



THIRTY-NINTH PARLIAMENT

REPORT 85

**STANDING COMMITTEE ON UNIFORM
LEGISLATION AND STATUTES REVIEW
ELECTRONIC CONVEYANCING BILL 2013**

Presented by Hon Kate Doust MLC (Chair)

February 2014

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“6. Uniform Legislation and Statutes Review Committee

6.1 *A Uniform Legislation and Statutes Review Committee* is established.

6.2 The Committee consists of 4 Members.

6.3 The functions of the Committee are –

- (a) to consider and report on Bills referred under Standing Order 126;
- (b) on reference from the Council, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to Standing Order 126;
- (c) to examine the provisions of any treaty that the Commonwealth has entered into or presented to the Commonwealth Parliament, and determine whether the treaty may impact upon the sovereignty and law-making powers of the Parliament of Western Australia;
- (d) to review the form and content of the statute book; and
- (e) to consider and report on any matter referred by the Council.

6.4 In relation to function 6.3(a) and (b), the Committee is to confine any inquiry and report to an investigation as to whether a Bill or proposal may impact upon the sovereignty and law-making powers of the Parliament of Western Australia.”

Members as at the time of this inquiry:

Hon Kate Doust MLC (Chair)

Hon Brian Ellis MLC (Deputy Chair)

Hon Mark Lewis MLC

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Glossary

ACCC	Australian Competition and Consumer Commission
ARNECC	Australian National Electronic Conveyancing Council
Bill	Electronic Conveyancing Bill 2013
Committee	Legislative Council Standing Committee on Uniform Legislation and Statutes Review
COAG	Council of Australian Governments
ELN	Electronic Lodgement Network
ELNO	Electronic Lodgement Network Operator
IGA	Intergovernmental Agreement. The full title is the <i>Intergovernmental Agreement for a National Electronic Conveyancing Law between the State of New South Wales, the State of Victoria, the State of Queensland, the State of Western Australia, the State of South Australia, the State of Tasmania and the Northern Territory of Australia, that came into operation on 21 November 2011 and as in force from time to time.</i>
MOR	Model Operating Requirements (subsidiary legislation)
MPR	Model Participation Rules
NEC	National Electronic Conveyancing
NECDL	National E-Conveyancing Development Ltd
NPA	National Partnership Agreement to Deliver a Seamless National Economy
OR	Operating Requirements
PA	Participation Agreements
PR	Participation Rules
PEXA	Property Exchange Australia

Registrar	Registrar of Titles responsible for the administration and integrity of the Torrens Title register in each State and Territory
Subscribers	Registered parties
TLA	<i>Transfer of Land Act 1893</i>
Torrens Title	A Torrens title is a single certificate of title for an allotment of land

EXECUTIVE SUMMARY, FINDING AND RECOMMENDATION

EXECUTIVE SUMMARY

- 1 The Electronic Conveyancing Bill 2013 (**Bill**) forms part of a uniform national scheme to establish an efficient electronic process for conducting property transactions. The Bill is a result of the State of Western Australia signing an Intergovernmental Agreement (**IGA**). The full name of the IGA is the *Intergovernmental Agreement for a National Electronic Conveyancing Law between the State of New South Wales, the State of Victoria, the State of Queensland, the State of Western Australia, the State of South Australia, the State of Tasmania and the Northern Territory of Australia, that came into operation on 21 November 2011 and as in force from time to time*. The IGA provides the legislative and governance framework for all participating States and Territory. The Australian Capital Territory is not a signatory of this IGA.
- 2 The Bill proposes substantial reforms in order to introduce the national electronic conveyancing system as the law of Western Australia. The Committee found that the purpose, object and intent of the IGA is reflected in the Bill. The Clauses of the Bill cover the establishment of the legal and governance frameworks, operating requirements, compliance processes and participation rules.
- 3 The Committee has inquired into the Bill and considered issues of parliamentary sovereignty and law making power. The Committee is satisfied that the Bill does not impact on the law making powers of the Western Australian Parliament.
- 4 The Committee's finding and recommendation are below.

FINDING AND RECOMMENDATION

- 5 The recommendation is as it appears in the text at the page number indicated:

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Finding 1: The Committee finds that the State of Western Australia entered into and signed an Intergovernmental Agreement for the National Electronic Conveyancing Law.

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Recommendation 1: The Committee recommends that the Electronic Conveyancing Bill 2013 be passed.

CHAPTER 1

BACKGROUND AND INQUIRY PROCESS

REFERRAL

- 1.1 On 5 December 2013, the Electronic Conveyancing Bill 2013 (**Bill**) was referred to the Standing Committee on Uniform Legislation and Statutes Review (**Committee**).¹ The Committee is required to table a report to the Legislative Council on 18 February 2014.

Conduct of the Inquiry

- 1.2 The Committee received the following correspondence:
- Letter from Hon Brendan Grylls MLA, Minister for Regional Development; Lands; Minister Assisting the Minister for State Development dated 1 October 2013 advising of the proposal for the enactment of uniform legislation on electronic national conveyancing,
 - Explanatory Memorandum,
 - Second Reading Speech,
 - Electronic Conveyancing Bill 2013,
 - Correspondence (Submission 1) dated 5 December 2013 from Ms Rachael Offer (Legal Counsel, Landgate) providing supporting documents and background information to the establishment of the national electronic conveyancing scheme. Documents in this submission included a copy of the Council of Governments' (**COAG**) Meeting on 3 July 2008, the Australian Registrars' National Electronic Conveyancing Council (**ARNECC**) report *Introduction of Electronic Conveyancing National Law Regulation Impact Statement for Decision*, copy of the Intergovernmental Agreement for an Electronic Conveyancing National Law (dated 2011) signed by Hon Brendon Grylls MLA and the ARNECC Model Participation Rules.
 - Letter from Hon Terry Redman MLA, Minister for Regional Development; Lands; Minister Assisting the Minister for State Development dated 15 January 2014 (Submission 2).

¹ The Attorney General, Hon Michael Mischin MLC, introduced the Bill into the Legislative Council on 5 December 2013 and nominated the Bill as a uniform legislation bill. The Bill stood referred pursuant to Standing Order 126 (1) of the Legislative Council.

- 1.3 The Committee consulted with Landgate on key aspects of the Bill. Landgate's submission included a table of matters as assessed against legislative scrutiny principles. Not all matters identified in the table on legislative scrutiny principles were considered by the Committee as they are outside the Committee's terms of reference. The Committee thanks the Minister and his staff for the timeliness and quality of explanatory material provided to the inquiry.

BACKGROUND TO THE BILL

- 1.4 Electronic conveyancing is an initiative of the COAG National Partnership Agreement to Deliver a Seamless National Economy (NPA). The IGA was signed in 2008 by all States and Territories and came into operation on 21 November 2011.

National Electronic Conveyancing (NEC) is a legal and business platform to enable the electronic preparation, financial settlement and lodgement of real property conveyancing transaction documents with a Land Registry.²

- 1.5 National E-Conveyancing Development Limited (NECDL) is the company engaged to build and operate the National Electronic Conveyancing platform. NECDL was established in 2010 and comprises New South Wales, Queensland, Victoria and Western Australia. Member States are shareholders, but this role is separate from their role in land registry. NECDL will operate an Electronic Lodgement Network (ELN).

A national electronic conveyancing system: A private company, known as NECDL – National E-Conveyancing Development Ltd - has been established and will operate Australia's first electronic lodgement network. The system is known as PEXA – Property Exchange Australia. Western Australia, Victoria New South Wales and Queensland established and were initial investors in NECDL. The four major financial institutions, the ANZ Bank, the Commonwealth Bank, the National Australia Bank and Westpac Bank, subsequently invested in the company, along with other private investors. The State, through Landgate, has a 15.9 per cent shareholding in NECDL and has invested a total of \$22.4 million. The shareholder benefits this investment is expected to return to the State, together with the business efficiency reforms that a digital platform for conveyancing, funds settlement and lodgement of

² Submission No 1 from Landgate, Electronic Conveyancing Bill 2013, Information for Legislative Council Standing Committee on Uniform Legislation and Statutes Review, 5 December 2013, p1.

*document will deliver to Landgate and the conveyancing industry, are significant.*³

- 1.6 The ELN is a web based hub for registered parties (subscribers) to conduct conveyancing, settle the transaction and electronically lodge documents for registration at the land registry. Subscribers are lawyers, conveyancers and lenders who act on behalf of their clients.

*A Subscriber will create electronic Land Registry instruments and other documents in an electronic workplace shared with other Subscribers to the ELN. Some data will be pre-populated into Land Registry instruments from the titles register. Other data will be entered by the Subscriber for the transacting party.*⁴

- 1.7 NECDL does not alter the information held by the land registry; it is simply a gateway or channel for documents. Landgate retains land information and intellectual property of the Land Registry.

- 1.8 Checks on data and lodgement verification will continue. The Subscriber will sign electronic documents (digital signature) under a Client Authorisation.

*On the nominated settlement date when the transaction is ready to settle, financial settlement occurs automatically by electronic funds transfer. Once settlement has occurred the Land Registry instruments will be electronically lodged with the Land Registry.*⁵

- 1.9 All States and Territories have agreed to nationally consistent legislation in establishing the digital registry instruments. A registrar in each State and Territory will authorise the Electronic Network Operator to lodge Registry documents electronically.

- 1.10 Model Operating Agreements (**MOA**) specify the relationship between the Registrar and Electronic Network Operator.

- 1.11 Model Participation Rules (**MPR**) are made by the Registrar. Subscribers must comply with the MPR when using the ELN.⁶ Model Operating Requirements (**MOR**)

³ Hon Michael Mischin MLC, Attorney General on behalf of Hon Ken Baston, MLC, Minister for Agriculture and Food, Parliament of Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 5 December 2013, p2.

⁴ Submission No 1 from Landgate, Electronic Conveyancing Bill 2013, Information for Legislative Council Standing Committee on Uniform Legislation and Statutes Review, 5 December 2013, p2.

⁵ Submission No 1 from Landgate, Electronic Conveyancing Bill 2013, Information for Legislative Council Standing Committee on Uniform Legislation and Statutes Review, 5 December 2013, p2.

⁶ Submission No 1 from Landgate, Electronic Conveyancing Bill 2013, Information for Legislative Council Standing Committee on Uniform Legislation and Statutes Review, 5 December 2013, p7.

set the obligations and duties of Registrars when lodging Registry Instruments electronically, eligibility requirements and the use of model participation agreement rules. These rules will be treated as subsidiary legislation and laid before Parliament under Clause 43(5) of the Bill. These Rules will be subject to disallowance.⁷

- 1.12 Participation Agreements (**PA**) are established between the operator of an Electronic Lodgement Network Operator (**ELNO**) and every subscriber.
- 1.13 All users of an Electronic Lodgement Network must comply with the Model Participation Rules. There will be provisions for service agreements between a financial settlement manager to provide the facility for the transfer of funds, a supplier and certifier of Digital Signature Certificates with an IT partner. All operating requirements will need to be met by any party to the agreement.

LEGAL AND GOVERNANCE FRAMEWORKS

- 1.14 The *National Partnership Agreement to Deliver A Seamless Economy* underpins the establishment of an Intergovernmental Agreement for an Electronic Conveyancing National Law. The IGA established the ARNECC with the Registrar General from each State having membership to ARNECC.
- 1.15 ARNECC facilitates the ongoing management of the regulatory framework for National E Conveyancing. ARNECC will ensure that land registry business practices are consistent, guide the development of Model Operating Requirements and provide advice on amendments to the law.
- 1.16 The ARNECC has responsibility for the implementation of the NEC.
- 1.17 The NEC will not alter the existing regulation of settlement agents, and legal practitioners, or the scope of the work that can be performed under the *Settlement Agents Act 1981* or the *Legal Profession Act 2008* (WA).⁸

*The ELN will operate nationally. Nationally consistent legislation governing electronic conveyancing is required so that an ELNO and its Subscribers participate on the same legal basis nationally.*⁹

- 1.18 The diagram¹⁰ on the next page illustrates the governance framework.

⁷ Submission No 1 from Landgate, Electronic Conveyancing Bill 2013, Information for Legislative Council Standing Committee on Uniform Legislation and Statutes Review, 5 December 2013, p7.

⁸ Submission No 1 from Landgate, Electronic Conveyancing Bill 2013, Information for Legislative Council Standing Committee on Uniform Legislation and Statutes Review, 5 December 2013, p4.

⁹ Submission No 1 from Landgate, Electronic Conveyancing Bill 2013, Information for Legislative Council Standing Committee on Uniform Legislation and Statutes Review, 5 December 2013, p8.



- 1.19 ARNECC comprises the Registrars of Title responsible for the administration and integrity of the Torrens Title register in each State and Territory.

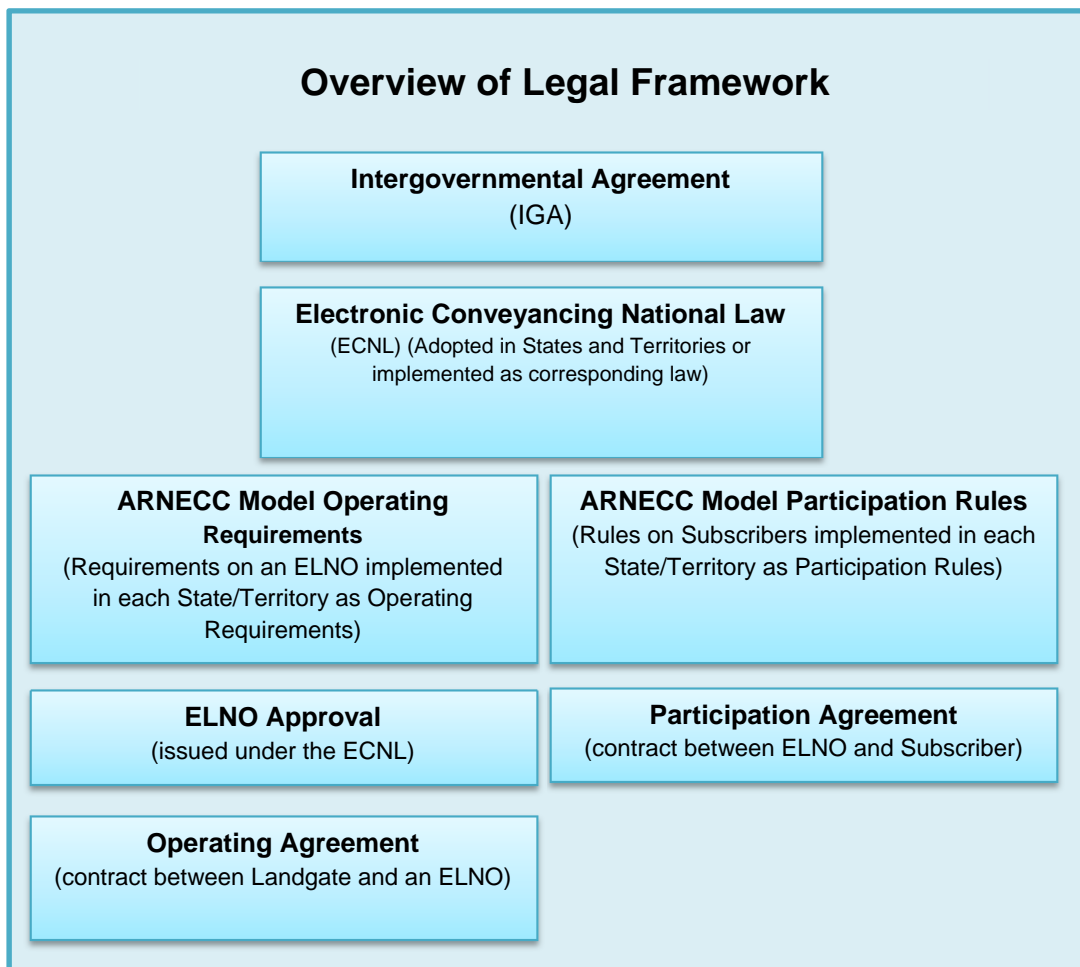
Consideration was given to nominating a Ministerial Council as the body responsible for managing the regulatory framework for NEC. However, the States and Territories considered that it was more appropriate that the statutory officers with responsibility for the accuracy and integrity of the titles register in each jurisdiction provide oversight.¹¹

- 1.20 The Committee notes the roles of ARNECC in providing advice and guidance in the establishment of the scheme.

¹⁰ Diagram from the ARNECC Proposed Electronic Conveyancing Law Discussion Paper located at http://www.arnecc.gov.au/_data/assets/pdf_file/0013/161023/ARNECC_ECNL_Discussion_Paper_v_-Final_050811.pdf, (viewed on 29 January 2014), p4.

¹¹ Submission No 1 from Landgate, Electronic Conveyancing Bill 2013, Information for Legislative Council Standing Committee on Uniform Legislation and Statutes Review, 5 December 2013, p4.

1.21 The legal framework of the National Electronic Conveyancing National Law¹² is illustrated below:



1.22 The Electronic Conveyancing National Law:

- *authorise the Registrar of the Land Registry to receive and process electronic instruments;*
- *provide that electronic Land Registry instruments, when digitally signed by a Subscriber under a Client Authorisation, have the same effects as a signed paper document;*
- *set out the circumstances in which a digital signature is binding;*

¹² Diagram from Submission No 1 from Landgate, Electronic Conveyancing Bill 2013, Information for the Legislative Council Standing Committee on Uniform Legislation and Statutes Review, 5 December 2013, p16.

- *authorise the Registrar (or in Western Australia, Landgate) to approve an operator of an ELN; and*
- *provide that the Registrar can make operating requirements binding an operator of an ELN and participation rules binding Subscribers to an ELN.*¹³

INTERGOVERNMENTAL AGREEMENT

1.23 The full title of the IGA is the *Intergovernmental Agreement for a National Electronic Conveyancing Law between the State of New South Wales, the State of Victoria, the State of Queensland, the State of Western Australia, the State of South Australia, the State of Tasmania and the Northern Territory of Australia, that came into operation on 21 November 2011 and as in force from time to time.*¹⁴

1.24 The IGA contains:

- a mechanism for amendments to be made into national law; and
- an obligation to pass consistent legislation for the adoption of Model Operating Requirements and Model Participation Rules developed by ARNECC.

Finding 1: The Committee finds that the State of Western Australia entered into and signed an Intergovernmental Agreement for the National Electronic Conveyancing Law.

1.25 Western Australia is required to amend state legislation to ensure consistency with the national law.

1.26 The adoption of an application law scheme over mirror legislation was first raised in the ARNECC Discussion Paper on the national law.¹⁵ The Discussion Paper noted at the time:

While a final decision on whether to apply or mirror the ECNL has not been made in a few jurisdictions, an application law scheme is preferred as it leads to a higher level of consistency. The applying

¹³ Submission No 1 from Landgate, Electronic Conveyancing Bill 2013 Information for Legislative Council Standing Committee on Uniform Legislation and Statutes Review, 5 December 2013, p5.

¹⁴ Electronic Conveyancing Bill 2013, p4.

¹⁵ Australian Registrars' National Electronic Conveyancing Council *Proposed Electronic Conveyancing National Law Discussion Paper*, Undated, at p6.

*jurisdictions enact application laws which apply the National Law (set out in the host jurisdiction's Act) as a law of that jurisdiction (with necessary changes to local references included in the application law). Amendments of the National Law in the host jurisdiction are automatically applied in all participating jurisdictions.*¹⁶

1.27 The final ARNECC paper incorporated stakeholder views. *The preferred option for regulation of National Electronic Conveyancing by means of a national applied law remains unchanged.*¹⁷

1.28 The Bill, however, enacts legislation corresponding to the EC National Law.

*It does not adopt the Electronic Conveyancing (Adoption of National Law) Act 2012 (NSW) as a law of Western Australia. Any amendment to the EC Bill will be subject to the usual Government and Parliamentary processes.*¹⁸

1.29 The Committee notes Clause 3, *Terms Used* in the Bill:

Electronic Conveyancing National Law or ECNL means the law set out in the Appendix to the Electronic Conveyancing (Adoption of National Law) Act 2012 (NSW) as that Appendix is in force from time to time.

1.30 The Committee notes the model law framing State and Territory legislation set out in the Appendix of the *Electronic Conveyancing (Adoption of National Law) Act 2012* (NSW).

1.31 The IGA requires Western Australia to use its 'best endeavours' to implement the Scheme. It specifies:

State of Western Australia, South Australia and the Northern Territory will, as soon as reasonably practicable, use their best endeavours to either enact legislation in their jurisdictions applying the New South Wales Legislation as a law of those jurisdiction or enact corresponding legislation, substantially similar to the agreed

¹⁶ ARNECC, *Introduction of the National Conveyancing Law*, Regulation Impact Statement for Decision, February 2013, p6.

¹⁷ ARNECC, *Introduction of the National Conveyancing Law*, Regulation Impact Statement for Decision, February 2013, p7.

¹⁸ Submission No 1 from Landgate, *Electronic Conveyancing Bill 2013 Information for the Legislative Council Standing Committee on Uniform Legislation and Statutes Review*, 5 December 2013, Attachment entitled *Consideration of Legislative Scrutiny Principles: Electronic Conveyancing Bill 2013 Parts 1-5*, p28.

*model so as to permit the scheme to be established in accordance with the COAG Agreement.*¹⁹

- 1.32 The date of operation is the date the parties execute the IGA.

*Subject to the passing of this Bill, Landgate and PEXA are expected to begin processing electronic conveyancing transactions in Western Australia in early 2014. PEXA will initially process the lodgement of mortgages and discharges, followed by transfers of land, caveats and withdrawals of caveats later in 2014.*²⁰

- 1.33 The Regulatory Impact Statement²¹ and COAG reform papers advise that the ACT is not likely to join the uniform scheme due to the costs in implementing the scheme.

*The ACT Government reported that it ‘has yet to sign the IGA, having reserved its position on the implementation of the reform due to cost-benefit concerns’ (ACT Government 2012, p. 19).*²²

- 1.34 The ACT’s decision not to join the uniform scheme will not impact Western Australia’s participation and operation of the scheme.

- 1.35 The Committee noted differences of terms used in the IGA and the Bill. Some terminology is cited in the IGA, but absent from the Bill. For example, the IGA defines a ‘*transacting party*’ as:

*a person who is engaged in a land transaction in relation to land registered in the titles register which will result in the lodgement of Electronic Registry Instruments or other Electronic documents.*²³

- 1.36 The Minister for Landgate, Hon Terry Redman MLA, explained that:

The term, “transacting party” in the Intergovernmental Agreement for an Electronic Conveyancing National (“IGA”) is not used in the EC Bill. It is therefore not necessary to include the definition. In

¹⁹ Council of Australian Governments, *Intergovernmental Agreement for an Electronic Conveyancing National Law* 2011, p11.

²⁰ Hon Michael Mischin MLC, Attorney General on behalf of Hon Ken Baston MLC, Minister for Agriculture and Food, Parliament of Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 5 December 2013, pp3-4.

²¹ ARNECC, *Introduction of the National Conveyancing Law*, Regulation Impact Statement for Decision, February 2013, p7.

²² COAG Reform Council, Seamless National Economy Report Card 2011-2012, p71. http://www.coagreformcouncil.gov.au/sites/default/files/files/reports/competition/sne-performance-11-12/chapter_10_electronic_conveyancing.pdf. Viewed on 10 February 2014.

²³ COAG, *Intergovernmental Agreement for an Electronic Conveyancing National Law* 2011, p8.

NEC, a transacting party is either represented by a Subscriber (for example, a lawyer or licensed conveyance) or is acting for itself (for example, a financial institution taking a mortgage). The generic term “transacting party” covers both. Some provisions of the EC Bill (like section 10 Client Authorisation) are only relevant where [a] transacting party is represented by a Subscriber.²⁴

1.37 The Minister further explained:

Other provisions (like section 9) apply irrespective of whether the transacting party is represented by a Subscriber or is acting for itself. From a drafting viewpoint, it was not appropriate to use the term “transacting party” as that term does not distinguish between situations where a transacting party is represented and where a transacting party acts for itself.²⁵

1.38 The definition in the IGA for a ‘subscriber’ differs to that described in the Bill.

1.39 The IGA defines subscriber as:

Subscriber is a corporation or other body corporate, partnership, government agency or natural person registered to use an ELN to complete conveyancing transactions electronically, as or on behalf of a Transacting Party.²⁶

1.40 ‘Subscriber’ in Clause 4 of the Bill 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.

1.41 The Minister further stated that:

It should be noted that the IGA was drafted by in – house lawyers for the participating States and Territories, not by the Parliamentary Counsel’s Committee who drafted the ECNL. The fact that terms defined in the IGA may vary from those used in the ECNL reflects the different drafters of each document.²⁷

²⁴ Submission No 2 from the Minister, Hon Terry Redman MLA, 10 January 2014, p2.

²⁵ Submission No 2 from the Minister, Hon Terry Redman MLA, 10 January 2014, p2.

²⁶ COAG, Intergovernmental Agreement on the Electronic Conveyancing National Law.

²⁷ Submission No 2 from the Minister, Hon Terry Redman MLA, 10 January 2014, pp2-3.

1.42 The Minister advised²⁸ of IGA terms excluded from the Bill:

- Business Regulation and Competition Working Group (BRCWG)
- BRCWG E Conveyancing Sub Group
- COAG
- COAG Agreement
- Electronic Document (the generic term “document” which is defined in the Schedule to the EC Bill is medium neutral and used instead)
- Minister
- Minor or inconsequential amendment
- National E-Conveyancing Development Ltd
- Stakeholders
- System

1.43 The Committee notes these excluded terms but accepts that these differences will not impact the operation of the Bill.

1.44 Other terms cited in the IGA such as ‘*Client authorisation*’ have been given greater detail in Clause 10 of the Bill. The IGA states that client authorisation is:

*a document by which a Transacting Party authorises a Subscriber to do one or more things on that party’s behalf in connection with the transaction.*²⁹

1.45 By comparison, ‘*client authorisation*’ in Clause 10 of the Bill is read as:

10. Client authorisations

(1) A client authorisation is a document-

(a) that is in the form required by the participation rules;

and

²⁸ Submission No 2 from the Minister, Hon Terry Redman MLA, 10 January 2014, p3.

²⁹ Council of Australian Governments, *Intergovernmental Agreement for an Electronic Conveyancing National Law 2011*, p6.

(b) *by which a party to a conveyancing transaction authorise a subscriber to do one or more things on that party's behalf in connection with the transaction so that the transaction, or part of the transaction, or part of the transaction, can be completed electronically.*

(2) *The following are examples of the things that a client authorisation may authorise a subscriber to do –*

- (a) *to digitally sign registry instruments or other documents;*
- (b) *to present registry instruments or other documents for lodgement electronically;*
- (c) *to authorise or complete any associated financial transaction.*

1.46 The Committee is satisfied that the definition of client authorisation contained in Clause 10 of the Bill is compatible and consistent with the intent of the IGA.

1.47 The Committee observed:

1. Western Australia applied to be a member of NECDL in October 2010 and is represented by the Minister.
2. The cover page of the IGA includes the ACT in its recitals but not as a signatory.
3. The Purpose of the IGA is consistent with the purposes of the Bill.
4. The IGA may be amended or reviewed (Clause 13.1). Its Review may occur within seven years (Clause 13.3). Amendments to the IGA may be made at any time if all Parties agree (Clause 13.1).
5. The Recitals set out the history of the NEC:
 - NECDL was established to create, implement and operate the system.
 - NECDL constitution provides for consultation, cooperation between land registries.

6. All Parties agree to use their best endeavours to implement the NEC (Clause 5.2.1 of the IGA).
7. All Parties agree to work collaboratively (Clause 5.2.2) and collaborate in good faith (Clause 5.2.3).

1.48 The Committee notes that at Clause K of the IGA, the object of the NECDL is to:

*...create and operate a system to provide an efficient, competitive system to settle property transactions, lodge instruments with Land Registries and pay associated duty and tax obligations electronically, without increasing the cost of such services to the community or excluding any current market participant from operating in the new electronic environment.*³⁰

1.49 The IGA³¹ specifies the activities that further the objects of the NECDL. These include identifying legislative and regulatory changes, developing business processes, rules and procedures, developing software, cooperation with Land Registries, facilitating prospective participants to join, implementation and protocols for the operation of the system program and liaison with stakeholders.

1.50 The IGA provides that the National Law (Clause 3.4) will not prohibit State or Territory based electronic lodgements arrangements.

1.51 Clause 3.6 of the IGA reads as:

This Agreement only sets forth the mutual intentions of the Parties, it does not create any binding obligation on any party and does not contain all matters upon which agreement must be reached.

1.52 Part 6 of the IGA provides for the formation, composition and operation of ARNECC. ARNECC provides advice, and advises parties of any changes to the National E Conveyancing. ARNECC may, by agreement, deal with matters informally and out of session, subject to the same provisions regarding quorum and voting as would apply to a meeting in session (Clause 6.6 of the IGA).

1.53 The Committee generally holds the view that decisions made out-of-session do not reflect open and transparent accountability of Ministers or Executive delegates. The use of an out-of-session COAG meeting to decide or determine significant reforms is neither supported nor encouraged by the Committee.

³⁰ COAG, *Intergovernmental Agreement for an Electronic Conveyancing National Law* 2011, Clause K, p5.

³¹ COAG, *Intergovernmental Agreement for an Electronic Conveyancing National Law* 2011, Clause L, p5.

1.54 The IGA provides for Alteration of the Electronic Conveyancing National Law at Clause 10. This provision allows Western Australia to propose an amendment to the National Law and each party will consider the proposal and notify each other of their agreement within six weeks (Clause 10.1 and 10.2).

1.55 Under Clause 10.5 of the IGA, if a Party does not vote by the end of the 12 week voting period, that Party will be taken to have voted against the proposed amendment.

1.56 Under Clause 10.6 of the IGA,

...the State of New South Wales (or the host jurisdiction, if 8.1.7³² applies) does not need to consult with the other Parties before making minor or inconsequential amendments to the ECNL, but must give the other parties sufficient notice (being not less than 28 days) of its intention to make such amendments. Where New South Wales (or the host jurisdiction) has notified the other Parties of its intention to make minor or inconsequential amendments and two (2) or more Parties advise New South Wales (or the host jurisdiction) in writing within 28 days that they believe the proposed amendments are not minor or inconsequential, then New South Wales (or the host jurisdiction) must submit the proposed amendments and clauses 10.1 to 10.5 of this Agreement will apply to those proposed amendments.

1.57 The State of New South Wales must give Parties sufficient notice of its intention to make such amendments.

1.58 Clause 10.8 of the IGA states:

If the State of Western Australian, South Australia or the Northern Territory enacts corresponding legislation rather than a law applying the New South Wales legislation as a law of their jurisdiction, then that jurisdiction will:

10.8.1 within a reasonable time submit to its Parliament a Bill or make a regulation giving effect to the changes to its law substantially similar to the agreed changes; and

10.8.2 take all reasonable steps to secure the passage of the Bill or the making of a regulation and bring it into force in accordance with a Timetable agreed by the Parties.

³² Clause 8.1.7 of the IGA states: 'The Parties agree that, if New South Wales is unable to pass the ECNL, then it may be introduced in another jurisdiction.'

- 1.59 Both the Bill and the IGA have review provisions. Part 13 of the IGA is a review provision (refer to Clauses 13.1 to 13.4 inclusive). Clause 13.1 enables the Agreement to be amended by the unanimous decision of all Parties to it at that time. After the IGA has operated for seven years (or at such earlier times as may be agreed between the Parties), the Parties will review the Agreement's operation and terms, including the operation and terms of the ECNL (Clause 13.4).
- 1.60 Under Clause 12.1 of the IGA, the State of Western Australian can withdraw from the Agreement. The withdrawal will become effective six months after the notice was sent. A party may revoke its withdrawal at any time prior to it becoming effective.
- 1.61 The Committee finds that the Bill is compatible with the clauses of the IGA signed by the State Minister in November 2011. The Bill applies all the provisions in the IGA agreed to by the State.
- 1.62 The Committee commends Landgate for their comprehensive written material to explain the proposed regulatory system.
- 1.63 The Committee considered provisions of the Bill that may impact parliamentary sovereignty or its law making powers as discussed in Chapter 2.

CHAPTER 2

KEY PROVISIONS OF THE ELECTRONIC CONVEYANCING BILL 2013

Key Clauses

- 2.1 The Bill comprises 95 Clauses plus Schedule 1 that has 37 clauses. The Bill enacts Electronic Conveyancing National Law (ECNL) within Western Australia and makes a number of consequential amendments to the *Transfer of Land Act 1893 (TLA)*, the *Settlement Agents Act 1981*, the *Duties Act 2008* and the *Taxation Administration Act 2003*. These amendments are required to implement the NEC in Western Australia:

Parts 1 to 4 of the EC Bill enact legislation in Western Australia corresponding to the EC National Law. The EC Bill is not an application law scheme.

...

*In addition, the EC 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 on 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.*³³

- 2.2 Landgate advised that the Bill would:

- *Provide national consistency*
- *Remove inefficiencies and enable business to be streamlined both nationally and in Western Australia*
- *Streamline processes*³⁴

- 2.3 The consequences of not implementing the NEC will prevent:

- *the conveyancing industry, their clients and Landgate from taking advantage of the benefits of NEC; and*

³³ Submission No 1 from Landgate, 5 December 2013, p6.

³⁴ Submission No 1 from Landgate, 5 December 2013, p8.

- *the estimated benefits to the national economy from being fully realised if financial institutions cannot participate in conveyancing transactions electronically in Western Australia.*³⁵

2.4 The Committee reviewed specific clauses of the Bill with a view to establishing whether the objects and purpose of the IGA were reflected in the Bill and whether any clauses impacted on Parliament's sovereignty and law making powers.

2.5 Clause 1 is the short title, the Electronic Conveyancing Act 2013.

2.6 Clause 2 reads as:

2. Commencement

This Act comes into operation as follows—

(a) Part 1 (other than sections 3 to 7A) — on the day on which this Act receives Royal Assent;

(b) the following provisions — on the day after that day —

(i) sections 3 to 7A;

(ii) Parts 3 to 5;

(iii) Schedule 1;

(c) the rest of the Act— on a day fixed by proclamation,

and different days may be fixed for different provisions.

2.7 The Committee notes Clause 5.1 of the IGA states that National E Conveyancing may be implemented at different times and at a different pace across each jurisdiction. In this regard, Clause 2 of the Bill reflects the intent of the IGA.

2.8 The scheduled roll out period requires Western Australia to enact legislation in 2014.

2.9 Clause 3 of the Bill defines terms. The IGA is directly cited in Clause 3 and reads as:

Intergovernmental Agreement for a National Electronic Conveyancing Law Between the State of New South Wales, the State of Victoria, the State of Queensland, the State of Western Australia, the State of South Australia, the State of Tasmania and the Northern

³⁵ Submission No 1 from Landgate, 5 December 2013, p9.

*Territory of Australia, that came into operation on 21 November 2011
and as in force from time to time.*

- 2.10 The Committee supports the inclusion of the IGA in the Bill, noting that it is consistent with accepted drafting practices.
- 2.11 The Committee notes that ‘*as in force from time to time*’ provides for amendments to the IGA as raised by signatory parties at a COAG meeting.

Interpretation and Exclusion of interpretation legislation of this jurisdiction

- 2.12 Clause 4 reads as:

4. Interpretation generally

Schedule 1 applies in relation to this Act (other than Parts 5 to 9).

- 2.13 Clause 5 reads as:

5. The Interpretation Act 1984 does not apply to—

(a) this Act (other than Parts 5 to 9), or

(b) the instruments made under this Act (other than regulations made under section 46).

- 2.14 Schedule 1 is a substantial provision of the Bill that applies definitions used in the interpretation of Commonwealth legislation. For example, Item 12 (1) of Schedule 1, the meaning of the word ‘*document*’ is:

Clause 12 *Definitions*

(1)

...

document means any record of information however recorded, and includes—

(a) anything on which there is writing; or

(b) anything on which there are marks, figures, symbols or perforations having a meaning for person qualified to interpret them; or

(c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or

(d) a map, plan, drawing or photograph; or

(e) any record of information that exists in a digital form and is capable of being reproduced, transmitted, stored and duplicated by electronic means.

- 2.15 The word ‘document’ is not defined in Clause 3 of the Bill. The Commonwealth definition is wider than the definition provided under s5 of the *Interpretation Act 1984* (WA) that describes document as:

document includes any publication and any matter written, expressed, or described upon any substance by means of letters, figures, or marks, or by more than one of those means, which is intended to be used or may be used for the purpose of recording that matter;

- 2.16 The Committee holds the view that the Commonwealth interpretation better reflects the object of the national law in that it considers any record of information in a digital form and is capable of being reproduced, transmitted, stored and duplicated. The Explanatory Memorandum refers to the provision as:

*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.*³⁶

- 2.17 The effect of this provision means that the *Interpretation Act 1984* applies only to Parts 5-9 or the instruments made under the Act (other than regulations made under section 46). The interpretative provisions in Schedule 1 apply instead of each State or Territory’s respective Interpretation Act. The Minister advised that the ‘*definitions in the Schedule are not inconsistent with the definitions in the Interpretation Act*’.

- 2.18 The Committee notes that this provision standardises the interpretation of the national law across all jurisdictions to achieve uniformity.

³⁶ Explanatory Memorandum Electronic Conveyancing Bill 2013, p15.

Clause 6 Purpose

2.19 Clause 6 reads as:

Purpose

- (1) *The purpose of this Act is to provide for electronic conveyancing in Western Australia by enacting provisions that correspond to the Electronic Conveyancing National Law and in that way achieve the object of that Law.*
- (2) *The object of the Electronic Conveyancing National Law is to promote efficiency throughout Australia in property conveyancing by providing a common legal framework that —*
 - (a) *enables documents in electronic form to be lodged and processed under the land titles legislation of each participating jurisdiction; but*
 - (b) *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.*

2.20 For the purposes of this inquiry, the Committee finds that the object of the IGA is reflected in the Bill.

Operating Requirements (OR) and Participation Rules (PR)

2.21 The Bill contains Clauses 22 and 23 that enable the Registrar to determine the requirements relating to the provision and operation of an ELN by an ELNO.

2.22 Clause 22 reads as:

22. ***Operating requirements for ELNOs (cf. ECNL s.22)***

- (1) *The Registrar may determine, in writing, requirements (**operating requirements**) relating to —*
 - (a) *the operation of an ELNO; and*
 - (b) *the provision and operation, by an ELNO, of an ELN.*
- (2) *The operating requirements may (without limitation) include provisions relating to the following matters—*

- (a) *the financial standing of an ELNO;*
- (b) *compliance with the participation rules, including (without limitation) —*
 - (i) *requiring an ELNO to use a participation agreement when authorising persons to use an ELN; and*
 - (ii) *requiring participation agreements to incorporate the participation rules;*
- (c) *the technical and operational requirements for an ELN;*
- d) *the insurance cover to be held by an ELNO;*
- (e) *the circumstances in which the Authority may suspend or revoke the approval of a person as an ELNO;*
- (f) *the giving of directions to an ELNO by the Authority or the Registrar, for example a direction to restrict, suspend or terminate a subscriber's or other person's use of an ELN.*

2.23 Clause 23 reads as:

23. Participation rules (cf. ECNL s.23)

- (1) *The Registrar may determine, in writing, rules relating to the use of an ELN (**participation rules**).*
- (2) *The participation rules may (without limitation) include provisions relating to the following matters—*
 - (a) *the eligibility criteria for subscribers;*
 - (b) *the obligations of subscribers, including (without limitation) any representations or warranties they are required to give;*
 - (c) *the circumstances in which a subscriber's authority to use the ELN may be restricted, suspended or terminated;*

- (d) *client authorisations;*
- (e) *the obligations of subscribers to verify the identity of their clients;*
- (f) *the certification of registry instruments and other documents for use in connection with the ELN;*
- (g) *digital signing;*
- (h) *the retention of documents created or obtained in connection with a subscriber's use of an ELN;*
- (i) *compliance by subscribers with the participation rules, including (without limitation) how subscribers demonstrate compliance with the rules, the procedures for notifying non-compliance and how non-compliance may be remedied.*

2.24 The Participation Rules (**PR**) set out the obligations of Subscribers and are determined by the Registrar. The Registrar must publish the Operating Requirements (**OR**) and the Participation Rules under Clause 25. Any changes to the OR and PR must be published under a Notice. The OR will be treated as subsidiary legislation and will be laid before the Parliament under Clause 43(5) of the Bill and be subject to disallowance under Clause 43(6) of the Bill. Regulations are made by the Governor under Clause 46.

2.25 The Committee notes the powers of the Registrar to determine the OR and the PR and any amendments to these instruments without scrutiny by the Parliament. Landgate advised:

It may be necessary to urgently amend the Operating Requirements to protect the integrity of the titles register. Having the operating requirements as subsidiary legislation and not incorporated in the EC Bill will enable urgent changes to be made.³⁷

Disallowance Provisions

2.26 Clause 43 reads as follows:

³⁷ Submission No 1 from Landgate, Consideration of Legislative Scrutiny Principles: *Electronic Conveyancing Bill 2013*, Parts 1- 5, 5 December 2013, p25.

43. ***Notification, tabling and disallowance of operating requirements and participation rules***

- (1) *In this section —*
- business day** means a day that is not —
- (a) *a Saturday or Sunday; or*
- (b) *a public holiday in the metropolitan region (as defined in the Planning and Development Act 2005 section 4(1)).*
- (1) *This section applies to the following documents —*
- (a) *operating requirements;*
- (b) *participation rules;*
- (c) *changes to operating requirements or participation rules.*
- (2) *Where any document to which this section applies is made publicly available in accordance with section 25, the Registrar must, within 10 business days after the day on which the document is first made publicly available, cause to be published in the Gazette notice of —*
- (a) *the making of the document; and*
- (b) *where the document is publicly available.*
- (3) *If notification of the making of a document to which this section applies is not published in the Gazette in accordance with subsection 0, the document ceases to have effect on the expiry of the 10th business day after the day on which the document was first made publicly available, but without affecting the validity or curing the invalidity of anything done or of the omission of anything in the meantime.*
- (4) *A copy of a document to which this section applies must be laid before each House of Parliament within 6 sitting days following notification of the making of the document in the Gazette in accordance with subsection 0.*

(5) *If notification of the making of a document to which this section applies is published in the Gazette, the Interpretation Act 1984 section 42 applies as if the document were a regulation published in the Gazette.*

2.27 Clause 43 is presented as a disallowance provision. The Explanatory Memorandum states that the:

Registrar [is] to publish a notice in the Government Gazette of the publication of the operating requirements, participation rules and changes to the documents. The documents must be laid before the Parliament and are subject to disallowance as if they were regulations under section 42 of the Interpretation Act 1984 (WA).³⁸

2.28 The Minister advised:

Clause 43 is not a deeming provision, it is a disallowance provision. The purpose of the clause is to enable Parliamentary scrutiny of the Operating Requirements and Participation Rules. For administrative convenience, the Operating Requirements and Participation Rules themselves need not be published in the Government Gazette. However, notice of the publication by the Registrar of the Operating Requirements and Participation Rules must be published in the Government Gazette.³⁹

2.29 The Committee holds the view that the Clause provides the level of parliamentary oversight.

Clause 46 Regulations

2.30 Clause 46 is read as:

46. Regulations

(1) *The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of this Act.*

(2) *If a regulation made under this section is inconsistent with any subsidiary legislation made under the land titles*

³⁸ Explanatory Memorandum, Electronic Conveyancing Bill 2013, p8.

³⁹ Submission No 2 from the Minister, Hon Terry Redman MLA, 10 January 2014, p2.

legislation, the regulation made under this section prevails to the extent of the inconsistency.

2.31 This clause allows the Governor to make regulations. The *Interpretation Act 1984* applies to regulations made under this section.

Clause 47 Review of the Act

2.32 Clause 47 reads as:

47. *Review of Act*

(1) *The Minister must carry out a review of the operation and effectiveness of this Act —*

(a) *as soon as is practicable after the period of 7 years beginning on the day on which section 7 comes into operation (the **review period**); or*

(b) *at any earlier time that the Minister considers appropriate.*

(2) *The Minister must —*

(a) *prepare a report based on the review; and*

(b) *cause the report to be laid before each House of Parliament as soon as is practicable after it is prepared, but in any event —*

(i) *if the review is carried out after the review period, not more than 12 months after that period; or*

(ii) *if the review is carried out earlier than that, not more than 6 months after the review is completed.*

2.33 The Committee notes that Clause 47 of the Bill enables a review by the Minister to be carried out within seven years and a report tabled before each House of Parliament. The Explanatory Memorandum notes that “*there is no equivalent to this Part in the ENCL*”.⁴⁰ The clause provides an appropriate mechanism for parliamentary oversight of the Act.

⁴⁰ Explanatory Memorandum, Electronic Conveyancing Bill 2013, p29.

Clause 77

2.34 Clause 77 is one of a number of clauses that amends the TLA.

2.35 Clause 77 amends section 180 of the TLA as follows:

2. Section 180 replaced

Delete section 180 and insert:

180. Commissioner may summons people to provide information

- (1) *For the purposes of enabling the Commissioner or the Registrar to perform any function under this Act or any other Act, the Commissioner may, by summons, require any of the persons listed in subsection (2) to appear at a time and place specified in the summons to do all or any of the following —*
- (a) *to give an explanation concerning —*
 - (i) *any land; or*
 - (ii) *any document affecting the title to any land; or*
 - (iii) *any conveyancing transaction;*
 - (b) *to produce any grant, certificate of title, will, mortgage or other instrument or document in the person's possession or within the person's control —*
 - (i) *affecting any land or the title to any land; or*
 - (ii) *relating to any conveyancing transaction.*
- (2) *The persons referred to in subsection (1) are the following —*
- (a) *the proprietor, mortgagee or other person interested in any land under, or proposed to be brought under, the operation of this Act in respect of which —*

-
- (i) *any transfer, lease, mortgage, charge, carbon right, carbon covenant, tree plantation agreement or other dealing is proposed to be transacted or registered; or*
 - (ii) *any discharge from any mortgage or charge, or any surrender of a carbon right, carbon covenant or plantation interest, is proposed to be transacted or registered; or*
 - (iii) *any transmission is proposed to be registered;*
- (b) *any person whom the Commissioner considers will be able to give an explanation concerning a conveyancing transaction or produce a document relating to a conveyancing transaction, including (without limitation) —*
- (i) *a subscriber;*
 - (ii) *any of a subscriber's employees, agents, contractors or officers;*
 - (iii) *an Australian lawyer;*
 - (iv) *a settlement agent as defined in the Settlement Agents Act 1981 section 3(1);*
 - (v) *an ELNO;*
 - (vi) *any of an ELNO's employees, agents, contractors or officers.*
- (3) *A summons under subsection (1) must be —*
- (a) *in an approved form; and*
 - (b) *signed by the Commissioner; and*
 - (c) *served on the person summoned in accordance with section 240 as if it were a notice to which that section applies.*

- (4) *For the purposes of this section—*
- (a) *the Commissioner may require a person summoned under subsection (1) to take an oath or to make an affirmation; and*
 - (b) *the Commissioner may administer an oath or affirmation to the person.*
- (5) *If a person is summoned under subsection (1), the Commissioner may deal with the person as in the case of contempt of the Supreme Court if the person—*
- (a) *fails, refuses or neglects —*
 - (i) *to attend the Commissioner for the purpose of being examined; or*
 - (ii) *to produce any document as required by the summons; or*
 - (iii) *to allow any document to which subparagraph(ii) applies to be inspected;*
 - or*
 - (b) *refuses or neglects to give any explanation required by the Commissioner.*
- (6) *If the Commissioner considers that any information or document that is withheld from the Commissioner in the circumstances set out in subsection (5) is material, the Registrar is not bound to proceed with the transaction to which that information or document relates.*

2.36 The Committee notes that Clause 77 is not part of the national uniform legislation scheme addressed in the IGA.

2.37 The Minister advised:

The amendment to Section 180 (subsection (2)(b)) extends the range of persons who may be summoned by the Commissioner. Except for this change, the substance of the existing section 180 is unchanged.

*The form and content of Section 180 has been redrafted and rearranged in line with modern drafting principles.*⁴¹

2.38 The Committee holds the view that amendments to s180 are additional to the uniform scheme and reflect an increase in the Commissioner's powers over a wider class of people.

CONCLUSION

2.39 The Committee considered a number of threshold issues:

1. Whether the State of Western Australia entered into and signed an Intergovernmental Agreement,
2. Compared the clauses of the IGA with those in the Bill,
3. Clauses of the Bill that may impact parliamentary sovereignty.

2.40 The Committee found that the IGA for an Electronic Conveyancing National Law was signed in 2011. The IGA came into operation on 21 November 2011.

2.41 Key clauses of the IGA are reflected in the Bill. The IGA contains clauses that provide a review mechanism for the IGA.

2.42 The Bill itself contains a review mechanism and reporting requirements of the Minister to the Western Australia Parliament in relation to the operation of the Bill. Any future amendments to the Bill can be brought before this Parliament.

2.43 The Committee recommends that the Bill be passed.

Recommendation 1: The Committee recommends that the Electronic Conveyancing Bill 2013 be passed.



**Hon Kate Doust MLC
Chair**

18 February 2014

⁴¹ Submission No 2 from the Minister, Hon Terry Redman MLA, 10 January 2014, p2.