstate or reappoint a person removed or  
17 suspended, and
- 18 (iv) power to appoint a person to act in the office if it is  
19 vacant (whether or not the office has ever been  
20 filled), and
- 21 (v) power to appoint a person to act in the office if the  
22 person appointed to the office is absent or is unable to  
23 discharge the functions of the office (whether because  
24 of illness or otherwise).

25 (2) The power to remove or suspend a person under subclause (1)(b) may  
26 be exercised even if this Law provides that the holder of the office to  
27 which the person was appointed is to hold office for a specified  
28 period.

29 (3) The power to make an appointment under subclause (1)(b) may be  
30 exercised from time to time as occasion requires.

31 (4) An appointment under subclause (1)(b) may be expressed to have  
32 effect only in the circumstances specified in the instrument of  
33 appointment.

- 1    **29.    Delegation of functions**
- 2       (1)   If this Law authorises a person or body to delegate a function, the
- 3       person or body may, in accordance with this Law and any other
- 4       applicable law, delegate the function to:
- 5           (a)   a person or body by name, or
- 6           (b)   a specified officer, or the holder of a specified office, by
- 7           reference to the title of the office concerned.
- 8       (2)   The delegation may be:
- 9           (a)   general or limited, and
- 10          (b)   made from time to time, and
- 11          (c)   revoked, wholly or partly, by the delegator.
- 12       (3)   The delegation, or a revocation of the delegation, must be in, or
- 13       evidenced by, writing signed by the delegator or, if the delegator is a
- 14       body, by a person authorised by the body for the purpose.
- 15       (4)   A delegated function may be exercised only in accordance with any
- 16       conditions to which the delegation is subject.
- 17       (5)   The delegate may, in the performance of a delegated function, do
- 18       anything that is incidental to the delegated function.
- 19       (6)   A delegated function that purports to have been exercised by the
- 20       delegate is taken to have been properly exercised by the delegate
- 21       unless the contrary is proved.
- 22       (7)   A delegated function that is properly exercised by the delegate is
- 23       taken to have been exercised by the delegator.
- 24       (8)   If, when exercised by the delegator, a function is dependent on the
- 25       delegator’s opinion, belief or state of mind, then, when exercised by
- 26       the delegate, the function is dependent on the delegate’s opinion,
- 27       belief or state of mind.
- 28       (9)   If:
- 29           (a)   the delegator is a specified officer or the holder of a specified
- 30           office, and

- 1 (b) the person who was the specified officer or holder of the  
2 specified office when the delegation was made ceases to be  
3 the holder of the office,
- 4 then:
- 5 (c) the delegation continues in force, and  
6 (d) the person for the time being occupying or acting in the office  
7 concerned is taken to be the delegator for the purposes of this  
8 clause.
- 9 (10) If:
- 10 (a) the delegator is a body, and  
11 (b) there is a change in the membership of the body,
- 12 then:
- 13 (c) the delegation continues in force, and  
14 (d) the body as constituted for the time being is taken to be the  
15 delegator for the purposes of this clause.
- 16 (11) If a function is delegated to a specified officer or the holder of a  
17 specified office:
- 18 (a) the delegation does not cease to have effect merely because  
19 the person who was the specified officer or the holder of the  
20 specified office when the function was delegated ceases to be  
21 the officer or the holder of the office, and  
22 (b) the function may be exercised by the person for the time  
23 being occupying or acting in the office concerned.
- 24 (12) A function that has been delegated may, despite the delegation, be  
25 exercised by the delegator.
- 26 (13) The delegation of a function does not relieve the delegator of the  
27 delegator's obligation to ensure that the function is properly  
28 exercised.
- 29 (14) Subject to subclause (15), this clause applies to a subdelegation of a  
30 function in the same way as it applies to a delegation of a function.

1 (15) If this Law authorises the delegation of a function, the function may  
2 be subdelegated only if the Law expressly authorises the function to  
3 be subdelegated.

4 **30. Exercise of powers before commencement**

5 (1) If a provision of this Law (the *empowering provision*) that has not  
6 commenced would, had it commenced, confer a power:

- 7 (a) to make an appointment, or  
8 (b) to make a statutory instrument of a legislative or  
9 administrative character, or  
10 (c) to do another thing,

11 then:

- 12 (d) the power may be exercised, and  
13 (e) anything may be done for the purpose of enabling the  
14 exercise of the power or of bringing the appointment,  
15 instrument or other thing into effect,

16 before the empowering provision commences.

17  
23 (2) If a provision of a New South Wales Act (the *empowering provision*)  
24 that does not commence on its enactment would, had it commenced,  
25 amend a provision of this Law so that it would confer a power:

- 26 (a) to make an appointment, or  
27 (b) to make a statutory instrument of a legislative or  
28 administrative character, or  
29 (c) to do another thing,

30 then:

- 31 (d) the power may be exercised, and

- 1 (e) anything may be done for the purpose of enabling the  
2 exercise of the power or of bringing the appointment,  
3 instrument or other thing into effect,  
4 before the empowering provision commences.
- 5 (3) If:
- 6 (a) this Law has commenced and confers a power to make a  
7 statutory instrument (the *basic statutory instrument-making*  
8 *power*), and  
9 (b) a provision of a New South Wales Act that does not  
10 commence on its enactment would, had it commenced,  
11 amend this Law so as to confer additional power to make a  
12 statutory instrument (the *additional instrument-making*  
13 *power*),
- 14 then:
- 15 (c) the basic instrument-making power and the additional  
16 instrument-making power may be exercised by making a  
17 single instrument, and  
18 (d) any provision of the instrument that required an exercise of  
19 the additional instrument-making power is to be treated as  
20 made under subclause (2).
- 21 (4) If an instrument, or a provision of an instrument, is made under  
22 subclause (1) or (2) that is necessary for the purpose of:
- 23 (a) enabling the exercise of a power mentioned in the subclause,  
24 or  
25 (b) bringing an appointment, instrument or other thing made or  
26 done under such a power into effect,
- 27 the instrument or provision takes effect:
- 28 (c) on the making of the instrument, or  
29 (d) on such later day (if any) on which, or at such later time  
30 (if any) at which, the instrument or provision is expressed to  
31 take effect.
- 32 (5) If:
- 33 (a) an appointment is made under subclause (1) or (2), or

- 1           (b) an instrument, or a provision of an instrument, made under  
2           subclause (1) or (2) is not necessary for a purpose mentioned  
3           in subclause (4),
- 4           the appointment, instrument or provision takes effect:
- 5           (c) on the commencement of the relevant empowering provision,  
6           or
- 7           (d) on such later day (if any) on which, or at such later time  
8           (if any) at which, the appointment, instrument or provision is  
9           expressed to take effect.
- 10       (6) Anything done under subclause (1) or (2) does not confer a right, or  
11       impose a liability, on a person before the relevant empowering  
12       provision commences.
- 13       (7) After the enactment of a provision mentioned in subclause (2) but  
14       before the provision's commencement, this clause applies as if the  
15       references in subclauses (2) and (5) to the commencement of the  
16       empowering provision were references to the commencement of the  
17       provision mentioned in subclause (2) as amended by the empowering  
18       provision.
- 19       (8) In the application of this clause to a statutory instrument, a reference  
20       to the enactment of the instrument is a reference to the making of the  
21       instrument.

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**Part 5 — Distance, time and age**

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**31. Matters relating to distance, time and age**

- (1) In the measurement of distance for the purposes of this Law, the distance is to be measured along the shortest road ordinarily used for travelling.
- (2) If a period beginning on a given day, act or event is provided or allowed for a purpose by this Law, the period is to be calculated by excluding the day, or the day of the act or event, and:
  - (a) if the period is expressed to be a specified number of clear days or at least a specified number of days, by excluding the day on which the purpose is to be fulfilled, and
  - (b) in any other case, by including the day on which the purpose is to be fulfilled.
- (3) If the last day of a period provided or allowed by this Law for doing anything is not a business day in the place in which the thing is to be or may be done, the thing may be done on the next business day in the place.
- (4) If the last day of a period provided or allowed by this Law for the filing or registration of a document is a day on which the office is closed where the filing or registration is to be or may be done, the document may be filed or registered at the office on the next day that the office is open.
- (5) If no time is provided or allowed for doing anything, the thing is to be done as soon as possible, and as often as the prescribed occasion happens.
- (6) If, in this Law, there is a reference to time, the reference is, in relation to the doing of anything in a jurisdiction, a reference to the legal time in the jurisdiction.
- (7) For the purposes of this Law, a person attains an age in years at the beginning of the person's birthday for the age.

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**Part 6 — Effect of repeal, amendment or expiration**

**32. Time of Law ceasing to have effect**

If a provision of this Law is expressed:

- (a) to expire on a specified day, or
- (b) to remain or continue in force, or otherwise have effect, until a specified day,

the provision has effect until the last moment of the specified day.

**33. Repealed Law provisions not revived**

If a provision of this Law is repealed or amended by a New South Wales Act, or a provision of a New South Wales Act, the provision is not revived merely because the New South Wales Act or the provision of the New South Wales Act:

- (a) is later repealed or amended, or
- (b) later expires.

**34. Saving of operation of repealed Law provisions**

(1) The repeal, amendment or expiry of a provision of this Law does not:

- (a) revive anything not in force or existing at the time the repeal, amendment or expiry takes effect, or
- (b) affect the previous operation of the provision or anything suffered, done or begun under the provision, or
- (c) affect a right, privilege or liability acquired, accrued or incurred under the provision, or
- (d) affect a penalty incurred in relation to an offence arising under the provision, or
- (e) affect an investigation, proceeding or remedy in relation to such a right, privilege, liability or penalty.

(2) Any such penalty may be imposed and enforced, and any such investigation, proceeding or remedy may be begun, continued or enforced, as if the provision had not been repealed or amended or had not expired.



1 **35. Continuance of repealed provisions**

2 If a New South Wales Act repeals some provisions of this Law and  
3 enacts new provisions in substitution for the repealed provisions, the  
4 repealed provisions continue in force until the new provisions  
5 commence.

6 **36. Law and amending Acts to be read as one**

7 This Law and all New South Wales Acts amending this Law are to be  
8 read as one.

**Part 7 — Instruments under Law**

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**37. Schedule applies to statutory instruments**

- (1) This Schedule applies to a statutory instrument, and to things that may be done or are required to be done under a statutory instrument, in the same way as it applies to this Law, and things that may be done or are required to be done under this Law, except so far as the context or subject matter otherwise indicates or requires.
- (2) The fact that a provision of this Schedule refers to this Law and not also to a statutory instrument does not, by itself, indicate that the provision is intended to apply only to this Law.

1                    **Schedule 2 — Consequential amendment to other**  
2    **legislation**

3                    **Electronic Transactions Regulation 2012**

4                    **Clauses 4 and 7**

5                    Omit “*Conveyancing Act 1919*, section 23C” wherever occurring.

