

5 April 2019

Ms Anne Larkins and Mr Cameron Geddes
Dench McLean Carson Pty Ltd
Level 5, 99 Queen Street
Melbourne VIC 3000

By email to: alarkins@dmcca.com.au and cgeddes@dmcca.com.au

Dear Ms Larkins and Mr Geddes

**Review of the InterGovernmental Agreement for an Electronic Conveyancing National Law:
Submission to Issues paper**

We refer to the Issues Paper dated 13 February 2019 that you have prepared for stakeholder consultation on this important review of the Intergovernmental Agreement for an Electronic Conveyancing National Law (ECNL). Our interest in this review stems from our role as the independent regulator of the legal profession in Victoria.

We support ARNECC in its efforts to bring about a successful transition to electronic conveyancing (eConveyancing) as it will bring efficiency gains for the legal profession and consumers of conveyancing services. We compliment you on your Issues Paper and are confident concerns and vulnerabilities within the eConveyancing environment have largely been identified and well considered in your paper. We support the preliminary findings, particularly those focused on ensuring that governments do not endorse and mandate a system where consumers are left without speedy and clear recourse when funds go missing or titles are compromised.

Who we are

The Victorian Legal Services Board (Board) and Victorian Legal Services Commissioner (Commissioner) are the two key independent statutory authorities responsible for the regulation of Victoria's legal profession, with responsibility for overseeing approximately 23,000 solicitors and barristers in the state¹. We are known collectively to the profession and consumers of legal services as the VLSB+C, and effectively operate as the one organisation, sharing both office space and staff engaged by the Commissioner, in accordance with the Commissioner's powers as a public service body head within the meaning of the *Public Administration Act 2004*.

The Board and Commissioner are established under the *Legal Profession Uniform Law Application Act 2014* ("Application Act") which applies the *Legal Profession Uniform Law* ("Uniform Law") set out in Schedule 1 to that Act as a law of Victoria. New South Wales has also applied the Uniform Law as a law of its own jurisdiction, and Western Australia is set to join the Uniform Law scheme from 1 July 2020. Like eConveyancing, the regulation of the legal profession is progressively moving towards a national system and also commenced by an intergovernmental agreement.

In contributing to this important and timely review, we have limited our comments to issues we see with the intersection of the Uniform Law and the ECNL and/or issues that impact detrimentally on lawyers and consumers of

¹ For ease we will refer to both in this submission as 'lawyers'

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legal services. We have also focussed our comments on the purpose of the review as set out succinctly at paragraph 1.3 of your paper.

The VLSB+C's statutory objectives which are relevant to this review include:

- ensuring the effective regulation of the legal profession and the maintenance and enforcement of professional and competency standards, including through discipline, dispute resolution, licensing and intervention
- providing a mechanism to address the concerns of clients of legal practices and provide for consumer protection, including empowering consumers to make informed choices about services and costs of those services and to address complaints
- ensuring the adequate management of lawyers' trust accounts
- managing efficiently and effectively a lawyers' *fidelity fund* to protect client money held in lawyers' trust accounts, and
- managing the *Public Purpose Fund*, which is a fund comprised of the interest earned on lawyers' trust accounts that is used to fund regulation, legal education, legal aid and law reform and a grants program.

Our submission centres on the topics of 'Regulatory Controls and Compliance', 'Regulatory Powers' 'Cyber Security' and 'Financial Settlement' identified and analysed in section 5 of your paper. Our submission also focuses on ELNO 'source accounts', a matter mentioned in your paper, but not specifically analysed. This issue was identified by lawyers in interviews² and is of high importance to us.

Source accounts and lawyers trust accounting obligations

The strict adherence by lawyers across Australia to the management of monies held on trust by them is underpinned by ethical and fiduciary obligations and principles with a long history in the legal profession. The seriousness with which a lawyer's trust accounting obligations is regarded is reflected by the fact that for many years and across jurisdictions, there have been requirements on lawyers to make contributions to a fidelity fund or guarantee fund where a trust account is operated. The Uniform Law requires the Board to operate a fidelity fund in Victoria for the benefit of clients in the event the lawyer or law practice commits a default involving fraud or dishonesty in relation to the client's trust money or trust property. This is an additional requirement to the professional indemnity insurance cover as provided to law practices by the Legal Practitioners Liability Committee (LPLC) in Victoria for lawyers in relation to the operation of trust accounts. The fidelity fund provides an essential consumer protection.

PEXA as the current ELNO, operate a 'source account' which is offered to subscribers to facilitate financial settlement. PEXA has advised us that this account was set up to facilitate uptake for subscribers who did not have established trust accounts and for subscribers where their bank was not yet connected to the Electronic Lodgement Network (ELN). Unlike lawyers, PEXA does not have any fiduciary obligations to clients of law practices. It should be noted that our comments in relation to ELNO operation of 'source accounts' are not specifically directed at PEXA but would also apply to any future ELNOs operating a similar account. From our perspective we want to ensure that when a consumer engages a lawyer (or a conveyancer) to undertake conveyancing work the same consumer protections apply regardless of whether a trust account or a source account is used for financial settlement on an ELN.

We are concerned that if there is fraud or theft facilitated or committed by an employee of an ELNO from a source account outside the control of the lawyer, consumers are not afforded a right to claim compensation. The model participant rules require lawyers to hold fidelity cover but we do not think that cover will actually extend to this particular situation.

This is because PEXA does not meet the definition of being an associate of a law practice under the Uniform Law and their contractual documentation supports this view. There are also fewer regulatory controls over the source

² See page 16 under heading 'lessons learned'

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account in contrast to the controls imposed by the Uniform Law on a solicitor's trust account. It should be noted we are also concerned about where the liability for losses arising from the negligence of an ELNO employee lies for similar reasons.

Although we do not want to force small law practices to open a trust account for a small number of transactions (i.e. we support their use of the source account), we are strongly of the view that the outcome for the consumer should be the same regardless of the account used and who is responsible for it.

We are also concerned about the potential liability for consumer losses arising from cybersecurity breaches resting with small law practices that may be vulnerable to hacking, particularly as governments progressively mandate e-conveyancing. If these practices wish to continue to provide conveyancing services to consumers, they will need to become subscribers to an ELNO. However, levels of cybersecurity preparedness are likely to vary greatly amongst this cohort (this is discussed in more detail below).

In addition, the interest on the source account operated by PEXA is applied for the benefit of private shareholders, whereas interest accrued on lawyers' trust accounts is applied for the benefit of the regulated group, the legal profession, consumers of legal services and the Victorian public more broadly through the Board's operation of a statutory 'Public Purpose Fund', into which all such interest is paid. There are no Model Operating Rules or contractual obligations determining the fate of interest on source account operated by PEXA and we highlight this as an important consideration for this review.

Consideration could be given to enabling ARNECC³, through reform to the ECNL or rule-making, to operate a fund seeded from the interest on settlement monies held in ELNO source accounts. This fund could provide for statutory consumer protection and benefits, achieving parity in consumer protection regardless of whether an ELNO source account or solicitor's (or conveyancer's) trust account is used in a transaction. In this regard we note your table on page 49 illustrating stakeholder funding expectations but agree that funding from general revenue would be unlikely to be acceptable to government, given not all taxpayers interact with eConveyancing. We are a regulator with the skills and expertise in managing such a fund (noting your comments in paragraph 5.19) and we support the idea of an advisory panel or regulator committee for ARNECC.

Alternative enforcement options

We agree that ARNECC should have a broader range of enforcement options in addition to suspension or termination, which should be reserved for serious breaches. In the context of a mandated monopoly in Victoria, this current limitation on ARNECC is unacceptable and places them in an impossible situation of conflict with its own statutory objective to facilitate the efficient uptake of eConveyancing. Terminating PEXA in Victoria would disable the entire eConveyancing system and have obvious broader implications for the economy. In the context of participants, suspension for a small breach by a legal practice has the potential to significantly damage that business. For financial institutions, aside from the business implications for them directly, lawyers with trust accounts at that financial institution will also likely be affected through no fault of their own.

Other options like fines, penalties and warnings are used extensively in regulated industries and we have many such options available under the Uniform Law. Extending ARNECC's enforcement powers to include these options would ensure that it was able to match the particular breach with the appropriate level of regulatory action. Fines could also be used to support ARNECC's regulatory activities and could form part of the fund we have suggested above. In this context we also submit consideration be given to ARNECC's stated objectives which in our view are too narrowly focused and do not include specifically, consumer protection.

Cyber Security

³ The review discusses other bodies may supplement or replace ARNECC so we intend to include that also when referencing ARNECC in this context

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Unlike the LPLC we have not received significant numbers of complaints by clients of lawyers concerning business email compromises, although it would be open to them to do so. Certainly failures of this nature could amount to conduct that is capable of attracting our regulatory powers and we are currently working towards production of regulatory guidance on this topic. It is our intention to approach ARNECC to discuss complaint investigation and referral between us. To date we have not received any referrals from ARNECC concerning the conduct of a lawyer. Again this may be something that is outside the core skills of the current ARNECC and where other regulators may be able to assist.

We agree the limited resources available to small law practices to access training, and potential deficiencies in the training available, as identified in your paper may be contributing to the risks of cyber security breaches. We agree that clients were likely compensated directly for these email breaches at the expense of the lawyer subscriber and the lawyer has not encouraged their client to report the matter to us. We share your concerns that these practices lack the time and resources to focus their energy sufficiently on these issues. We *enclose* for your information a media release to the Victorian legal profession just prior to the mandate that occurred in October 2018.

We note and agree with your analysis in relation to the 'very limited Vendor Guarantee' at paragraph 5.61 and the complicated liability environment at paragraph 5.59. Further, we add that the Model Operating Rules do not currently require ELNOs to offer this guarantee and PEXA would not be required to maintain it. This may be of particular consideration if future ELNOs decide not to offer a similar guarantee. Consideration should be given to embedding in the ECNL clear responsibilities on ELNOs to ensure buyers and sellers are not left without funds or title or otherwise out of pocket while fault is investigated. This is particularly important for governments to consider where consumers have no choice but to use an ELN, as is the case in Victoria.

Complaints about the conduct of financial institutions

We are concerned about comments by lawyers and conveyancers about banks and other financial institutions 'rolling over' and otherwise causing delays to settlement, that are raised throughout the Issues Paper. The situation where lawyers feel that they are 'chained to their desks' is not acceptable and would add a significant burden to these law practices. This is compounded particularly for legal business as the obligation to apply the digital signature to transactions is the individual responsibility of the lawyer as it is considered legal work and non-lawyer employees are excluded. This differs in Victoria for conveyancing businesses, in which an employee of the licensee may effect the digital signature. This is because the Conveyancers Act licenses conveyancers *to carry on the business of conveyancing* while a lawyer's practising certificate is a personal licence to engage in legal practice that cannot extend to non-legal employees of a law practice. We believe there would be merit in ARNECC considering what skills and expertise it expects of those executing digital signatures irrespective of whether the subscriber is a legal practitioner or licensed conveyancer.

Another related issue arises where a financial institution or potentially an ELNO makes an error in the amount that is to be deducted from a law practice trust account. In one situation a lawyer was placed in breach of his trust accounting obligations and was required (and did) notify us of this breach, despite it not being the lawyer's fault. We agree that a potential solution may be more performance markers and training requirements for financial institutions but there could also be situations where fines and infringements may be appropriate. We are also concerned about the extent of the 'keying in' errors identified, noting the burden for ensuring correct account details falls to the subscriber. Although there is a role for education, this cannot completely eliminate human error and consideration should be given to additional checks and balances that place responsibilities on other parties to the transactions, particularly financial institutions.

In closing, we support the development of a model that balances competition and efficiency with robust consumer protection and minimises burdens to law practices, particularly smaller practices with limited resources. We hope this submission is of assistance to you and we are grateful for the extension granted to provide it.

We appreciate we were not involved in the interview process for the review but would be pleased to be further involved should you consider this appropriate. Should you require further information or clarification the responsible

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officer is Natalie Neal, Senior Policy Officer, who can be contacted on (03) 9679 8016 or by email at nneal@lsbc.vic.gov.au.

Yours sincerely

Fiona McLeay
Board CEO and Commissioner

Attachment – Media Release – RPA NEWS 47 September 2018 – e-conveyancing – obligations and trust accounts