

2020

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

ELECTRONIC CONVEYANCING NATIONAL LAW (ACT) BILL 2020

REVISED EXPLANATORY STATEMENT

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ELECTRONIC CONVEYANCING NATIONAL LAW (ACT) BILL 2020

Outline

This revised explanatory statement relates to the Electronic Conveyancing National Law (ACT) Bill 2020 as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

The statement is to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill.

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Purpose of the Bill

The Electronic Conveyancing National Law (ACT) Bill 2020 (the Bill) is integral to establishing the legislative framework to apply the national electronic conveyancing system in the Australian Capital Territory.

The Bill, together with the Land Titles (Electronic Conveyancing) Legislation Amendment Bill 2020 are regulatory reform initiatives to allow Canberrans to receive the benefit of best practice land titling processes and to increase protections against fraudulent dealings.

As background, in July 2008 the Council of Australian Governments agreed pursuant to the *Seamless National Economy National Partnership Agreement* that there should be a new electronic conveyancing system for the settling of real property transactions in all Australian States and Territories.

The national electronic conveyancing system enables legal practitioners and financial institutions to:

- use electronic online processes to prepare electronic instruments that create, transfer and remove estates and interests in land,
- settle financial transactions such as payment of disbursements including lodging fees and duties, and
- electronically lodge instruments with relevant State or Territory Land Registries.

The *Intergovernmental Agreement for an Electronic Conveyancing National Law* came into operation on 21 November 2011. The Electronic Conveyancing National Law made possible the implementation of the national electronic conveyancing system in Australia.

The Electronic Conveyancing National Law:

- authorises 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;
- empowers the Registrar to operate or to authorise one or more persons to operate an Electronic Lodgment Network for their jurisdiction;
- empowers the Registrar to set conditions for access to and use of an Electronic Lodgment Network;
- empowers the Registrar, or his or her delegate, to conduct an examination of compliance with any conditions for access to and use of an Electronic Lodgment Network;
- provides that by entering into an approved form of Client Authorisation, a transacting party may authorise a Subscriber to:
 - digitally sign electronic registry instruments and other electronic documents on that transacting party's behalf;
 - lodge electronic registry instruments and other electronic documents with the relevant Land Registry;
 - authorise any financial settlement involved in the transaction; and

- do anything else necessary to complete the transaction electronically.

The Electronic Conveyancing National Law is set out in the Appendix to the *Electronic Conveyancing (Adoption of National Law) Act 2012* (New South Wales) and is in force in New South Wales, Queensland, South Australia, Victoria and Western Australia.

Human Rights Considerations

Privacy of Personal Information

The Electronic Conveyancing National Law allows for the lawful collection of personal information through the establishment of an Electronic Lodgment Network – an electronic system that enables the lodging of registry instruments and other documents in electronic form for the purpose of the land titles legislation.

Personal information, such as name and address, is included as part of these instruments, just as it is under the current paper-based system. Collection of this data under E-Conveyancing is necessary to ensure accurate and legal transfer of title or registration of other dealings relating to land.

The regulatory framework for E-Conveyancing governs the way in which personal information is used and protected for online transfers and other land dealings. Electronic Lodgment Network Operators and subscribers must maintain confidentiality of all information provided which the provider of the information would reasonably expect confidentiality to be maintained. They must comply with all applicable privacy laws and laws relating to document and information collection, storage and retention.

A subscriber must take reasonable steps to ensure that information provided to the Subscriber by any other Subscriber, any Client, the Registrar or the Electronic Lodgment Network Operator is protected from unauthorised use, reproduction or disclosure.

The client of the subscriber authorises the collection and disclosure of information by the subscriber to specified parties to be used for the purpose of maintaining publicly searchable registers and indexes.

Given that:

- personal information of the type that will be submitted through the Electronic Lodgment Network is already publicly available;
- the Electronic Conveyancing National Law framework allows for the lawful collection and use of personal information, and imposes obligations on subscribers and Electronic Lodgment Network Operators to protect that data; and
- personal information is essential to effect a legal transfer of land or register other dealings;

the proposed measures will limit the right to privacy in a reasonably justified manner.

Verification of Identity

Verification of identity is an important part of the E-Conveyancing regulatory framework. It requires subscribers and Electronic Lodgment Network Operators to verify the identity of the transaction party.

Verification of identity has the potential to engage the following rights under the *Human Rights Act 2004*:

- right to privacy (s12). The E-Conveyancing regulatory framework sets out standards for undertaking verification of identity such as a face to face interview and checking of identity documents, and
- right to equality before the law and protection from discrimination (s8). Some sectors of the community may find it challenging to meet the verification of identity document requirements.

The requirement for verification of identity serves a legitimate objective, that is, the protection of individual land ownership from fraudulent behaviour. The measure supports the right to non-interference with home (s12) by protecting the sanctity and validity of the land titles register.

Where people are unable to establish their identity through official documents, it is possible for a subscriber to verify the identity of a person in some other way that constitutes the taking of reasonable steps. For example, it may be possible to obtain other documents which support identity or to make inquiries with the client or a third party such as a doctor, nurse or government officer. Moreover, the introduction of verification of identity will help protect all sectors of the community against fraud, including groups who may be particularly vulnerable to fraudulent activity in an electronic environment, such as the elderly, refugees or the intellectually impaired.

The measure of verification of identity is proportionate given the 2016 case of land fraud in the ACT¹ and other instances elsewhere in Australia. Two cases of fraud in Western Australia in 2011 and 2013 prompted that jurisdiction to prioritise the introduction of verification of identity ahead of E-Conveyancing.

Consequential amendments to the *Land Titles Act 1925* as part of the E-Conveyancing regulatory framework will extend verification of identity requirements to in-person settlements to reduce the risk of fraud across the board. Thus, to the extent that verification of identity may engage with the rights of privacy, equality and non-discrimination, these limitations are justified.

Compliance auditing

The Electronic Conveyancing National Law removes the immunity from self-incrimination in two limited circumstances where information is required by the Registrar-General when

¹ [Astell v Australian Capital Territory \[2016\] ACTSC 238](#)

conducting a compliance examination. Limitation of the right against self-incrimination is likely to be justified and proportionate given the immutable need for confidence in the land titles register in the ACT. The provision of immunities in regard to compliance examinations would undermine the Registrar-General's capacity to uphold the integrity of the Electronic Lodgment Network.

The safeguards that will be in place to circumscribe the limitation of the right not to self-incriminate include those found in subsection 34(6), Division 5, Part 3 in the Appendix to the *Electronic Conveyancing (Adoption of National Law) Act 2012* (NSW). Essentially, subsection 34(6) prevents the use in criminal proceedings of self-incriminating information provided by an individual, or information derived from the information provided with a few exceptions in subsection 34(7). The exceptions are reasonably necessary for the Registrar-General to perform compliance examinations.

The Act introduces new subsection 35(4) to ensure that the Registrar-General can disclose any information held by the Registrar-General that is reasonably relevant to facilitate the investigation of the appropriate authority.

Operation of the Act as an applied legislative scheme

The Act will operate as an applied legislative scheme, adopting the Electronic Conveyancing National Law as in force from time to time. Future amendments to the Electronic Conveyancing National Law will therefore be applied automatically, subject to the application and notification provisions set out in Clause 6 in Part 2.

- Clause 6 in Part 2 provides the Minister with capacity to ensure a sufficient transition period is provided before an amendment comes into force.

The Intergovernmental Agreement details the process that is to be undertaken before changes are made to Electronic Conveyancing National Law and broadly, requires at least 75% of participating jurisdictions to agree to substantive changes, if there is not unanimity. This process is further described in relation to the operation of clause 6.

As a signatory to the Intergovernmental Agreement, the ACT will have the capacity to ensure amendments are developed in a manner consistent with the Human Rights Act.

The application of the Electronic Conveyancing National Law in these circumstances allows the ACT to obtain the benefit of a national operating approach to E-Conveyancing that is consistent with human rights.

ELECTRONIC CONVEYANCING NATIONAL LAW (ACT) BILL 2020

Detail

Part 1 – Preliminary

Clause 1 — Name of Act

This is a technical clause that names the short title of the Act. The name of the Act will be the *Electronic Conveyancing National Law (ACT) Act 2020*.

Clause 2 — Commencement

This clause provides that the Act will commence on 1 June 2020. The naming and commencement provisions will automatically commence on the notification day in accordance with section 75(1) of the *Legislation Act 2001*.

Clause 3 — Dictionary

This clause provides that the dictionary at the end of this Act is part of the Act, and that a definition in the dictionary applies to the local applications provisions of the Act.

The Notes to this clause point to the dictionary defining certain terms used in the Act, and that the definitions in the dictionary apply to the entire Act unless otherwise provided or the contrary intention appears.

Clause 4 – Terms used in Electronic Conveyancing National Law (ACT)

Clause 8 to this Bill provides, in brief, that the Appendix to the *Electronic Conveyancing (Adoption of National Law) Act 2012 (New South Wales)* applies as a territory law and may be referred to as the *Electronic Conveyancing National Law (ACT)*.

This clause provides that terms used in the local application provisions of this Act and also in the *Electronic Conveyancing National Law (ACT)* have the same meaning as they do in those provisions as they do in the *Electronic Conveyancing National Law (ACT)*.

The Note points to section 155 of the *Legislation Act 2001* to explain that a definition in an Act applies except so far as the contrary intention appears.

The clause goes on to define ‘local application provisions of this Act’ by meaning the provisions of this Act other than the *Electronic Conveyancing National Law (ACT)*

Clause 5 – Notes

This clause explains that a note included in this Act is explanator and is not part of the Act.

Part 2 – Application of Electronic Conveyancing National Law

This part applies the Electronic Conveyancing National Law as a territory law and explains the meaning of certain terms in the *Electronic Conveyancing National Law (ACT)*.

The Electronic Conveyancing National Law is set out in the Appendix to the *Electronic Conveyancing (Adoption of National Law) Act 2012* (New South Wales).

The Electronic Conveyancing National Law:

- authorises 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;
- empowers the Registrar to operate or to authorise one or more persons to operate an Electronic Lodgment Network (ELN) for their jurisdiction;
- empowers the Registrar to set conditions for access to and use of an ELN;
- empowers the Registrar, or his or her delegate, to conduct an examination of compliance with any conditions for access to and use of an ELN;
- provides that by entering into an approved form of Client Authorisation, a transacting party may authorise a Subscriber to:
 - digitally sign electronic registry instruments and other electronic documents on that transacting party's behalf;
 - lodge electronic registry instruments and other electronic documents with the relevant Land Registry;
 - authorise any financial settlement involved in the transaction; and
 - do anything else necessary to complete the transaction electronically

Clause 6 – Application of Electronic Conveyancing National Law

This clause applies the Electronic Conveyancing National Law as a territory law. It explains that the implemented territory law may be referred to as the *Electronic Conveyancing National Law (ACT)* and that it applies as if it were part of this Act.

Under new section 6(2) of the Act, a law that amends the Electronic Conveyancing National Law that is passed by the New South Wales Parliament after this Act’s notification day, will commence on:

- the 90th day after the day the law commences in New South Wales (the default commencement day), or
- on a different day if declared by the Minister before the default commencement day.

In the event of amendment to the Electronic Conveyancing National Law, on notification by the Directorate, the ACT legislation register will note those amendments will come into effect on a specified date (being the 90th day after the law commenced in New South Wales) unless the Minister varies the commencement date.

Should the Minister make a declaration varying the commencement date, section 6(3) of the Act confirms that it is a notifiable instrument, with the Note drawing the reader's attention to the notification requirements under the *Legislation Act 2001*.

Should a substantive change be proposed to the Electronic Conveyancing National Law, provisions in Part 10 of the *Intergovernmental Agreement for an Electronic Conveyancing National Law* come into operation. These provisions, amongst other things, require that all parties have six weeks in which to consider the proposed change, which if not agreed to unanimously may then go to a vote of the parties within a further twelve weeks.

If a substantive change is approved by all parties, or if taken to a vote at least 75% of the parties agree to the amendment, it can proceed. Under the Intergovernmental Agreement the amending Bill must be in a form agreed by the parties as giving effect to the proposed changes before introduction into the NSW Parliament.

The ACT, through the Minister, will actively consider, negotiate and vote on such legislative proposals as required.

These arrangements ensure that the Territory has the opportunity, and the time, to:

- consider any proposed substantive amendments to the Electronic Conveyancing National Law
- vote on the proposed amendments (should there not be unanimity between the parties to the Intergovernmental Agreement in favour of the proposed amendments), and
- effectively choose the day on which any amendments come into effect within the Territory.

No amendments have been made to the Electronic Conveyancing National Law since it commenced in 2013.

If the circumstance were to arise that the ACT is outvoted at a jurisdictional level on a matter of crucial importance to the Territory, the Minister can exercise the application provision to ensure there is sufficient time for the Legislative Assembly to amend the Electronic Conveyancing National Law (ACT), so that the Territory did not adopt the disagreed amendment.

Changes have been made to nationally agreed model operating requirements and participation rules developed and published by the Australian Registrars' National Electronic Conveyancing Council. The ACT registrar-general is required to have regard to the desirability of maintaining consistency with any model provisions (Electronic Conveyancing National Law section 24) when amending the ACT's operating requirements and participation rules, which are disallowable instruments (please see Schedule 1, Clause 1.1, section 25).

Clause 7 – Exclusion of Legislation Act

This clause provides at subclause (1) that the *Legislation Act 2001* does not apply to the *Electronic Conveyancing National Law (ACT)* other than section 25. Subclause (2) explains that the Legislation Act does however apply to this Act.

Clause 8 – Meaning of certain terms in Electronic Conveyancing National Law (ACT)

This clause defines certain terms used in the *Electronic Conveyancing National Law (ACT)*.

The term *land titles legislation* is defined by reference to a number of Acts and any other territory law prescribed by regulation.

The term *registrar* means the registrar-general. The term registrar-general is defined in the *Legislation Act 2001* to mean the Registrar-General under the *Registrar-General Act 1993*.

The term *registry instrument* means any instrument that is required or permitted to be lodged with the registrar-general under the *Land Titles Act 1925*.

The term *responsible tribunal* is defined to mean the Supreme Court. The term Supreme Court is defined in the *Legislation Act 2001* to mean the Supreme Court of the Australian Capital Territory.

The term *this jurisdiction* is defined to mean the Australian Capital Territory.

The term *titles register* means the register created under section 43 of the *Land Titles Act 1925* to record interests in land.

Clause 9 – Regulation-making power

This clause provides that the Executive may make regulations for this Act. The Note goes on to explain that any such regulation must be notified, and presented to the Legislative Assembly, under the provisions of the *Legislation Act 2001*.

Schedule 1 – Modifications – Electronic Conveyancing National Law

Clause 1.1 – Section 25

This clause will displace existing section 25 of the Electronic Conveyancing National Law for the purposes of the Australian Capital Territory. Subclause (1) clarifies that an operating requirement and a participation rule are disallowable instruments. Subject to other circumstances allowing for an earlier commencement set out in section 25, an operating requirement or participation rule must be notified 20 business days before the changes take effect.

The intention of this provision is to provide accountability to the Legislative Assembly and reasonable notice of any changes to users of the electronic conveyancing system.

The exception is set out in subclause (2) and is where the Registrar is satisfied that an operating rule or a participation rule must be changed urgently because an emergency situation exists. In that case the requirement or rule may be commenced earlier than the period of 20 business days specified in subclause (1)(b).

Subclause (3) provides guidance on when an emergency situation exists. Under that provision an emergency situation exists if the Registrar considers that, because of the occurrence of an event or the existence of particular circumstances, the operation, security, integrity or stability of an electronic lodgment network is being, or is likely to be, jeopardised.

Subclause (4) provides for the validity of an operating requirement or participation rule which is notified less than 20 days before its commencement, although confirms such a measure will commence on the 20th business day after its notification.

Clause 1.2 – new section 35(4)

This clause provides that if the Registrar refers a matter to an appropriate authority, the Registrar may give the appropriate authority any information held by the Registrar that is reasonably relevant to the matter.

An equivalent power is provided under the *Land Titles Act 1925* as amended by the *Land Titles (Electronic Conveyancing) Legislation Amendment Act 2020*, for the registrar-general to refer a matter to an appropriate authority instead of, or as well as, taking action under section 48I of the *Land Titles Act 1925*.

Dictionary

This clause provides a Dictionary for the purposes of this Act.

The Notes explain that the Legislation Act 2001 contains definitions and other provisions relevant to this Act and goes on to provide some examples.

The Dictionary defines *Electronic Conveyancing National Law (ACT)* as the provisions applying because of section 5 of this Act. Those provisions may be found in the Appendix to the *Electronic Conveyancing (Adoption of National Law) Act 2012* (New South Wales).

The Dictionary also defines *local application provisions of this Act* to mean the provisions of this Act other than the *Electronic Conveyancing National Law (ACT)*.