

Electronic Conveyancing Bill 2013

EXPLANATORY MEMORANDUM

Overview of the Bill

Background

In July 2008, the Council of Australian Governments agreed pursuant to the *National Partnership Agreement to Deliver a Seamless National Economy* that there should be a new national electronic conveyancing (“NEC”) system for the settling of real property transactions in all Australian States and Territories.

The NEC system will enable legal practitioners, conveyancers and financial institutions (“subscribers”) to use electronic online processes to prepare electronic instruments that create, transfer and remove estates and interests in land, to settle the financial components of a transaction and to lodge instruments with relevant State or Territory Land Registries electronically.

All Australian States and the Northern Territory signed the *Intergovernmental Agreement for an Electronic Conveyancing National Law* (“IGA”) committing to adopt a model law for National Electronic Conveyancing or to implement legislation corresponding to the model law. The IGA came into operation on 21 November 2011. The IGA, amongst other things, establishes the Australian Registrars' National Electronic Conveyancing Council (“ARNECC”) comprised of the jurisdictions' Registrars or their nominees. Under the IGA ARNECC has responsibility for the development of a nationally agreed set of requirements of an operator of the NEC system and rules for subscribers to the NEC system. ARNECC also provides advice on NEC to the parties to the IGA and on any future amendment of the National Law.

The Electronic Conveyancing National Law (the “National Law”) will make possible the implementation of the NEC in Australia. The National Law will—

- authorise the Registrar of Titles in each jurisdiction (the “Registrar”) to—
 - receive electronic registry instruments and other electronic documents by electronic lodgment; and
 - register electronic registry instruments, with the same effect as receiving and registering paper instruments under the jurisdiction's Torrens legislation;

- empower the Registrar to operate or to authorise one or more persons to operate an Electronic Lodgment Network (“ELN”) for their jurisdiction;
- empower the Registrar to set conditions for access to and use of an ELN;
- empower the Registrar, or his or her delegate, to conduct an examination of compliance by the Electronic Lodgment Network Operator (“ELNO”) with its obligations in respect of the ELN and a subscriber with its obligations in respect to access to and use of an ELN;
- provide 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 else necessary to complete the transaction electronically.

New South Wales is the host jurisdiction for the National Law and the National Law was passed by the New South Wales Parliament and became operative on 1 January 2013. The National Law has also been passed in Victoria, Queensland, Tasmania and the Northern Territory.

Each of the other States and Territories (except at present the Australian Capital Territory) will enact legislation to apply or adopt the National Law in their own jurisdiction and to provide for amendments of other Acts, required as a consequence of the application of the National Law in their jurisdiction.

The Bill

The main objective of this Bill is to enact legislation corresponding to the National Law in Western Australia. In Western Australia, the Commissioner of Titles (“Commissioner”), Registrar and the Western Australian Land Information Authority established under the *Land Information Authority Act 2006* (trading as “Landgate”) each has statutory functions and duties relating to the Torrens land title register. The Bill modifies some provisions of the National Law to reflect the statutory functions and duties of the Commissioner, Registrar and Landgate.

The Bill also makes amendments to Western Australia’s Torrens legislation, the *Transfer of Land Act 1893* (“TLA”), as well as amendments to the *Settlement Agents*

Act 1981 ("SA Act"), Duties Act 2008 ("Duties Act") and Taxation Administration Act 2003 ("TA Act") needed to implement NEC in Western Australia.

In addition, the Bill amends the *TLA* to reduce the risk of identity fraud and other improper dealings in property transactions by conferring an express statutory power on the Commissioner and Registrar to require the conduct of verification of identity and confirmation of authority to deal with land under the *TLA*. This is to ensure that the person transacting the land is the legal owner of the land.

Part 1 of the Bill provides for preliminary matters, being the purpose, commencement of the Bill and definitions.

Parts 2 to 4 of the Bill enact provisions corresponding to the National Law.

Part 5 of the Bill provides for general matters, being the notification of the publication of the operating requirements and participation rules and their tabling before Parliament, makes it an offence to provide false or misleading information, the making of regulations under the *EC Act* and review of the *EC Act* by the Minister.

Part 6 of the Bill provides for the consequential amendments to the *Duties Act* required to implement NEC in Western Australia.

Part 7 of the Bill provides for the consequential amendments to the *SA Act* required to implement NEC in Western Australia.

Part 8 of the Bill provides for the consequential amendments to the *TA Act 2003* required to implement NEC in Western Australia.

Part 9 of the Bill provides for the consequential amendments to the *TLA* required to implement NEC in Western Australia and to reduce the risk of identity fraud and other improper dealings in property transactions in Western Australia.

Schedule 1 applies provisions relating to interpretation so that the National Law is interpreted consistently across the participating States and Territories.

PART 1—PRELIMINARY

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| Clause 1 | Sets out the short title of the Act which is the Electronic Conveyancing Act 2013 (" <i>EC Act</i> "). |
| Clause 2 | Provides that Part 1 (other than sections 3 to 7A) come into operation upon Royal Assent, that sections 3 to 7A, Parts 3 and 5 and Schedule 1 come into effect on the day after that, and the rest of the Act on a day fixed by proclamation. |
| Clause 3 | Provides definitions for various terms used in the <i>EC Act</i> . |

- Clause 4 Applies the Schedule containing the interpretation provisions for the National Law to Part 1 and to Parts 2 to 4 which correspond to the National Law to ensure that the same statutory interpretation provisions will apply in each State or Territory that adopts the National Law.
- Clause 5 Excludes the application of the *Interpretation Act 1984* to the *EC Act* (other than to Parts 5 to 9) and to instruments made under the *EC Act*, other than regulations made under the *EC Act*.
- Clause 6A Explains that the numbering system used in the *EC Act* is to maintain consistency with the numbering in the National Law.
- Clause 6 Sets out the object of the *EC Act* and the object of the National Law. The object of the *EC Act* is to enact legislation corresponding to the National Law to achieve the object of the National Law. The object of the National Law is to promote efficiency in property conveyancing by providing a common legal framework that:
- enables documents in electronic form to be lodged and processed under the land titles legislation of each participating jurisdiction; but
 - does not derogate from the fundamental principles of the Torrens system of land title as incorporated in the land titles legislation of each participating jurisdiction, such as indefeasibility of title.
- Clause 7A Provides that the *EC Act* binds the State.

PART 2—ELECTRONIC CONVEYANCING

Division 1 Electronic Lodgment

- Clause 7 Allows a document to be lodged electronically for the purposes of the land titles legislation if the document is lodged in a form approved by the Registrar and by means of an electronic lodgment network provided and operated under the Act.
- Clause 8 Requires the Registrar, Commissioner or Landgate as appropriate to process a document lodged electronically.
- Clause 9 Provides that an instrument digitally signed and lodged electronically under the *EC Act* has the same effect as a paper document.

Division 2 Client authorisations and digital signatures

Sub-Division 1 Client authorisations

Clause 10 Provides for client authorisations. A client authorisation is a document by which a party to a conveyancing transaction authorises a subscriber to complete a conveyancing transaction electronically.

Clause 11 Gives effect to client authorisations.

Sub-Division 2 Digital signatures

Clause 12 Provides for the digital signing of documents by subscribers and the effect of documents that are digitally signed. The clause sets out the circumstances in which a digital signature may be repudiated. A digital signature may be repudiated if it was not created by the subscriber or a person authorised to create digital signatures on behalf of the subscriber and the subscriber did not fail to comply with the participation rules or to take reasonable care with respect to the creation of the digital signature. The clause does not prevent the unsigned of a document, which may occur prior to settlement.

PART 3—ELECTRONIC LODGMENT NETWORKS

Division 1 Preliminary

Clause 13 Explains what is meant by an Electronic Lodgment Network (“ELN”). An 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.

Division 2 Operation of Electronic Lodgment Networks

Clause 14 Gives Landgate power to provide and operate an ELN.

Clause 15 Gives Landgate power to approve a person to provide and operate an ELN. Such a person is called an Electronic Lodgment Network Operator (“ELNO”).

Clause 16 Permits Landgate to attach conditions to an approval to operate an ELN.

Clause 17 Permits a person approved as an ELNO to provide an ELN in accordance with the approval.

Clause 18 Requires a person approved as an ELNO to comply with the operating requirements.

- Clause 19 Provides for renewal of approval as an ELNO.
- Clause 20 Permits Landgate to revoke or suspend the approval of a person as an ELNO.
- Clause 21 Permits Landgate, the Registrar and the Commissioner to monitor activities in an ELN.
- Division 3 Operating requirements and participation rules**
- Clause 22 Enables the Registrar to determine requirements in relation to the operation of an ELNO and the provision and operation, by an ELNO, of an ELN (“operating requirements”).
- Clause 23 Enables the Registrar to determine rules relating to the use of an ELN by subscribers (“participation rules”).
- Clause 24 Requires the Registrar to have regard to any model operating requirements or model participation rules published by ARNECC in determining the operating requirements and participation rules.
- Clause 25 Requires the Registrar to ensure that copies of the current operating requirements and participation rules, and superseded versions, are publicly available.
- Clause 26 Requires subscribers who are authorised to use an ELN to comply with the participation rules relating to an ELN.
- Clause 27 Allows Landgate or the Registrar to waive compliance with all or any provisions of the operating requirements and the Registrar to waive compliance with all or any provisions of the participation rules.
- Division 4 Appeals**
- Clause 28 Provides for appeals against certain decisions of the Registrar or Landgate made under the *EC Act*.
- Clause 29 Provides for the determination of appeals by the responsible tribunal. In Western Australia, the responsible tribunal is the State Administrative Tribunal (“SAT”).
- Clause 30A Provides that the responsible tribunal, in hearing an appeal, must consider a published direction, given to Landgate by the Minister under section 65 of the *Land Information Authority Act 2006*, as if it were a statement of policy under section 28 of the *State Administrative Tribunal Act 2004* (“*SAT Act*”). The intention of the clause is that published government policy relevant to the State’s

participation in NEC be considered by the SAT in hearing an appeal under the *EC Act*.

Clause 30 Notes that section 30 of the National Law is not enacted as costs in proceedings before the SAT are dealt with comprehensively in the *SAT Act*.

Clause 31 Makes it clear that the Division applies despite any Act that establishes or continues the responsible tribunal, but does not otherwise limit such an Act.

Division 5 Compliance examination

Clause 32 Makes it clear that the Division extends to former ELNOs and to former subscribers.

Clause 33 Enables the Registrar to conduct investigations (“compliance examinations”) in relation to an ELNO or subscriber for the purpose of ascertaining whether or not the operating requirements and participation rules are being complied with, or investigating any suspected misconduct with respect to the use of an ELN. Also requires the Registrar to conduct a compliance examination at the request of Landgate or the Commissioner.

Clause 34 Requires an ELNO or subscriber to cooperate with a compliance examination.

Clause 35 Allows the Registrar, instead of conducting a compliance examination or during or after the conduct of a compliance examination, to refer a matter to an investigatory, disciplinary or other appropriate authority.

Clause 36 Makes it clear that the Division does not limit any provision of the land titles legislation that also authorises investigations, inquiries or examinations.

PART 4—MISCELLANEOUS

Division 1 Delegation

Clause 37 Permits Landgate, the Registrar and the Commissioner to delegate functions under the *EC Act*.

Division 2 Liability of Authority, Registrar and Commissioner

- Clause 38 Makes it clear that neither Landgate, the Registrar nor the Commissioner is obliged to monitor activities in an ELN or to conduct compliance examinations.
- Clause 39 Provides that no compensation is payable for things done or omitted in good faith in connection with the monitoring of activities in an ELN or the conduct of compliance examinations.
- Clause 40 Makes it clear that Landgate and the Registrar are not responsible for the regulation or operation of any services provided by an ELNO that are additional to the ELN.

Division 3 Relationship with other laws

- Clause 41 Makes it clear that the *EC Act* is in addition to and not in substitution for the laws of the State relating to electronic transactions or the use of electronic documents.
- Clause 42 Provides that a power conferred by the land titles legislation to make an instrument of a legislative or administrative character, or to do any other thing, extends to making instruments, or doing other things, for the purposes of the *EC Act*.

PART 5—GENERAL

- Clause 43 Requires the Registrar to publish notice in the Government Gazette of the publication of operating requirements, participation rules and changes to those documents. The documents must be laid before Parliament and are subject to disallowance as if they were regulations under section 42 of the *Interpretation Act 1984*.
- Clause 44 Provides that a copy of the operating requirements or participation rules certified by the Registrar is evidence of those requirements or rules.
- Clause 45 Makes it an offence to knowingly give false or misleading information, answers or documents to Landgate, the Registrar, the Commissioner or a delegate of any of them under the *EC Act* or under an instrument made under the *EC Act*, like the operating requirements or participation rules. The offence is a crime. The applicable penalty is \$100 000 or 10 years imprisonment and the summary conviction penalty is \$40 000 or 3 years imprisonment.
- Clause 46 Allows the Governor to make regulations under the *EC Act*.

Clause 47 Requires the Minister to review the operation and effectiveness of the *EC Act* after 7 years or at an earlier date.

PART 6—DUTIES ACT 2008 AMENDED

Clause 48 Notes that the Part amends the *Duties Act*.

Clause 49 Amends the definition of “transfer duty statement”.

Clause 50 Inserts definitions for new terms used in Chapter 2 Part 4 Division 2 of the *Duties Act*.

Clause 51 Provides that a digitally signed electronic conveyancing instrument is taken to be an instrument in hard copy form.

Clause 52 Provides that a person in relation to whom a digitally signed electronic conveyancing instrument is lodged is taken to have complied with the requirement to lodge a hard copy or a transfer duty statement.

Clause 53 Makes it clear that a digitally signed electronic conveyancing instrument that becomes unsigned is a cancelled transaction and that duty is not chargeable on the unsigned electronic conveyancing instrument.

Clause 54 Provides that where the Commissioner of State Revenue has established procedures relating to electronic conveyancing instruments, a reference to a transaction record being duty endorsed includes a reference to the electronic conveyancing instrument being verified or certified by the Commissioner of State Revenue.

Clause 55 Removes the requirement on the Registrar to be satisfied that evidence referred to in a caveat lodged for noting in the Titles Register has been duty endorsed or lodged for duty endorsement.

PART 7—SETTLEMENT AGENTS ACT 1981 AMENDED

Clause 56 Notes that the Part amends the *SA Act*.

Clause 57 Amends section 46 of the *SA Act* to enable a subscriber to an ELN who is a licensed real estate settlement agent, or the person in bona fide control of a licensee who is a firm or body corporate, to authorise an employee of the subscriber licensee to digitally sign and provide certifications in electronic documents on behalf of the subscriber licensee.

Clause 58 Amends Schedule 2 to the *SA Act* to authorise a licensed real estate settlement agent to provide certifications in relation to documents lodged and to perform a conveyancing transaction electronically by means of an ELN.

PART 8—TAXATION ADMINISTRATION ACT 2003 AMENDED

Clause 59 Notes that the Part amends the *TA Act*.

Clause 60 Inserts new subsections (4A) and 4(B) in section 114 so that the section does not prevent disclosure of information or material to Landgate, the Commissioner, Registrar, ELNO or subscribers for the purposes of electronic conveyancing transactions through an ELN.

PART 9—TRANSFER OF LAND ACT 1893 AMENDED

Clause 61 Notes that Part 9 amends the *TLA*.

Clause 62 Amends section 3 to provide that in the event of inconsistency between the *TLA* and the *EC Act*, the *EC Act* prevails.

Clause 63 Amends section 4 by inserting definitions used in the amendments to the *TLA* made by Part 9.

Clause 64 Deletes section 14 of the *TLA* and substitutes a section enabling the Commissioner and Registrar to exercise functions under the *TLA* by electronic means.

Clause 65 Deletes section 30(5) and substitutes a subsection enabling a caveat under section 30 of the *TLA* to specify an electronic address for service of notice.

Clause 66 Deletes section 48B(4) and substitutes a subsection enabling the Registrar to cancel a duplicate certificate of title on the request of a registered proprietor, registered proprietor of a mortgage or an incoming mortgagee.

Clause 67 Deletes section 52(2) and substitutes a provision removing the requirement that the original instrument, a memorandum of which has been entered in the Register, must be sealed to complete registration.

Clause 68 Amends section 54 by removing the requirement for a memorandum, as defined in that section, to be sealed.

- Clause 69 Amends section 57 by removing the requirement for the Registrar to endorse an instrument to the effect that the memorandum of the instrument has been entered in the Register.
- Clause 70 Amends section 74 which enables the Registrar (with the Commissioner's consent) to dispense with production of a duplicate certificate of title by dis-applying section 74 if regulations have been made under section 181(1)(bd) or if requirements have been made by the Commissioner or Registrar under section 182A(1)(b) relating to how duplicate certificates of title are to be dealt with when a document is lodged electronically under the *EC Act*.
- Clause 71 Amends section 74B to enable the Registrar to issue a new duplicate certificate of title or new edition of the duplicate certificate of title where a document lodged electronically is lodged but withdrawn or rejected from registration and the duplicate certificate has been destroyed or invalidated under regulations or requirements setting out how duplicate certificates of title for electronic transactions are to be dealt with.
- Clause 72 Deletes section 81W(9) and substitutes a subsection enabling a caveat under section 81W(9) of the *TLA* to specify an electronic address for service of notice.
- Clause 73 Amends section 105 to provide that where an electronic mortgagee's counterpart of a mortgage or charge is lodged, the mortgage or charge will not be enforceable against the registered proprietor if the registered proprietor has not signed the mortgagor's counterpart of the mortgage or charge.
- Clause 74 Provides that a subsequent mortgagee does not need to obtain the consent of an existing mortgagee to the subsequent mortgagee's mortgage and that the execution of a subsequent mortgage without consent will not be a breach of the existing mortgage.
- Clause 75 Makes a consequential amendment to section 129A as a result of amendment made to section 52 in clause 67.
- Clause 76 Deletes section 137(1D) and substitutes a subsection enabling a caveat under section 137 of the *TLA* to specify an electronic address for service of notice.
- Clause 77 The clause:

- Extends the range of persons who may be summoned by the Commissioner under section 180.
- Inserts section 181A which enables the Registrar and Commissioner to require certifications to be given in relation to matters, to require the verification of identity and confirmation of the authority of parties to a conveyancing transaction or a person who signs or authorises the signing of a document to deal with the land or the estate or interest and empowers the Registrar and Commissioner to require supporting documents or evidence to be submitted or produced.
- Inserts section 181B which enables the Registrar and the Commissioner in performing their respective functions to require matters to be verified by statutory declaration.

Clause 78 Amends section 181 enabling regulations to be made relating to the lodging of documents, how duplicate certificates of title are to be dealt with when documents are lodged electronically, certifications, endorsements and consents, verification of identity and authority, applications to the Commissioner and the giving of notices by electronic means.

Clause 79 Inserts:

- Section 182A enabling the Registrar and the Commissioner to determine requirements relating to the lodging of documents, how duplicate certificates of title are to be dealt with when documents are lodged electronically, certifications, endorsements and consents, verification of identity and authority, applications to the Commissioner and the giving of notices by electronic means. Requirements are not subsidiary legislation for the purposes of the *Interpretation Act 1984*.
- Section 182B requiring requirements determined under section 182A to be made publicly available, including by publication on Landgate's website, practice manual or customer information bulletins.

Clause 80 Deletes section 188(8) and substitutes new subsections (8) and (9). New subsection (8) enables the Minister to approve the destruction of a document or class of documents. New subsection (9) provides

that the destruction of a cancelled duplicate certificate of title does not require the Minister's approval.

Clause 81 Amends section 189 to allow the Registrar to exercise the power to correct patent errors in both paper and electronic documents.

Clause 82 Inserts:

- Section 192A empowering the Registrar to deal only with the lodging party and to assume that the lodging party has the authority from the parties to the conveyancing transaction to lodge, withdraw, uplift for amendment, answer requisitions and to attend to all other matters relevant to registration of the document in respect of documents lodged after the *EC Act* section 82 comes into operation.
- Section 192B empowering the Registrar to refuse lodgment of a document for non-compliance with a requirement of the *TLA* or *EC Act*.
- Section 192C empowering the Commissioner to refuse to take action required or authorised under the *TLA* to be taken where there is non-compliance with a requirement of the *TLA* or *EC Act*. The Commissioner may direct the Registrar to give notice of non-compliance in the same manner and with the same consequences as the issuing of a requisition notice under section 192.
- Section 192D empowering the Register to refuse registration where there is non-compliance with a requirement of the *TLA* or the *EC Act*.
- Section 192E providing that before exercising the power to refuse registration where there is non-compliance, the Registrar may give notice of non-compliance in the same manner and with the same consequences as the issuing of a requisition notice under section 192.

Clause 83 Section 192 is amended to correct a past drafting error.

Clause 84 Section 193 is amended to allow the Commissioner to state a case for the opinion of the Supreme Court where a question arises under the *TLA*, or under the *EC Act*, as to the performance of any duty or function by the Commissioner or Registrar.

- Clause 85 Section 198 is amended to extend the exclusion from liability for acts done bona fide to acts or matters done or omitted to be done under the *TLA* and the *EC Act*.
- Clause 86 Deletes sections 214 to 214B and replaces them with:
- A new section 214 making certain fraudulent acts specified in subsection (3), including false or misleading conduct, the making of a false or misleading certification, the suppression of documents, facts or information, the false procuring of entries in the titles register, the unlawful defacing or destruction of a duplicate certificate of title or instrument and the failure to lodge a duplicate certificate of title or Crown lease when required to do so, an offence and, by subsection (2) a crime. The penalty for an offence under the section is imprisonment for 10 years or a fine of \$100 000. A summary conviction penalty of \$40 000 or 3 years imprisonment also applies.
 - Section 214A denying a person who has committed a fraudulent act under section 214 from taking the benefits of that fraud.
- Clause 87 Inserts:
- Section 232A providing that where a duplicate certificate of title is dealt with in the way set out in regulations or requirements determined under section 182A, the duplicate certificate of title will be deemed to have been produced as required by the *TLA* or any other written law.
 - Section 232B providing that where a consent, permission or approval is required under the *TLA* or another written law and is provided in a way set out in regulations or requirements determined under section 182A, the consent, permission or approval is deemed to have been provided as required.
- Clause 88 Section 234 is amended to correct a past drafting error.
- Clause 89 Inserts:
- Section 238A providing that the copy of an electronic document produced by the Registrar is the definitive form of the document.
 - Section 238B providing that the Registrar may require an electronic document to be resubmitted where the data capture for

that document is defective, preserving that document's priority for two months or a longer time allowed by the Registrar and providing for a refund of fees in certain circumstances.

- Clause 90 Amends section 239 to provide that, in relation to electronic documents, the Registrar need only make available for inspection and search purposes the consolidated electronic counterparts of the document, not each counterpart.
- Clause 91 Amends section 239B to provide that the Registrar does not have to affix the Registrar's seal to certified documents provided for evidentiary purposes.
- Clause 92 Amends section 240 to enable notice under the *TLA* to be given electronically.
- Clause 93 Deletes section 240A and replaces it with a new section 240A enabling an update of notification details to include an update of, where applicable, an electronic address for service.
- Clause 94 Inserts transitional provisions as Part XV.
- Clause 95 Deletes the Twenty Fifth Schedule – Form of Summons to the *TLA* consequential to the amendment to section 180(3) which provides that a summons must be in an approved form.
- Schedule 1 Miscellaneous provisions relating to interpretation**
- Schedule 1 Sets out the general interpretation provisions that have effect in relation to the *EC Act*. The provisions have effect (other than in Parts 5 to 9) in substitution for the provisions of the *Interpretation Act 1984*.