



24 November 2021

Jenny Cottnam  
Chair  
Australian Registrars' National Electronic Conveyancing Council  
Via Email: [chair@arnecc.gov.au](mailto:chair@arnecc.gov.au)

Dear Ms Cottnam,

## Modification of the Electronic Conveyancing National Law

The Australian Banking Association (**ABA**) and its members welcome Australian Registrars' National Electronic Conveyancing Council's (**ARNECC**) ongoing work and engagement on modifications to the Electronic Conveyancing National Law (**ECNL**). The ABA continues to support the introduction of competition in the e-conveyancing market, which will improve efficiency and reduce costs for consumers and practitioners.

We welcome the changes included in the consultation draft and have some minor comments, contained in the attachment, regarding aspects of the drafting where further consideration may be warranted. The ABA is available to assist ARNECC in considering these issues.

### Assessing impact on ELNO participation or subscriber agreements

ABA also wishes to highlight a consequential piece of legal analysis that will need to be undertaken with respect to each of PEXA and Sympli's participation agreements or subscriber agreements. We understand each ELNO's participation or subscriber agreements contain clauses that are intended to apply or extend the benefit of the reliance provision to their subscribers. In an interoperable transaction, it would be critical to ensure these provisions work together to protect subscribers and users.

If PEXA and Sympli plan to review their respective agreements following current changes to the ECNL and Model Operating Requirements, we believe all relevant stakeholders should also take the opportunity to review the clauses in their agreements relating to reliance.

We understand that the ELNOs may claim intellectual property over their agreements. However, we also firmly believe ARNECC and the ELNOs need to create a mechanism to enable the type of legal review of specified clauses, as described above. This work could be done as part of the Agreements Working Group, if the group's mandate is appropriately adjusted.

### Ongoing engagement

We look forward to continued engagement with ARNECC on these important changes. If you require any further information, please do not hesitate to contact me.

Regards,

Brendon Harper  
Policy Director  
Australian Banking Association



Australian Banking  
Association

## About the ABA

The Australian Banking Association advocates for a strong, competitive and innovative banking industry that delivers excellent and equitable outcomes for customers. We promote and encourage policies that improve banking services for all Australians, through advocacy, research, policy expertise and thought leadership



Attachment

| Section of ECNL   | Feedback  |
|---|---|
| <p>S. 12</p> <p><b>12. Reliance on, and repudiation of, digital signatures</b></p> <p>(1A) In this section:</p> <p><b>financial institution</b> means:</p> <p>(a) an authorised deposit-taking institution as defined in the Banking Act 1959 (Commonwealth) section 5(1), or</p> <p>(b) a bank constituted by a law of this jurisdiction or of another State or the Commonwealth...</p> <p>(1)(c) unless that subscriber repudiates that digital signature, that digital signature is binding, in relation to that registry instrument or other document, for the benefit of:...</p> <p>(v) in the case of a document that contains a direction for the payment of money as part of that conveyancing transaction, each financial institution that pays or receives money in accordance with that direction, and</p>                             | <p>The definition of Financial Institution should be broadened to ensure it captures non-bank lenders.</p> <p>Including non-bank lenders would ensure all lenders providing money in a conveyancing transaction can clearly receive the benefit.</p>  |
| <p>S. 43</p> <p><b>43. Registrar authorised to disclose certain information</b></p> <p>(1) The Registrar may disclose information about the following matters to ARNECC, another registrar or a person or body who or which has functions under, or responsibility for the administration or oversight of, this Law or the land titles legislation:</p> <p>(a) an ELNO's compliance with the operating requirements or the interoperability requirement,</p> <p>(b) a subscriber's compliance with the participation rules,</p> <p>(c) a compliance examination conducted under Division 5 of Part 3,</p> <p>(d) any other matter relating to the performance of the Registrar's functions under this Law.</p> <p>(2) The Registrar may disclose the information despite any law of this jurisdiction relating to privacy or confidentiality.</p> | <p>This proposed amendment is similar to what is proposed as part of the enforcement regime. ABA seeks further information about the types of information that could be disclosed under this and similar provisions.</p> <p>Without this clarification, industry is not supportive of the Registrar being able to disregard privacy laws in disclosing customer information.</p> <p>ABA asks ARNECC to engage with OAIC and state privacy regulators about whether this provision could result in the ELNO or subscribers breaching their privacy law obligations under the laws of any jurisdiction.</p> |
| <p>Ss. 7(2) and 44</p> <p><b>7. Documents may be lodged electronically</b></p> <p>(2) An approval for the purposes of subsection (1)(a) may be given under section 44 or the land titles legislation or in some other way that the Registrar considers appropriate.</p> <p><b>44. Forms</b></p> <p>The Registrar may approve forms for use under this Law.</p>  | <p>The ABA has no in-principle objection to this proposed change. However, preferably there would be consistency between the forms approved under the relevant land titles legislation and the ECNL. For instance, it would be difficult if there were different forms under the land titles legislation for paper conveyancing as compared to electronic conveyancing.</p>   |



Ss. 3 and 12(4)

**3.**

Digital signature means encrypted electronic data intended for the exclusive use of a particular person as a means of identifying that person as the sender of an electronic communication or the signer of a document.

**12(4)(a)**

that the digital signature was not created by the subscriber, and

*The right to repudiate in s.12(4) includes where the digital signature was not created by the subscriber (or by someone for whose conduct the subscriber is bound), with digital signature being defined in s.3.*

*In relation to s.12(4), further consideration should be given to effect of the phrase 'create a digital signature' and the term 'digitally sign'.*