



# Electronic Conveyancing National Law (Queensland) Bill 2012

**Report No. 19**  
**Agriculture, Resources and Environment  
Committee**  
**March 2013**



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## **Agriculture, Resources and Environment Committee**

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<b>Deputy Chair</b>	Ms Jackie Trad MP, Member for South Brisbane
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### **Acknowledgements**

The committee thanks departmental officers who briefed the committee and those who provided submissions and contributed to the inquiry.

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## Abbreviations and definitions

ABA	Australian Bankers' Association
ARNECC	Australian Registrars' National Electronic Conveyancing Council
COAG	Council of Australian Governments
Cwlth	Commonwealth
DNRM	Department of Natural Resources and Mines (Qld)
ECNL	Electronic Conveyancing National Law
ELN	Electronic Lodgement Network
FLP	Fundamental legislative principle
LTA	<i>Land Title Act 1994</i>
MP	Member of Parliament
NECDL	National e-Conveyancing Development Ltd
PEXA	Property Exchange Australia
QCAT	Queensland Conciliation and Arbitration Tribunal
Qld	Queensland
QLS	Queensland Law Society
SO	Standing Order

## Chair's foreword

This report presents the findings from the committee's inquiry into the Electronic Conveyancing National Law (Queensland) Bill 2012 introduced on 27 November 2012 by Hon Andrew Cripps MP, Minister for Natural Resources and Mines.

On behalf of the committee I thank those individuals and organisations that made submissions to this inquiry.

I commend the report to the House.

A handwritten signature in blue ink, appearing to read 'Ian Rickuss'.

Ian Rickuss MP  
**Chair**

March 2013





## Recommendations

### Recommendation 1

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The committee recommends that the Electronic Conveyancing National Law (Queensland) Bill 2012 be passed.



## 1. Introduction

### Role of the committee

The Agriculture, Resources and Environment Committee (the committee) is a portfolio committee established by a resolution of the Legislative Assembly on 18 May 2012. The committee's primary areas of responsibility are agriculture, fisheries and forestry, environment and heritage protection, and natural resources and mines.<sup>1</sup>

In its work on Bills referred to it by the Legislative Assembly, the committee is responsible for considering the policy to be given effect and the application of fundamental legislative principles.<sup>2</sup>

In relation to the policy aspects of Bills, the committee considers the policy intent, approaches taken by departments to consulting with stakeholders and the effectiveness of the consultation. The committee may also examine how departments propose to implement provisions in Bills that are enacted.

Fundamental legislative principles are defined in Section 4 of the [Legislative Standards Act 1992](#) as the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to the rights and liberties of individuals and the institution of Parliament.

### The referral

On 27 November 2012 Hon Andrew Cripps MP, Minister for Natural Resources and Mines, introduced the Electronic Conveyancing National Law (Queensland) Bill 2012. The Legislative Assembly referred the Bill to the Agriculture, Resources and Environment Committee for examination, with the committee's report due by 12 March 2013 in accordance with SO 136(1).

### The committee's processes

In its examination of the Bill, the committee:

- identified and consulted with likely stakeholders on the Bill
- sought advice from the Department of natural resources and Mines
- invited public submissions on the Bill
- convened a public briefing and hearing in the Parliamentary Annexe on 6 March 13 to examine the provisions in the Bill and clarify points raised by submitters, and
- sought expert advice on possible fundamental legislative principle issues with the Bill.

A list of submitters is at Appendix A.

Briefing officers and hearing witnesses are listed at Appendix B.

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<sup>1</sup> Schedule 6 of the [Standing Rules and Orders of the Legislative Assembly of Queensland](#) as at 1 January 2013.

<sup>2</sup> Section 93 of the [Parliament of Queensland Act 2001](#).



## 2. Examination of the Electronic Conveyancing National Law (Queensland) Bill 2012

### Policy objectives

The purpose of the Bill is to provide a legislative framework in Queensland for the implementation and operation of a national electronic conveyancing system.

The establishment of National Electronic Conveyancing Law is an initiative of the Council of Australian Governments (COAG) as part of the 2008 National Partnership Agreement to deliver a seamless national economy. It was agreed by COAG that National Electronic Conveyancing would provide an efficient and effective national platform to:

- settle real property transactions electronically
- prepare and lodge registry instruments electronically with Land Registries, and
- meet associated duty and tax obligations electronically.<sup>3</sup>

The national e-conveyancing reform would remove the need to have paper documents signed and to attend a physical settlement which can be problematic. According to the Department of Natural Resources and Mines (DNRM), some 30 per cent of paper-based settlements fail to proceed as planned due to errors in the cheques or paperwork.<sup>4</sup>

All states and territories are participating in e-conveyancing except the ACT where most property is held under leasehold tenure which is out of scope for e-conveyancing. Queensland will be the third jurisdiction to introduce e-conveyancing after NSW and Victoria.<sup>5</sup> The other jurisdictions are expected to follow as they are ready. If the Bill is passed, e-conveyancing could commence in Queensland on a limited basis in late 2013.

The initial e-conveyancing platform to be called 'Property Exchange Australia (PEXA)' is being developed by National e-Conveyancing Development Ltd (NECDL),<sup>6</sup> a company limited by shares and majority-owned by the governments of Queensland, Victoria, New South Wales and Western Australia. Australia's largest financial institutions also hold a minority shareholding.<sup>7</sup>

The Australian Registrars' National Electronic Conveyancing Council (ARNECC) which comprises state and territory registrars of titles is managing the implementation and ongoing management of the regulatory framework. According to ARNECC, participation in e-conveyancing will be optional, and there is no present intention to make participation mandatory, or to remove paper-based conveyancing.<sup>8</sup> Individuals wishing to do their own conveyancing would still use the paper-based system.

The economic impact of National Electronic Conveyancing is estimated to deliver a total net benefit of \$582.0 m (in net present value terms) during the period between 2011-12 and 2027-28 according

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<sup>3</sup> Council of Australian Governments, 2008, *Communiqué of 3 July 2008 meeting* <<http://www.coag.gov.au/node/291> accessed 7.3.13>.

<sup>4</sup> Department of Natural Resources and Mines, 2013, Transcript

<sup>5</sup> Department of Natural Resources and Mines, *Correspondence*, 10 January 2013.

<sup>6</sup> Information on the Property Exchange Australia (PEXA) is available at <http://www.necd.com.au/PEXA>.

<sup>7</sup> Department of Natural Resources and Mines, 2013, *National Electronic Conveyancing System*, p.1. <[http://www.derm.qld.gov.au/property/titles/e\\_conveyancing.html](http://www.derm.qld.gov.au/property/titles/e_conveyancing.html) accessed 9.1.13>.

<sup>8</sup> Australian Registrars' National Electronic Conveyancing Council, 2012, *Introduction of the Electronic Conveyancing National Law – Consultation Regulation Impact Statement*, p.2, ARNECC: Adelaide. <[http://www.arnecc.gov.au/\\_data/assets/pdf\\_file/0004/171976/Consultation\\_Regulation\\_Impact\\_Statement\\_July\\_2012.pdf](http://www.arnecc.gov.au/_data/assets/pdf_file/0004/171976/Consultation_Regulation_Impact_Statement_July_2012.pdf) accessed 9.1.13>.

to ARNECC. The private sector share of this net economic benefit is \$532.4m and the public sector share is \$59.60m.<sup>9</sup>

The introduction of the Queensland Bill follows the passage through the NSW Parliament on 14 November 2012 of the Electronic Conveyancing (Adoption of National Law) Bill 2012 that contained the national law.<sup>10</sup>

The Bill before the committee provides for an act to adopt the Electronic Conveyancing National Law (ECNL) in Queensland, and amends the long title of the Act it establishes.<sup>11</sup> Under the ECNL, the Registrar of Titles in Queensland would be authorised to operate, or authorise the operation of, an Electronic Lodgement Network (ELN) and to set requirements and rules for its operation and use in Queensland. The text of the ECNL is included as 'Editors Notes' at the back of the Bill. The ELN is the network operators that facilitate the electronic lodgement of data through to the Register.

The Bill also provides for amendments to the *Land Act 1994* and the *Land Title Act 1994* to ensure the provisions of those acts interact appropriately with the ECNL, and provide a complete legislative framework to ensure that national e-conveyancing can be implemented in Queensland. In the ECNL users of the e-conveyancing system such as solicitors and banks are referred to as 'subscribers'.

### The provisions of the Bill

The Electronic Conveyancing National Law (Queensland) Bill 2012 has 50 clauses, plus the text of the Electronic Conveyancing National Law (ECNL) from the NSW Bill as 'Editors Notes' after clause 50.

The effects of the key clauses of the Bill are as follows:

**Clause 1** of the Bill provides for an act to be called the Electronic Conveyancing National Law (Queensland) Act 2012 to adopt in Queensland the national law relating to electronic conveyancing.

**Clause 4** provides that the Electronic Conveyancing National Law set out in the appendix to the Electronic Conveyancing (Adoption of National Law) Act 2012 of New South Wales, as in force (and amended) from time to time, will be the national law that applies in Queensland. This means that amendments to the appendix to the NSW Act that are subsequently passed by the NSW Parliament will automatically amend the law that applies in Queensland without being considered by the Queensland Parliament.

**Clause 5** provides that the Minister must table in the Legislative Assembly any amendments to the appendix to the NSW Act. This is designed as a protection measure given Clause 4.

**Clause 6** prescribes meanings in Queensland for generic terms used in the national law.

**Clauses 7 & 9** provide that the Queensland Conciliation and Arbitration Tribunal (QCAT) is the responsible tribunal to hear appeals against decisions of the registrar and for related matters, and that a reference in the national law to an appeal against a decision is a reference to a review as provided under the QCAT Act.

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<sup>9</sup> Australian Registrars' National Electronic Conveyancing Council, 2012, p.31.

<[http://www.arnecc.gov.au/\\_data/assets/pdf\\_file/0004/171976/Consultation\\_Regulation\\_Impact\\_Statement\\_July\\_2012.pdf](http://www.arnecc.gov.au/_data/assets/pdf_file/0004/171976/Consultation_Regulation_Impact_Statement_July_2012.pdf) accessed 9.1.13>

<sup>10</sup> The Electronic Conveyancing (Adoption of National Law) Bill (NSW) 2012 and Explanatory Notes to the Bill are available online at

<http://www.parliament.nsw.gov.au/Prod/parliament/nswbills.nsf/131a07fa4b8a041cca256e610012de17/a843b43e984f7ea8ca257a99001ea2c1?OpenDocument>.

<sup>11</sup> Clauses 11& 12 would if agreed amend the long title of the Act to more accurately reflect all that the Act does. This will be achieved by removing from the long title all words after 'conveyancing'. The deleted words and underlined as follows - An Act to adopt in Queensland a national law relating to electronic conveyancing and to amend this Act, the *Land Act 1994* and the *Land Title Act 1994* for particular purposes.

**Clause 8** provides that the *Acts Interpretation Act 1954* does not apply to the Electronic Conveyancing National Law. According to DNRM, it is standard for 'national law' schemes drafted by the Parliamentary Counsels' Committee to exclude the Acts Interpretation Act of each jurisdiction and replace it with a schedule with interpretation provisions for the national law. This is to ensure that the same interpretation rules apply in each jurisdiction.<sup>12</sup> The interpretation schedule, 'Schedule 1- Miscellaneous provisions relating to interpretation' commences at page 32 of the ECNL at the back of the Bill.

**Clause 10** provides a regulation making power.

**Clauses 11 & 12** amend the long title of the Electronic Conveyancing National Law (Queensland) Act 2012. Clause 12 removes reference in the title to the amendments to the Land Act and the Land Title Act that are part of the Bill, but not part of the new Act.<sup>13</sup> This is to ensure the title of the new Act is accurate.

**Clauses 13 – 29** amend the *Land Act 1994*, and **clauses 30-50** amend the *Land Title Act 1994*. According to the Explanatory Notes, these amendments are to ensure the provisions in those acts interact appropriately with the ECNL and provide a complete legislative framework to ensure that national e-conveyancing can be implemented in Queensland.<sup>14</sup>

Essentially, these amendments require that electronic transactions and documents are accepted in the same way as face-to-face transactions and paper documents.

**Editor's Notes** – contain the Electronic Conveyancing National Law (ECNL) from the NSW Bill. The ECNL is essentially to provide a common legal framework for national e-conveyancing in the participating jurisdictions. Sections of the rules deal with electronic conveyancing and lodgement, client authorisation and digital signatures, electronic lodgement networks, operating requirements and participation rules, appeals, compliance liabilities of registrars, relationship with other laws and definitions.

The committee draws the House's attention to the following issues arising from its examination of the Bill.

## Consultation

The department advised that there has been consultation on the national policy, limited stakeholder consultation after the Bill was introduced and no public consultation on the Bill.

Since early 2011, ARNECC has undertaken consultation at a national level,<sup>15</sup> and information on e-conveyancing national laws has been available publicly from the ARNECC website.<sup>16</sup>

Stakeholders from the Queensland legal and finance sectors were consulted during the development of the national e-conveyancing proposals. Some of this consultation was undertaken by ARNECC on behalf of all participating jurisdictions, not by DNRM. The organisations consulted include: the Queensland Law Society; the Australian Bankers' Association; Suncorp Bank; Lexon Insurance Pty Ltd (professional indemnity insurers for Queensland solicitors; and Abacus - Australian Mutuals (representative organisation for credit unions, building societies and mutual banks).

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<sup>12</sup> The Department of Natural Resources and Mines advised the committee in correspondence dated 9 January 2013 that many of the terms defined and references in this schedule are not actually used in the national law. The more relevant interpretation provisions are in Part 1 of the national law (pages 9-10 of the Editor's Note), and definitions of particular terms for Queensland in Parts 1 and 2 (Clauses 3-6) of the Bill.

<sup>13</sup> Clauses 11& 12 would amend the long title of the Act by removing from the long title all words after 'conveyancing'.

<sup>14</sup> Explanatory Notes, Electronic Conveyancing National Law (Queensland) Bill 2012, pp.1-2.

<sup>15</sup> Department of Natural resources and Mines, *Correspondence*, 8 January 2013.

<sup>16</sup> See <http://www.arnecc.gov.au/publications>.

## Digital signature

The Bill introduces a digital signature for e-conveyancing whereby a subscriber will be required by the participation rules to obtain a digital certificate from an accredited provider. A digital signature will be created when the encrypted data contained in the digital certificate is applied to a document with access to secure information attached to that particular digital certificate.

The Bill at clause 3 defines a digital signature as:

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

In their submission to the committee, the Queensland Law Society (QLS) submitted that the definition was not contained in the *Land Title 1994* (LTA) and should be included for consistency:

*There does not appear to be a definition of "digitally sign" in the LTA. The Society therefore considers that a definition specifically referring to the national definition should be in the LTA to ensure clarity and consistency.<sup>17</sup>*

The committee sought comment from DNRM in relation to the issue raised by the QLS. The department advised:

*A definition of 'digitally sign' is not required as the only use of that term in the LTA will be in expressions clearly referring to digital signing under the national law, for example 'through a subscriber digitally signing the instrument under the Electronic Conveyancing National Law (Queensland) - s 11A(2A) as amended. Other provisions referring to digitally signing in a similar way includes 11B, s 14C, note to s 161, s 185.*

*The LTA, as proposed to be amended, will provide that electronic conveyancing documents signed in accordance with the national law will satisfy the requirements of the LTA.<sup>18</sup>*

## Repudiation of digital signature

There may be circumstances where a digital signature is used fraudulently by an unknown party not connected with a conveyance.

Section 12(4) of the Electronic Conveyancing National Law (ECNL) at the back of the Bill takes these circumstances into account where a person seeks to repudiate a digital signature used inappropriately in a conveyance. In order to repudiate a digital signature, section 12(4) of the Bill states:

*Despite subsections (1) and (2), a subscriber can repudiate the subscriber's digital signature with respect to a registry instrument or other document if the subscriber establishes:*

*(a) that the digital signature was not created by the subscriber, and*

*(b) that the digital signature was not created by a person who, at the time the subscriber's digital signature was created for the registry instrument or other document:*

*(i) was an employee, agent, contractor or officer (however described) of the subscriber, and*

*(ii) had the subscriber's express or implied authority to create the subscriber's digital signature for any document or documents, and*

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<sup>17</sup> Queensland Law Society, 2013, *Submission No.1*, p.3.

<sup>18</sup> Department of Natural Resources and Mines, *correspondence*, 1 March 2013.



*(c) that neither of the following enabled the subscriber's digital signature to be created for the registry instrument or other document:*

*(i) a failure by the subscriber, or any of the subscriber's employees, agents, contractors or officers, to fully comply with the requirements of the participation rules,*

*(ii) a failure by the subscriber, or any of the subscriber's employees, agents, contractors or officers, to take reasonable care.*

Essentially, repudiation of a digital signature in accordance with section 12(4) requires a subscriber to show that they did not create the digital signature in question and that it was not created by a person given authority by the subscriber. It must also be shown that a subscriber's agents, employees and officers took reasonable care and complied with the participation rules.

In its submission to the committee the QLS expressed concern that the process to repudiate a digital signature as set out in section 12(4) is unduly onerous.

As submitted by the QLS:

*The Society remains concerned that the process to repudiate an electronic signature in section 12(4) of the ECNL is unduly onerous. The Society notes that even when a digital signature is created fraudulently a subscriber will be liable for its use unless the subscriber can establish:*

- *The subscriber did not create the digital signature*
- *The digital signature was not created by an employee of or with the authority of the subscriber*
- *That the subscriber's employees, agents and officers at all times complied with the participation rules and took reasonable care.*

*In the circumstance where a sophisticated hacker has accessed a subscriber's system a subscriber may be placed in an invidious position as it may be impossible to prevent the attack but may prove difficult to meet this test to repudiate the use of a digital signature in a transaction.*

*The Society acknowledges that the test in this section was set deliberately at a high level to ensure that there could be a high degree of confidence in the use of a digital signature by other parties to a transaction. The issue, as far as the Society sees it, is striking the right balance between properly promoting confidence in the use of the system and not unfairly imposing liability on a subscriber for events (including frauds) over which they had no knowledge or control. The Society is uncertain whether the result of the drafting of section 12 has reached that balance.<sup>19</sup>*

The QLS also raised the issue with the committee at its public hearing arguing that the onus placed on small legal firms in relation to liability is too great:

*The Society still has some concerns about the potential impact of that section on practitioners, particularly in terms of their liability. Effectively what it It's effectively about being able to repudiate a signature once you've digitally signed a document. It puts the onus fairly and squarely on the practitioner if there's been a fraud to prove the things set out in section 12, subsection 4, particularly that the lawyer or subscriber didn't create the signature themselves, it wasn't done by an employee, whether or not that employee was engaged in that particular transaction, and that the fraud was not due to any failure by the solicitor or its staff to comply fully with the participation rules or some other failure to take reasonable care. I guess our concern with that is this system is going to be used by a lot of small practitioners, one- and two-man firms. I think the majority of law firms in Queensland*

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<sup>19</sup> Queensland Law Society, 2013, *Submission No.1*, p.2.

*are one- and two-partner firms, so if you're sitting out in Barcaldine, for example, and you've got a little computer, your IT knowledge is going to be fairly limited.*

*So if your system is hacked into by somebody overseas the difficulty of proving that – to be able to repudiate your signature – is very high. And we understand the registrar's need to make the register secure, and so to be able to be certain about the authenticity of stuff once it's put into the register, the flow-on effect of this section is the liability for practitioners. So at the moment what it's saying is if there's fraud, unless the practitioner can prove all these things, the practitioner's going to end up paying for the loss someone's suffered.*

*We think that's unnecessarily harsh, we think that's going to be an impediment to people using the system, we're very concerned about the insurance cost, which may flow from that. Unless something can be done to soften that, we have grave fears about the take-up.<sup>20</sup>*

At the committee's public briefing, the department responded to the concerns raised by the QLS:

*...Section 12 provides for several things – the basic purpose of Section 12 this is in the electronic conveyancing national law is that all parties using this electronic system will be able to rely on a subscriber's digital signature. Some of those parties aren't connected to each other by a contact so that's why there's a statutory rule saying they can rely on that signature for their benefit.*

*The repudiation I think was the real concern of the Law Society and the fact that the section says that the subscriber will have to prove certain things in order not to be bound by their digital signature. Now as the chair pointed out that if a solicitor currently – or anybody claims their signature is forged – they have to prove that in some way, often that's just a statement saying 'this was forged' or you can get a handwriting expert. But none of us can interpret how a court will interpret what is required to prove this.*

....

*It would seem to me that the intent of that section is if it's anyone other than an employee, in other words hacker, then it will come squarely within the section, so long as the word of the subscriber and the office practices as they're documented and so on can support the fact they haven't been negligent in any way that they have followed all the rules relating to the security system.*

*So I think the issue is about the subscriber providing this – it's not a matter of absolute proof – it's a matter of anything that has to be proved in a court of law on the civil standard of balance of probabilities and the legislation can't stay any more about that – it's not appropriate.<sup>21</sup>*

#### **Comment**

The committee is satisfied with the advice provided by DNRM.

### **E-conveyancing and the definition of settlement**

Currently, settlement of a conveyance involves the parties meeting at an agreed time and place to exchange documents and cheques in order to complete the transfer of the property in question. Once the exchange has occurred to the satisfaction of all parties, the conveyance is deemed to have 'settled'.

In their submission to the committee the QLS submitted that further definitions are required to section 36 of the *Acts Interpretation Act 1954* to remove any doubt as to when a contract 'settles' or

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<sup>20</sup> Raven, M. 2013, *Transcript*, 6 March, p.9.

<sup>21</sup> Vidas, M. 2013, *Transcript*, 6 March, pp.16-17.

there is 'completion' of a contract in an electronic conveyance in circumstances where the parties are not physically present to agree that settlement has occurred.

As submitted by the QLS:

*In an electronic conveyancing environment it is more complex. There is a point where all parties have authorised a settlement to take place, there is an appointed time when the system will initiate settlement and a later time when the funds will be transferred and the transfer document lodged. It is unclear at which of these points, or some other time, statutory rights to terminate expire upon 'completion' or when a contract 'settles'. It seems most logical that in the electronic conveyancing environment that the relevant point in time is when the transaction is generally irrevocable.*

*The Society is firmly of the view that a statutory definition is necessary to provide sufficient clarity around when the existing statutory rights to terminate a contract expire in a transaction. Given the sums involved in property conveyancing it is not satisfactory to leave this matter to industry practice which may be challenged or to rely upon subsequent litigation to make a determination. To do so is to introduce an unacceptable level of risk for the public into electronic conveyancing.<sup>22</sup>*

The committee sought comment from the department in relation to the issue raised by the QLS.

The department advised:

*These issues appear to relate, not to the content of the Bill or the national law, but to broader issues relating to interpretation of contracts. The Bill relates only to conveyancing, which is the formal process for transferring an interest in land or granting a new interest such as a mortgage. Usually this process follows on from a contract, for example a loan agreement or a contract of sale, and is required in order to perform obligations under the contract. Other actions required under the contract, such as the payment of money, are not part of the conveyancing process.*

*The comments relate to contracts for the sale of land and the submission refers to rights under various statutes to terminate a contract before settlement. It is also stated that, in a paper-based transaction, there is agreement as to when settlement occurs.*

*No statutory rights to terminate a contract are included in the LTA, which does not provide for contractual matters.*

*There is currently a widely-used standard contract for the sale of land in Queensland. It may be appropriate for QLS and other industry stakeholders to develop standard clauses to be included in this contract when a transaction is to be undertaken through a national e-conveyancing system, including a statement of when 'settlement' occurs. Introduction of a statutory definition may also be suitable for consideration during the pending review of Queensland property legislation.<sup>23</sup>*

The QLS made further submissions in relation to this issue at the committee's public hearing:

*The final point is our point about the need for a definition of when a transaction actually settles or is completed in the electronic environment, and in our submission we've given some different examples of where it's relevant. For example, the Environmental Protection Act says the buyer can rescind an agreement at any time before completion of the agreement, the Body Corporate Community Management allows termination where a conveyance has not already settled, and the Land Sales Act gives the buyer a right to terminate the contract before the vendor gives the purchaser a registrable instrument of transfer.*

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<sup>22</sup> Queensland Law Society, 2013, *Submission No.1*, p.4.

<sup>23</sup> Department of Natural Resources and Mines, *correspondence*, 1 March 2013.

*Our concern is in an electronic environment it's very difficult to identify exactly when all those times are. As I understand the system, if I'm acting for a purchaser I would give it a tick basically, digitally sign the documents and send them off, there would be an agreed settlement time, shortly sometime in the future - let's say three o'clock for the sake of the example - and shortly before that - maybe 15 minutes, half an hour before that - the workspace closes down so people can't make alterations and then the system starts checking things, it seems to me as I understand it, that stage it's all pretty irreversible. So if I, in that 15 minutes - say between quarter to three and three o'clock - if I get instructions from my client to terminate under one of these contractual rights, I don't know if they're allowed to or not because all the legislation outside the Land Title Act is talking about settlement which is a concept, in current paper system, that's very easy to identify. I turn up in a room, I hand over checks, I get a transfer in return, and everyone goes okay are we alright and everyone says 'yes' and we leave, so it's very obvious when settlement's occurred.*

*In this electronic environment there are various stages where things happen so at three o'clock then the system's done a bit of verification, it's checked that the title's clear, it'll then start sending some messages and talking to the Registrar or the Registrar's system, and then it'll send some messages off to banks and funds will start to get transferred, so practically it's probably all happening in the space of 15 minutes to half an hour in 99% of cases, but there's no clear point there which identifies when rights are lost because settlement's occurred.*

*We just think that's a point that needs to be clarified.<sup>24</sup>*

The department responded to the QLS submission at the committee's public hearing.

The department advised:

*I'd suggest that understanding when settlement occurs will need to be a conversation with NECDL and with actually using the system when its built and then at that stage it's probably appropriate that we put a definition into our property legislation - whether that's the Land Sales Act or the Property Law Act or some other act dealing with the contract - and I guess that there's a timing issues - I don't think we're necessarily ready to know exactly when settlement occurs now anyway, but also it's probably a conversation for those type of pieces of legislation and the review that's ongoing at the moment.<sup>25</sup>*

#### **Committee Comment**

The committee is satisfied with the advice provided by DNRM.

### **Should the Bill be passed?**

Standing Order 132(1) requires the committee to recommend whether the Bill should be passed. After examining the form and policy intent of the Bill, the committee determined that the Bill should be passed.

#### **Recommendation 1**

The committee recommends that the Electronic Conveyancing National Law (Queensland) Bill 2012 be passed.

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<sup>24</sup> QLS, 2013, *Transcript*. pp.10-11.

<sup>25</sup> Dann, L. 2013, *Transcript*, 6 March, p.17.

### 3. Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* states that ‘fundamental legislative principles’ are the ‘principles relating to legislation that underlie a parliamentary democracy based on the rule of law’. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of parliament.

The committee sought advice from DNRM in relation to a number of possible fundamental legislative principles issues. The following sections discuss the issues raised by the committee and the advice provided by the department.

#### Clause 29 & 50 and the Electronic Conveyancing National Law (ECNL) s. 3

##### Definitions generally

As pointed out by the former Scrutiny of Legislation Committee,<sup>26</sup> a better definition consequentially enhances the rights of persons who may be subject to its provisions.

##### *‘File’, ‘deposit’, ‘lodge’ definitions*

Section 3 of the ECNL, included as Editor’s Notes at the back of the Bill, defines ‘lodge’ to include ‘deposit, present and file’. However, the definition of ‘file’ in clause 29 for the *Land Act 1994* and in clause 50 for the *Land Title Act 1994* mean ‘lodge the document electronically’. The definition of ‘deposit’ in schedule 6 of the *Land Act 1994* and schedule 2 of the *Land Title Act 1994* mean ‘file in the land registry other than for registration’.

The committee noted with some concern the differences in the definitions for ‘lodge’ in the ECNL in the Bill and ‘file’ in the *Land Act 1994* and the *Land Title Act 1994*, and the potential for these differences to create ambiguity.

##### Request for advice

The committee sought assurances from the department that the definition for ‘lodge’ in the ECNL is unambiguous and drafted in a sufficiently clear and precise way, and that the meaning of the definition is consistent with the definition for ‘file’ in the *Land Act 1994* and the *Land Title Act 1994*.

##### DNRM advice

*Under Queensland legislation, the different terms ‘lodged’ and ‘deposited’ are used to describe the different ways of ‘getting documents in’ to the land register. These are notionally different concepts, but for practical purposes, there is no difference in the action required to lodge or deposit a document. The real difference is in the status of these documents once they are in the register, under the Land Act or the Land Title Act. This depends on the nature of the document. For example, a document that creates a registered interest in land, such as a mortgage, is lodged under the Land Title Act. If it is a document that does not create an interest, such as an administrative advice, it is deposited.*

*The definition for ‘lodge’ in the ECNL also includes the term ‘present’, which is used in the legislation of some other participating jurisdictions. This inclusion is not relevant to Queensland and the definition of ‘lodge’ in the ECNL is therefore consistent with the definition of ‘file’ in the Land Title Act and the Land Act. There is no need for these definitions to align completely as there will be no ambiguity when interpreting the ECNL in*

<sup>26</sup> Scrutiny of Legislation Committee, 2000, *Alert Digest 4 of 2000*, page 7.

*conjunction with the Land Act (or the Land Title Act) as to whether a particular type of document is lodged or deposited.*<sup>27</sup>

#### **Committee comment**

The committee is satisfied with the department's advice.

#### **Expanded definition of 'document'**

The Schedule to the ECNL sets out provisions relating to its interpretation. These are similar to the provisions of the *Acts Interpretation Act 1954* (Qld). However, the definition of 'document' in schedule 1, item 12 of the ECNL includes a map, drawing or photograph or anything capable of being stored reproduced, transmitted, stored or reproduced electronically as follows:

'**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 persons 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.'*

#### **Request for advice**

The committee requested the department's advice on the implications of broadening the definition of 'document' to include a map, plan, drawing or photograph, or any record of information that exists in a digital form and is capable of being reproduced, transmitted, stored and duplicated by electronic means.

#### **DNRM advice**

*The expanded definition will make it clear that a document can be in digital form, which is required to allow land titling transactions to be completed through e-conveyancing. It is possible that the Acts Interpretation Act 1954 definition of 'document' already includes documents in digital form as paragraphs (b) and (c) of that definition would include maps etc. and articles or material in which or by which digital information is stored and writings can be reproduced; however including the expanded definition puts it beyond doubt.*

*The department also notes –*

- *the Land Title Act has a definition of 'instrument' which includes a plan of survey and any type of document which would be lodged (or deposited) under that Act; and*
- *the Land Act has a definition of 'document' which includes a plan of survey and any type of document which would be lodged (or deposited) under that Act; and*
- *the definition of 'document' in the Evidence Act 1977 (Schedule 3 Dictionary) includes similar items to (d) and (e) in the national law.*

*Consequently there are not considered to be any adverse impacts in broadening the definition.*<sup>28</sup>

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<sup>27</sup> Department of Natural Resources and Mines, *correspondence*, 4 March 2013.

<sup>28</sup> *Ibid.*

**Committee comment**

The committee is satisfied with the department's advice.

**Clauses 16, 33, sections 22 and 23 ECNL****Execution of documents in accordance with forms**

Clause 16 amends section 288 of the *Land Act 1994*. Section 288 sets out the requirements for signing documents transferring a lease, sublease or licence or creating an interest in a lease or sublease. Clause 16 provides that for electronic conveyancing documents, the requirements in section 288 apply subject to the form approved for the instrument under section 7 of the ECNL.

Similarly, clause 33 amends section 11 of the *Land Title Act 1994*. Section 11 sets out the requirements for execution of instruments transferring or creating interests in lots and discharges and releases of mortgages. Clause 33 provides that for electronic conveyancing documents, the requirements in section 11 for execution of certain instruments apply subject to the form approved for the instrument under the ECNL, section 7. That is, a form approved under the ECNL, section 7, may potentially have the effect of overriding the *Land Act 1994*, section 288 and *Land Title Act 1994*, section 11.

As outlined in the explanatory notes for both clauses 16 and 33,

*The form approved may, for example, be required to be digitally signed by only one party when that type of instrument in paper form would usually require two parties' signatures under this section.*

That is, the Bill effectively authorises amendment of an Act by a form. This is similar in effect to a Henry VIII clause, that is, a power to amend an Act by regulation.<sup>29</sup> The power to approve forms is delegated to the Registrar under the ECNL, section 7.

Henry VIII clauses are objectionable because they are inappropriate delegation, below Parliament, of legislative power.

It seems even less appropriate for a form to override the effect of an Act especially given that the section deals with execution of instruments transferring or creating interests in leases and lots and discharges and releases of mortgages. These documents implement many Queensland land transactions, from the sale and purchase of residential properties to large commercial developments, on a daily basis. These provisions are important to the operation of the Queensland land title scheme. Therefore it is questionable whether this clause has sufficient regard to the institution of Parliament.

**Request for advice**

The committee requested assurance from the department that clause 16 is an appropriate delegation of legislative power to appropriate persons.

The committee also sought advice as to why the execution or digital signature requirements, for electronic conveyancing documents transferring or creating an interest in a lease or lot and discharges and releases of mortgages, is not stated in the Act itself, rather than providing for this to be dealt with by a form approved by the Registrar under the ECNL.

<sup>29</sup> Pearce, D. and Argument, S. 2005, *Delegated Legislation in Australia*, 3<sup>rd</sup> edition, Lexis Nexis Butterworths, Chatswood, page 14.

### **DNRM advice**

*Clause 16 should not be read in isolation but must be read with the new s 290Q to be inserted into the Land Act by clause 21 and with the provisions of the ECNL, including ss 7, 9(3) and 23 of the ECNL.*

*The new s 290Q is the key provision about the signing or executing of an electronic conveyancing document. It states that the document must be digitally signed as provided for under the ECNL. Section 23 of the ECNL states that the participation rules may provide for certification of registry instruments and digital signing. Section 7 of the ECNL provides that a document may be lodged electronically if it is in a form approved by the registrar and s 9(3) provides that a registry instrument digitally signed in accordance with the participation rules is taken to satisfy the requirements of any other law of the jurisdiction relating to the signing of the document.*

*Similarly, for the Land Title Act, clause 33 must be read with the new s 14C to be inserted by clause 37 and with relevant sections of the ECNL, including ss 7, 9(3) and 23.*

*The ECNL provides for electronic conveyancing documents to be lodged through an electronic lodgement network, which can only be used by subscribers and in accordance with participation rules made under the ECNL. The only persons who will be able to meet the security and fidelity requirements for subscribers will be regulated financial institutions, legal practitioners and government agencies.*

*As members of the general public will not be able to become subscribers, they will not be able to use the network to digitally sign and lodge documents. In some cases, individuals will be represented by legal practitioners who are subscribers and can digitally sign for them. In other transactions, in particular where a mortgage is granted but there is no associated purchase, they are not usually represented by a solicitor.*

*To facilitate these transactions in e-conveyancing, the mortgagor will sign a mortgage in the form of a paper document and the participation rules will require the mortgagee to certify (among other things) that they hold an equivalent paper mortgage document signed by the mortgagor.*

*It is not practicable to provide for the detail of execution/digital signature requirements for e-conveyancing documents in the Act. There will be certifications required from a subscriber for each document which will be digitally signed. The requirements for certification and for signing will not be the same in each case and will not be the same even for two documents of the same type, for example a mortgage where the mortgagor is represented by a legal practitioner subscriber and another where the mortgagor is not represented.*

*It is an appropriate delegation to the registrar to prescribe the type of form in conjunction with setting the participation rules applying when a digital document in that form is to be lodged. This does not override the requirement that the document be signed in accordance with the legislation.*

*The prescribing of a form by the registrar does not operate to change the legislative requirements for signing. The signing of e-conveyancing documents is governed by the new s 290Q (Land Act) or s 14C (Land Title Act) and by the strict regime binding subscribers as prescribed in the participation rules to be made under the legislation.<sup>30</sup>*

### **Committee comment**

The committee is satisfied with the department's advice.

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<sup>30</sup> DNRM, correspondence, 4 March 2013.



## Limitation on sovereignty of the Queensland Parliament

The Bill is national scheme legislation. National scheme legislation creates a tension between the efficient collaboration between the several jurisdictions of Australia and the independence of action of each of their sovereign Parliaments.<sup>31</sup> This tension was articulated by the Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia in its position paper on the Scrutiny of National Schemes of Legislation<sup>32</sup> in the following terms:

*National schemes of legislation affecting the people of a State should be made available to the Parliament. Parliament has a broad responsibility to the electors and the people whom it represents. The current system of dealing with national schemes of legislation removes the Parliament's ability to carry out its responsibility to scrutinise and hold the Executive responsible.*

By clause 4 of the Bill the ECNL, as in force from time to time, is applied in Queensland. This means that if the *Electronic Conveyancing (Adoption of National Law) Act 2012* of New South Wales is amended, the amended provisions will apply as a law of Queensland. This illustrates the limitation this Bill creates for the sovereignty of the Queensland Parliament.

One factor that diminishes the concerns about limiting the sovereignty of the Queensland Parliament is that amendments to the ECNL, if not agreed by all participating jurisdictions, must be voted on and proposals will be agreed if at least 75 per cent of the parties vote in its favour.<sup>33</sup> Also, a copy of amendments to the ECNL as set out in the *Electronic Conveyancing (Adoption of National Law) Act 2012* of New South Wales must be tabled in the Legislative Assembly.<sup>34</sup> This provides a mechanism for parliamentary scrutiny of amendments. However, there is no requirement that the amendments be tabled in time to be debated in the Queensland Parliament before they are made.

### Request for advice

The committee asked the department to explain why clause 4 of the Bill should not be amended to require that amendments are tabled allowing an appropriate period of time to afford Parliament an opportunity to debate future amendments before they have effect in Queensland.

### DNRM advice

*As referred to in the Committee's letter, under the Intergovernmental Agreement for an Electronic Conveyancing National Law, it has been agreed that amendments to the ECNL may be proposed by any participating jurisdiction and will only be made by New South Wales as host jurisdiction if 75 per cent of jurisdictions agree on them. The agreement provides for a total deliberative period of 18 weeks from the initial proposal if there is not complete agreement within six weeks.*

*There is no direct mechanism for any proposed amendment to be debated by the Queensland Parliament before it comes into effect. However, the Queensland Parliament may enact legislation to disapply an amendment to the ECNL.*

*Any proposed amendment would be brought to the attention of the responsible Minister through the registrar of titles. This would allow consideration of whether legislation should be introduced to disallow the amendment in Queensland. Any proposal for such legislation could be progressed during the deliberative period after proposal of an amendment as referred to above.<sup>35</sup>*

<sup>31</sup> Office of the Queensland Parliamentary Counsel, 2008, *Fundamental Legislative Principles: The OQPC Notebook*, p. 176.

<sup>32</sup> Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, 1996, *Position Paper on Scrutiny of National Schemes of Legislation*, page 39.

<sup>33</sup> Intergovernmental Agreement for an Electronic Conveyancing National Law, part 10, page 13.

<sup>34</sup> Clause 5 of the Bill.

<sup>35</sup> DNRM, *correspondence*, 4 March 2013

### Committee comment

The committee is satisfied with the department's advice.

### Tabling intergovernmental agreement

When Queensland legislation implements national scheme legislation based on an intergovernmental agreement, it is preferable for the intergovernmental agreement itself to be tabled in the Queensland Legislative Assembly. This practice is based on a *Position Paper on Scrutiny of National Schemes of Legislation*,<sup>36</sup> which stated:

*It is clear, therefore that there is a need for Parliaments to be informed about intergovernmental agreements.*

The former Industry, Education, Training and Industrial Relations Committee took this approach in its report on the Education and Care Services National Law (Queensland) Bill 2011.<sup>37</sup>

### Request for advice

The committee requests the department to advise whether the Intergovernmental Agreement for an Electronic Conveyancing National Law will be tabled in the Queensland Legislative Assembly and, if so, when it will be tabled.

### DNRM advice

*The Intergovernmental Agreement was signed by the relevant Ministers (in Queensland's case, the previous Government's Minister for Finance, Natural Resources and The Arts) on 21 November 2011. It is published on the Australian Registrars' National Electronic Conveyancing Committee (ARNECC) website [www.arnecc.gov.au](http://www.arnecc.gov.au). At this stage it is not intended to table it in the Queensland Legislative Assembly.*

### Committee comment

The committee is satisfied with the department's advice.

### Queensland modifications

The existence of Queensland-specific modifications to a national scheme reduced concerns of the former Scrutiny of Legislation Committee about national scheme legislation.<sup>38</sup> This Bill includes some Queensland-specific modifications including, for example, the definition of land titles legislation in clauses 6, 17 and 18 that amend the provisions of the *Land Act 1994* relating to electronic conveyancing documents for mortgages. Further, sections 22 and 23 of the ECNL provide that the Registrar may approve operating requirements and participation rules for Queensland. However, in doing so, the Registrar is required by section 24 of the ECNL to have regard to the desirability for national consistency.

The benefits of participation in the national conveyancing scheme such as 'greater efficiency throughout Australia'<sup>39</sup> must be balanced against the limitation on the right of Queensland Parliament to unilaterally amend the ECNL. As identified on page three of in the explanatory notes, the national scheme for electronic conveyancing requires ongoing consistency.

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<sup>36</sup> Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, October 1996, page 39.

<sup>37</sup> Industry, Education, Training and Industrial Relations Committee, 2011, *Report No.4: Education and Care Services National Law (Queensland) Bill 2011*, P.21.

<sup>38</sup> Office of the Queensland Parliamentary Counsel, 2008, *Fundamental Legislative Principles: The OQPC Notebook*, p. 177.

<sup>39</sup> Explanatory notes, Electronic Conveyancing National Law (Queensland) Bill 2012, p. 1.

**Request for advice:**

The committee requested the department to advise how the Bill has sufficient regard to the institution of Parliament given the requirement for ongoing consistency of the legislation.

The committee also sought clarification of the mechanisms, if any, by which the Queensland Parliament and the parliaments of other participating jurisdictions may monitor and challenge amendments made to the national rules, or the operation of the national rules in practice that conflicts with Queensland's or other jurisdictions' interests.

**DNRM advice**

*The participating jurisdictions are aiming for consistency in the legislative framework for e-conveyancing, but this is not a binding requirement and will be subject to the needs of particular jurisdictions. The consistency referred to is in the ECNL which provides the high-level structure for the national e-conveyancing legal framework. Each jurisdiction has its own land titling legislation (in Queensland, primarily the Land Title Act) which provides for the operation of the Torrens system within that jurisdiction. This and other property-related legislation within the jurisdiction is not within the scope of the intended consistency. Although this property and titling legislation is based on similar fundamental principles, there are many differences in details between the jurisdictions. E-conveyancing relates only to the creation and lodgement of land titling documents and not to fundamental principles of land law or the Torrens system of land titling.*

*If the Bill becomes an Act, Queensland Parliament can, at any time, repeal that Act. That is, Queensland Parliament may repeal the Act that applies the ECNL as enacted in New South Wales, or amend it so that only certain provisions are applied in Queensland.*

*By way of example, Victoria has adopted the ECNL as enacted in New South Wales and has disappplied one provision of that Act – see *Electronic Conveyancing (Adoption of National Law) Act 2013 (Victoria) s 4*. The Queensland Bill has also qualified the ECNL in several respects, including by providing that a reference to 'an appeal against a decision' is to be read as a review of the relevant decision under the QCAT Act (Bill cl 9). This provision was included as it was determined that this was the appropriate way for the appeal jurisdiction to be undertaken in Queensland.*

*If in the future it is decided that amendment or repeal is in the interests of Queensland, there is no fetter on the Parliament's power to proceed accordingly.*

*Under ss 22 and 23 of the ECNL respectively, the registrar is empowered to make operating requirements which will bind the operator of an electronic lodgement network and participation rules which will bind subscribers to such a network. The ECNL requires the registrar to 'have regard' to the desirability of maintaining consistency with the nationally agreed model operating requirements and model participation rules when determining the operating requirements and participation rules to apply within their own jurisdiction.*

*There is no compulsion to adopt these model requirements and rules but the aim of national consistency has been acknowledged in the legislation. The model requirements and rules will be developed by the Australian Registrars' National Electronic Conveyancing Committee, with input from Queensland's registrar of titles. However, if there is a need to vary from the model requirements and rules within Queensland, there is no fetter on the registrar implementing this. Also, s 27 of the ECNL empowers the registrar to waive compliance with all or any of the operating requirements or participation rules if the Registrar is satisfied that granting the waiver is reasonable in all the circumstances.<sup>40</sup>*

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<sup>40</sup> DNRM, correspondence, 4 March 2013

**Committee comment**

The committee is satisfied with the department's advice.

## **Appendix A – List of submitters**

Queensland Law Society

Australian Bankers' Association

## **Appendix B – Briefing officers and hearing witnesses**

### **Briefing officers**

#### **Department of Natural Resources and Mines**

- Ms Liz Dann - Executive Director, Titles Registry
- Mr Brad Warneke - Director Operations, Titles Registry
- Ms Marie Vidas - Manager Practice and Standards, Titles Registry

### **Hearing witnesses**

#### **Queensland Law Society**

- Mr Matt Raven, Chair, Property Committee
- Mr Matthew Dunn, Principal Policy Solicitor

#### **Australian Bankers' Association Inc.**

- Mr Ian Gilbert, Policy Director

## Appendix C – Summary of submissions

Clause/section	Submitter	Key Points raised / Response provided by Department of Natural Resources and Mines
<b>Support for the Bill</b>		
Support for the Bill	Queensland Law Society (Sub No.1)	The QLS is supportive in principle of e-conveyancing, but are critical of the lack of consultation in Queensland. (Submission 1, p.1)
Support for the Bill	Australian Bankers' Association (Sub No. 2)	The ABA strongly supports the COAG e-conveyancing initiative. (Submission 2, p.1)
Support for the Bill	Australian Bankers' Association Sub No.2)	<p>The ABA looks forward to amendments to land title legislation that will recognise and provide for efficiencies in the creation, execution and retention of mortgage instruments through the maximum possible utilisation of electronic techniques so as to facilitate a largely paperless conveyancing environment and avoid barriers to achieving this objective.</p> <p>For example, these amendments could make provision for electronic signatures, the abolition of witnesses of signatures because of the more regulated and limited access of subscribers to an electronic lodgement operating systems, the abolition of certificates of titles, the creation of nationally standard forms of mortgage and electronic means for the retention of documents. (Submission 2, p.3)</p> <p><b>Departmental response</b> The submitter's comment does not relate to the specific of this bill. Rather it relates to matters that the submitter considers would be desirable to be provided for in Queensland's land titling legislation in the future.</p> <p>The comment focuses on requirements for mortgage instruments, which is only one category of document which is lodged and provided for under the land titling legislation. To the extent the comment refers to requirements relevant to the bill and e-national conveyancing, the department provides the following comments on particular items:</p> <ul style="list-style-type: none"> <li>• electronic signatures: The bill allows documents created in accordance with the Electronic Conveyancing National Law (ECNL) and the rules applying for e-conveyancing in Queensland to be digitally signed. For documents prepared in paper, the requirement will continue to be that they be personally signed and, for most documents (including mortgages), that the signature is witnessed by a person in one of the prescribed categories of witnesses.</li> <li>• abolition of certificates of title: The bill does not provide for the abolition of certificates of title.</li> <li>• creation of nationally standard forms of mortgage: The bill does not provide for this. The form for mortgages to be created and lodged digitally through e-conveyancing will be similar in most respects for all the jurisdictions. However the form of both electronic and paper mortgages will continue to be determined in each jurisdiction under the relevant legislation and approved as required by that legislation.</li> <li>• electronic means for the retention of documents. The bill does not provide for electronic retention of documents, nor does Queensland land titling legislation have any relevant obligation to retain paper documents (other than impliedly a certificate of title, where one exists). The submitter may be referring to obligations of subscribers under the proposed participation rules (to be made under the ECNL) to retain documents. Where documents with original signatures are required to be retained, this has been determined as necessary to ensure the security of titling transactions and to allow effective monitoring and auditing of subscribers' compliance with their obligations.</li> </ul>
<b>Consultation</b>		
Consultation	Queensland Law Society (QLS) (sub No. 1)	<i>While there has been prior public consultation on the text of the ECNL, there has been no public consultation on the amendments to the Land Act 1994 or the Land Title Act 1994 to accommodate electronic conveyancing. QLS is strongly of the view that broad consultation on policy and legislation at an early stage is the key to good law and considers that it would have been useful and appropriate for such consultation to have taken place. Given the timing of the period for making submissions on the Bill it has not been possible to conduct an exhaustive review. It is therefore</i>

Clause/section	Submitter	Key Points raised / Response provided by Department of Natural Resources and Mines
		<p><i>possible that there are issues relating to unintended drafting consequences or fundamental legislative principles which we have not identified. (Submission 1, p.1)</i></p> <p><b>Departmental response</b></p> <p>The QLS submission acknowledges the public consultation undertaken on the Electronic Conveyancing National Law (national law). This consultation was extensive, undertaken at a national level by the Australian Registrars' National Electronic Conveyancing Council and also directly with Queensland stakeholders, including the QLS, by the Department of Natural Resources and Mines (the department). The department has previously provided details of this consultation to the Committee.</p> <p>The primary purpose of the Bill is to apply the national law as a law of Queensland. This is provided in clause 4, with the text of the national law included in the Bill as an Editor's Note.</p> <p>Amendments to the Land Act and LTA included in the Bill are minor and the nature of many of these amendments was determined by the provisions of the national law. Most amendments make minor changes to provisions that were drafted in terms appropriate for paper documents, to ensure these provisions can also apply to digital documents, for example relating to the form of instruments, signing of instruments and what constitutes a 'copy' of an instrument lodged digitally.</p> <p>The amendments make no change to the fundamental operation of the LTA or the Land Act or to how the titling system operates in Queensland for freehold or non-freehold land.</p>
<p><b>Comments on the provisions of the Bill</b></p> <p><b>Part 2 Application of Electronic Conveyancing National Law</b></p>		
<p>Clause 8 (Exclusion of interpretation legislation of this jurisdiction) Definitions of "settle" and "completion"</p>	<p>Queensland Law Society (Sub No.1)</p>	<p><i>The Society considers that additional definitions are required in section 36 of the Acts Interpretation Act 1954 to provide clarity around when a contract 'settles' or there is 'completion' of a contract in an electronic conveyancing transaction. (Submission 1, p.3)</i></p> <p><i>The Society is firmly of the view that a statutory definition is necessary to provide sufficient clarity around when the existing statutory rights to terminate a contract expire in a transaction. Given the sums involved in property conveyancing it is not satisfactory to leave this matter to industry practice which may be challenged or to rely upon subsequent litigation to make a determination. To do so is to introduce an unacceptable level of risk for the public into electronic conveyancing. (Submission 1, p.4)</i></p> <p><i>A corollary to the need to introduce clarifying definitions is the need to standardise the way contract termination provisions are expressed to improve certainty and to remove unnecessary red tape. (Submission 1, p.4)</i></p> <p><b>Departmental response</b></p> <p>These issues appear to relate, not to the content of the Bill or the national law, but to broader issues relating to interpretation of contracts.</p> <p>The Bill relates only to conveyancing, which is the formal process for transferring an interest in land or granting a new interest such as a mortgage. Usually this process follows on from a contract, for example a loan agreement or a contract of sale, and is required in order to perform obligations under the contract. Other actions required under the contract, such as the payment of money, are not part of the conveyancing process.</p> <p>The comments relate to contracts for the sale of land and the submission refers to rights under various statutes to terminate a contract before settlement. It is also stated that, in a paper-based transaction, there is agreement as to when settlement occurs.</p> <p>No statutory rights to terminate a contract are included in the LTA, which does not provide for contractual matters.</p> <p>There is currently a widely-used standard contract for the sale of land in Queensland. It may be appropriate for QLS and other industry stakeholders</p>



Clause/section	Submitter	Key Points raised / Response provided by Department of Natural Resources and Mines
		to develop standard clauses to be included in this contract when a transaction is to be undertaken through a national e-conveyancing system, including a statement of when 'settlement' occurs. Introduction of a statutory definition may also be suitable for consideration during the pending review of Queensland property legislation.
<b>Part 5 Amendment of Acts - Division 3 Amendment of Land Title Act 1994</b>		
Clause 33 Amendment of s 11 (Execution of certain instruments)	Australian Bankers' Association (Sub No.2)	<p>The ABA's supplementary submission raises a number of matters:</p> <p>(i) Concern that amendments to the Land Title Act and the Land Act were not the subject of prior consultation</p> <p style="text-align: center;"><b>Department's response</b></p> <p>The primary purpose of the Bill is to apply the ECNL as a law of Queensland. This is provided in clause 4, with the text of the ECNL included in the Bill as an Editor's Note. Amendments to the Land Act and LTA included in the Bill are minor and the nature of many of these amendments was determined by the provisions of the ECNL. The amendments to the Land Title Act and the Land Act were drafted by the Office of Queensland Parliamentary Counsel in a manner to ensure that the ECNL would interact effectively with the Queensland legislation providing for land titling matters.</p> <p>Extensive consultation on the ECNL was undertaken at a national level by the Australian Registrars' National Electronic Conveyancing Council (ARNECC) and also directly with stakeholders, including the ABA. The department has previously provided details of this consultation to the Committee.</p> <p>Most amendments to the Land Title Act and the Land Act make minor changes to provisions that were drafted in terms appropriate for paper documents, to ensure these provisions can also apply to digital documents, for example relating to the form of instruments, signing of instruments and what constitutes a 'copy' of an instrument lodged digitally.</p> <p>The amendments make no change to the fundamental operation of the LTA or the Land Act or to how the titling system operates in Queensland for freehold or non-freehold land.</p> <p>(ii) Participating jurisdictions need to work together to achieve as much consistency as is feasible in the national framework for e-conveyancing.</p> <p style="text-align: center;"><b>Department's response</b></p> <p>The ECNL provides the consistent national framework required for national e-conveyancing to operate in the participating jurisdictions and is the result of collaboration between the jurisdictions over a number of years. National e-conveyancing relates essentially to the lodgement of documents required to make changes to the land titles registers. It does not relate to more substantive matters about how the registers are maintained or to paper-based transactions, which will continue in the current manner in each jurisdiction. Through ARNECC, Queensland and the other jurisdictions are working towards more harmonisation of registry practices in the future, however this is a long-term project and not directly relevant to the matters dealt with in the Bill.</p> <p>(iii) Concern about the meaning of s 9(3)(b) of the ECNL and its interaction with s 11 of the Land Title Act as proposed to be amended by clause 33 of the bill. The main concern appears to be that s 11, as proposed to be amended, could be interpreted in such a way as to require a mortgage document to be signed by the mortgagor in all cases, notwithstanding the operation of s 9(3)(b) of the ECNL. The ABA suggests two alternative ways in which the amendment should be drafted, including in a similar way to the proposals for amendment of titling legislation in Western Australia.</p> <p style="text-align: center;"><b>Department's response</b></p> <p>Section 9(3)(b) of the ECNL was drafted by the Australasian Parliamentary Counsels' Committee on instructions from all the participating jurisdictions and achieves the intended objective. The submitter's concern about a possibly different interpretation from what was intended is</p>

Clause/section	Submitter	Key Points raised / Response provided by Department of Natural Resources and Mines
		<p>not shared by Parliamentary Counsel or the jurisdictions.</p> <p>Section 9(3)(b) of the ECNL must be read together with other relevant provisions, in particular ECNL sections 7, 8, 23 and 26. Section 7 provides that a document may be lodged through an electronic lodgement network if it is in a form approved by the registrar. Section 8 requires the registrar to process any such electronically lodged document in accordance with the land titles legislation and section 9 provides that an instrument digitally signed in accordance with the participation rules applicable to that instrument is taken to have satisfied the requirements of any other law of the jurisdiction relating to signing etc. The participation rules (ss 23 and 26) will set out rules for each type of document, including certifications required from the subscriber lodging the document.</p> <p>Also, Land Title Act s 11 (as proposed to be amended by clause 33) must be read in light of the ECNL provisions referred to above and the new LTA s 14C to be inserted by clause 37. Section 14C states that, if the Land Title Act provides for a document to be signed or executed and the document is an electronic conveyancing document (that is, it is to be lodged through an electronic lodgement network), it must be digitally signed as provided for under the ECNL.</p> <p>(iv) Concern about the National Credit Code prohibition - a mortgagee is not permitted to sign a mortgage on behalf of a mortgagor</p> <p><b>Department's response</b></p> <p>There is no intention for a mortgagee to sign an e-conveyancing mortgage on behalf of a mortgagor. A mortgagee will digitally sign only for themselves. Where a mortgagor is not represented by a subscriber, the participation rules require appropriate certifications to be given by a mortgagee to confirm compliance with rules about the verification of the mortgagor's identity and the signing of an equivalent paper mortgage document by the mortgagor, to be held by the mortgagee.</p> <p>(v) Concern about provisions not detailing what is required for mortgages</p> <p><b>Department's response</b></p> <p>For Queensland, it has been decided that it is not appropriate to detail in the legislation specific requirements for mortgages, in the manner suggested by the submitter. The legislation is intended to apply to <u>all</u> documents, with specifics about the form, certifications and signing of different types of documents to be detailed in the participation rules. In this way, the legislation will be appropriate to facilitate additional transaction types and other future developments in e-conveyancing into the future, without the need for amendment. Any changes in detail will be incorporated in amended participation rules.</p> <p>(vi) Seeking consistent changes to State and Territory laws to allow the mortgagor to electronically execute a mortgage counterpart with the mortgagee electronically executing its own counterpart version of the mortgage document for registration purposes</p> <p><b>Department's response</b></p> <p>The submission indicates a misunderstanding of the extent to which the jurisdictions need uniformity in their legislation for national e-conveyancing. Consistent registry practices do not necessarily require uniform legislation. A fundamental premise of jurisdictions' participation in national e-conveyancing is that the land titling laws continue in effect and will be administered by their States under existing legislation. Although all States have a land register based on the principles of the Torrens system, there are many differences in detail of legislation between the jurisdictions and of how the titling systems operate. Nevertheless, as referred to previously, the amendments in the Bill will accommodate a range of future developments.</p>

Clause/section	Submitter	Key Points raised / Response provided by Department of Natural Resources and Mines
Clause 44 Amendment of s157 (Rejecting instrument for failure to comply with requisition)	Queensland Law Society (Sub No.1)	<p><i>The Society considers that there should be facility to allow electronic documents to be relogged as it will assist with efficiency and reduce any further unnecessary delay. However if this clause is to remain, the Society recommends that the Bill be made clear that if an electronic document cannot be relogged parties can lodge a paper instrument instead. (Submission 1, p.3)</i></p> <p><b>Departmental response</b></p> <p>The context of this comment is as follows:</p> <ul style="list-style-type: none"> <li>• For any document lodged under the LTA, the registrar of titles may issue a requisition if there is some deficiency in the document or some other matter (for example, lodgement of a caveat) which prevents the document being registered.</li> <li>• If the lodger fails to comply with the requisition within the time specified, the document may be rejected.</li> <li>• A rejected document which was prepared in paper may be re-lodged.</li> <li>• The amendments provide that a rejected e-conveyancing document cannot be re-lodged.</li> </ul> <p>As there will be no paper document to re-lodge, there is no way of re-lodging a document in e-conveyancing. A paper 'rendering' of the digital document will be produced if a requisition is issued for an e-conveyancing document, however this will not be in a form suitable to be executed and lodged in the same way as a paper document. It will be, in effect, a physical token linking to a digitally lodged document. The paper rendering cannot be used in lieu of a rejected digital document, as it will not satisfy the requirements for lodgement, for example, the digital signing of the rejected document does not 'transfer' or apply to a paper document.</p> <p>The digital data comprising the lodged and rejected document cannot be 'taken out' of the register and sent back into the subscriber's e-conveyancing workspace to be changed and re-lodged.</p> <p>Subscribers will be able to create, digitally sign and lodge a new digital document to effect the same conveyancing transaction that a rejected document related to. Alternatively, a new paper document in the proper form can be prepared, executed and lodged. No change is needed to the LTA to allow this.</p> <p>It is expected that the requisition rate for e-conveyancing documents will be very low as there will be pre-population of data into the document from the register, title activity checks at regular intervals from the time the document is created and a lodgement verification check a short time before the document is lodged. This means there will be greater accuracy in document preparation and parties will be aware of any change to the title that may impact on the registrability of the document, such as a change in a registered owner or lodgement of a caveat.</p> <p>It is expected there will be very few requisitions issued for e-conveyancing documents, and it follows that there will be even fewer documents rejected.</p>
Clause 46 Amendment of s 161 (Execution and proof)	Queensland Law Society (Sub No.1)	<p><i>The Society considers that instead of an explanatory note, the differentiation between signing paper and electronic documents should be set out as a provision, as has been the case with other sections in the Bill. (Submission 1, p.3)</i></p> <p><b>Departmental response</b></p> <p>Where a change relates to matters solely provided for in the LTA, the relevant section has been amended to state what will be the requirement or process for e-conveyancing documents.</p> <p>Where a change is a fundamental matter provided for in the national law, the provision is not repeated in the LTA, as the national law will be law in Queensland. This is why it is only provided as a note and does not need to be set out in a provision.</p> <p>It is noted that the Bill amends the LTA to insert a new s 14C as follows –</p> <p style="text-align: center;"><b>'14C Signing or executing an electronic conveyancing document</b></p>

Clause/section	Submitter	Key Points raised / Response provided by Department of Natural Resources and Mines
<p>Clause 47 Amendment of s 164 (Dispensing with production of instrument)</p>	<p>Queensland Law Society (Sub No.1)</p>	<p><i>If this Act provides for a document to be signed or executed and the document is an electronic conveyancing document, the document must be digitally signed as provided for under the Electronic Conveyancing National Law (Queensland).'</i></p> <p><i>The Society considers this subsection, which appears to be aimed at facilitating the phasing out of Certificates of Title when held by mortgagees, is too broad and not specifically necessary for e conveyancing. The Society recommends that this subsection be excluded from the Act until its impact can be properly assessed. (Submission 1, p.3)</i></p> <p><b>Departmental response</b></p> <p>Under the LTA, if a certificate of title exists for a lot, it must be returned to the registry for cancellation in order for an instrument for the lot to be registered.</p> <p>After registration of the instrument, the certificate of title is no longer current and cannot be used for any purpose relating to the land.</p> <p>Section 164 provides a number of exemptions from the requirement to return a certificate of title.</p> <p>A certificate of title cannot be issued for a lot unless any registered mortgagee consents to this (and the certificate of title is invariably held by the mortgagee until the mortgage is released).</p> <p>This amendment is directed at facilitating e-conveyancing as it will allow a registered mortgagee to lodge a document (for example, a release of mortgage) without having to physically return a certificate of title to the registry, that is, it will allow a fully electronic transaction in cases where this would otherwise not be possible.</p> <p>The submission expresses concern that this amendment could allow dealings with the land without the consent of the registered mortgagee; however this misinterprets the intent of the provision. The registrar's practices for dispensing with certificates of title are rigorous and the provision would only be used at the request of the registered mortgagee. It is envisaged that most requests would be made when the mortgagee wishes to lodge a release of its mortgage through e-conveyancing.</p> <p>In Queensland only about 16% of titles have paper certificates of title issued and 21% of these are held by mortgagees. This further exemption has been included following feedback from stakeholders and has been assessed as having no impact on the rights of the registered owner or any other person with an interest in the land.</p>
<p><b>Comments on the Electronic Conveyancing National Law (included as 'Editor's Notes at the back of the Bill)</b></p>		
<p>ECNL s 3 (Definitions) Definition of "digital signature"</p>	<p>Queensland Law Society (Sub No.1)</p>	<p>The QLS shares the Law Council of Australia's concerns regarding the definition of "digital signature".</p> <p><i>The term 'digital signature' is defined in the ECNL as:</i></p> <p><i>digital signature means encrypted electronic data intended for the exclusive use of a particular person as a means of identifying that person as the sender of an electronic communication or the signer of a document.</i></p> <p><i>In Public Key Infrastructure a person has a pair of linked mathematical keys, one made public and one kept private. A document encrypted by the use of one key can only be decrypted successfully by use of the other key. A person digitally signs a document by encrypting it with their private key. The receiver of the document can then decrypt that document only by using the sender's public key. In doing so the receiver can be assured that it was the sender (as the only person who knows their private key) who encrypted the document The concern of the Law Council and the Society is that the key definition of 'digital signature' in the ECNL does not correctly reflect this process which is to be used in the electronic conveyancing system and is fundamental to the legislative framework.</i></p>

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		<p><i>At this stage there may be little opportunity to amend the ECNL, but it would be desirable if a clarification of this key definition could be progressed by Government prior to electronic conveyancing coming into operation in Queensland. (Submission 1, p.2).</i></p> <p><b>Departmental response</b></p> <p>The comments relate to s 3 of the national law which defines certain terms used in the national law. The Law Council of Australia raised this issue during consultation on the national law.</p> <p>The definition of digital signature in the national law is appropriate for the purpose of that law. A national electronic conveyancing system, to be called Property Exchange Australia (PEXA), is currently being developed by National Electronic Conveyancing Development Limited. It is intended that digital signatures for documents created in PEXA will be of a certain type which is administered under a Public Key Infrastructure and is described in the QLS submission.</p> <p>However, for the national law, the definition needs to be technology-neutral and should not refer to one type of digital signature. It is possible that a different type of digital signature, for example, a biometric signature, will be used in a future electronic lodgement network.</p> <p>Any detailed requirements for digital signatures applying from time to time will be included in the operating requirements and/or participation rules made by the registrar of titles in each jurisdiction pursuant to the national law. The draft versions of the operating requirements and participation rules which have been circulated for public consultation include this type of detail for the type of digital signature to be used in the PEXA system.</p>
<p>ECNL s 3 (Definitions) no definition of 'digitally sign'</p>	<p>Queensland Law Society (Sub No.1)</p>	<p><i>There does not appear to be a definition of "digitally sign" in the Land Title Act 1994(LTA). The Society therefore considers that a definition specifically referring to the national definition should be in the LTA to ensure clarity and consistency. (Submission 1, p.3).</i></p> <p><b>Departmental response</b></p> <p>A definition of 'digitally sign' is not required as the only use of that term in the LTA will be in expressions clearly referring to digital signing under the national law, for example 'through a subscriber digitally signing the instrument under the Electronic Conveyancing National Law (Queensland) - s 11A(2A) as amended. Other provisions referring to digitally signing in a similar way include s 11B, s 14C, note to s 161, s 185.</p> <p>The LTA, as proposed to be amended, will provide that electronic conveyancing documents signed in accordance with the national law will satisfy the requirements of the LTA.</p>
<p>ECNL s 9 (Status of electronic registry instruments) - 9(3)(b)</p>	<p>Australian Bankers' Association (Sub No.2)</p>	<p>The ABA's supplementary submission raises a number of matters: (i), (ii), (iii), (iv), (v) and (vi)</p> <p>(i) Concern that amendments to the Land Title Act and the Land Act were not the subject of prior consultation</p> <p><b>Department's response</b></p> <p>The primary purpose of the Bill is to apply the ECNL as a law of Queensland. This is provided in clause 4, with the text of the ECNL included in the Bill as an Editor's Note. Amendments to the Land Act and LTA included in the Bill are minor and the nature of many of these amendments was determined by the provisions of the ECNL. The amendments to the Land Title Act and the Land Act were drafted by the Office of Queensland Parliamentary Counsel in a manner to ensure that the ECNL would interact effectively with the Queensland legislation providing for land titling matters.</p> <p>Extensive consultation on the ECNL was undertaken at a national level by the Australian Registrars' National Electronic Conveyancing</p>

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		<p>Council (ARNECC) and also directly with stakeholders, including the ABA. The department has previously provided details of this consultation to the Committee.</p> <p>Most amendments to the Land Title Act and the Land Act make minor changes to provisions that were drafted in terms appropriate for paper documents, to ensure these provisions can also apply to digital documents, for example relating to the form of instruments, signing of instruments and what constitutes a 'copy' of an instrument lodged digitally.</p> <p>The amendments make no change to the fundamental operation of the LTA or the Land Act or to how the titling system operates in Queensland for freehold or non-freehold land.</p> <p>(ii) Participating jurisdictions need to work together to achieve as much consistency as is feasible in the national framework for e-conveyancing.</p> <p><b>Department's response</b></p> <p>The ECNL provides the consistent national framework required for national e-conveyancing to operate in the participating jurisdictions and is the result of collaboration between the jurisdictions over a number of years. National e-conveyancing relates essentially to the lodgement of documents required to make changes to the land titles registers. It does not relate to more substantive matters about how the registers are maintained or to paper-based transactions, which will continue in the current manner in each jurisdiction. Through ARNECC, Queensland and the other jurisdictions are working towards more harmonisation of registry practices in the future, however this is a long-term project and not directly relevant to the matters dealt with in the Bill.</p> <p>(iii) Concern about the meaning of s 9(3)(b) of the ECNL and its interaction with s 11 of the Land Title Act as proposed to be amended by clause 33 of the bill. The main concern appears to be that s 11, as proposed to be amended, could be interpreted in such a way as to require a mortgage document to be signed by the mortgagor in all cases, notwithstanding the operation of s 9(3)(b) of the ECNL. The ABA suggests two alternative ways in which the amendment should be drafted, including in a similar way to the proposals for amendment of titling legislation in Western Australia.</p> <p><b>Department's response</b></p> <p>Section 9(3)(b) of the ECNL was drafted by the Australasian Parliamentary Counsels' Committee on instructions from all the participating jurisdictions and achieves the intended objective. The submitter's concern about a possibly different interpretation from what was intended is not shared by Parliamentary Counsel or the jurisdictions.</p> <p>Section 9(3)(b) of the ECNL must be read together with other relevant provisions, in particular ECNL sections 7, 8, 23 and 26. Section 7 provides that a document may be lodged through an electronic lodgement network if it is in a form approved by the registrar. Section 8 requires the registrar to process any such electronically lodged document in accordance with the land titles legislation and section 9 provides that an instrument digitally signed in accordance with the participation rules applicable to that instrument is taken to have satisfied the requirements of any other law of the jurisdiction relating to signing etc. The participation rules (ss 23 and 26) will set out rules for each type of document, including certifications required from the subscriber lodging the document.</p> <p>Also, Land Title Act s 11 (as proposed to be amended by clause 33) must be read in light of the ECNL provisions referred to above and the new LTA s 14C to be inserted by clause 37. Section 14C states that, if the Land Title Act provides for a document to be signed or executed and the document is an electronic conveyancing document (that is, it is to be lodged through an electronic lodgement network), it must be digitally signed as provided for under the ECNL.</p> <p>(iv) Concern about the National Credit Code prohibition - a mortgagee is not permitted to sign a mortgage on behalf of a mortgagor</p> <p><b>Department's response</b></p>

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		<p>There is no intention for a mortgagee to sign an e-conveyancing mortgage on behalf of a mortgagor. A mortgagee will digitally sign only for themselves. Where a mortgagor is not represented by a subscriber, the participation rules require appropriate certifications to be given by a mortgagee to confirm compliance with rules about the verification of the mortgagor's identity and the signing of an equivalent paper mortgage document by the mortgagor, to be held by the mortgagee.</p> <p>(v) Concern about provisions not detailing what is required for mortgages</p> <p><b>Department's response</b></p> <p>For Queensland, it has been decided that it is not appropriate to detail in the legislation specific requirements for mortgages, in the manner suggested by the submitter. The legislation is intended to apply to all documents, with specifics about the form, certifications and signing of different types of documents to be detailed in the participation rules. In this way, the legislation will be appropriate to facilitate additional transaction types and other future developments in e-conveyancing into the future, without the need for amendment. Any changes in detail will be incorporated in amended participation rules.</p> <p>(vi) Seeking consistent changes to State and Territory laws to allow the mortgagor to electronically execute a mortgage counterpart with the mortgagee electronically executing its own counterpart version of the mortgage document for registration purposes</p> <p><b>Department's response</b></p> <p>The submission indicates a misunderstanding of the extent to which the jurisdictions need uniformity in their legislation for national e-conveyancing. Consistent registry practices do not necessarily require uniform legislation. A fundamental premise of jurisdictions' participation in national e-conveyancing is that the land titling laws continue in effect and will be administered by their States under existing legislation. Although all States have a land register based on the principles of the Torrens system, there are many differences in detail of legislation between the jurisdictions and of how the titling systems operate. Nevertheless, as referred to previously, the amendments in the Bill will accommodate a range of future developments.</p>
<p>ECNL s 12 Reliance on, and repudiation of, digital signatures</p>	<p>Queensland Law Society (Sub No.1)</p>	<p>The QLS raise concerns regarding the process to repudiate an electronic signature.</p> <p><i>The Society remains concerned that the process to repudiate an electronic signature in section 12(4) of the ECNL is unduly onerous. The Society notes that even when a digital signature is created fraudulently a subscriber will be liable for its use unless the subscriber can establish:</i></p> <ul style="list-style-type: none"> <li>• <i>The subscriber did not create the digital signature</i></li> <li>• <i>The digital signature was not created by an employee of or with the authority of the subscriber</i></li> <li>• <i>That the subscriber's employees, agents and officers at all times complied with the participation rules and took reasonable care.</i> (Submission 1, p.2).</li> </ul> <p><i>...The issue, as far as the Society sees it, is striking the right balance between properly promoting confidence in the use of the system and not unfairly imposing liability on a subscriber for events (including frauds) over which they had no knowledge or control. The Society is uncertain whether the result of the drafting of section 12 has reached that balance.</i> (Submission 1, p.2).</p> <p><b>Departmental response</b></p> <ul style="list-style-type: none"> <li>• Subscribers to an electronic lodgement network will digitally sign e-conveyancing documents.</li> <li>• A subscriber's digital signature created for an e-conveyancing document can only be repudiated in more limited circumstances than a person's 'wet' signature could be.</li> </ul>

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		<ul style="list-style-type: none"> <li>● In particular, a subscriber cannot repudiate a digital signature –                             <ol style="list-style-type: none"> <li>1. Created by an employee, agent or officer of the subscriber who had the subscriber's express or implied authority to create digital signatures on behalf of the subscriber (for any purpose, not necessarily for the relevant e-conveyancing transactions). This differs from common law where an employer's vicarious liability for actions of their employees does not extend to matters outside their ostensible authority.</li> <li>2. Created by any person who did not have authority to create digital signatures on behalf of the subscriber, if they were able to sign because of a failure by the subscriber (or their employees, contractors, agents or officers) to comply with the Participation Rules or to take reasonable care.</li> </ol> </li> </ul> <p>The relevant provision is s 12 of the national law which contains the 'attribution rule' for digital signatures in e-conveyancing. That is, it sets out the circumstances in which a digital signature can be relied on as the signature of a subscriber:</p> <ul style="list-style-type: none"> <li>● A subscriber is bound by their digital signature unless they can repudiate it under s 12.</li> <li>● 'Repudiation' means the subscriber, in effect, 'disowns' their digital signature for a particular e-conveyancing document and will not then be bound by it, in the same way that a person would not be bound by their apparent signature on a paper document if they establish that 'signature' is a forgery.</li> <li>● The attribution rule for digital signatures in s 12 has been modified from the original draft national law, following stakeholder feedback. The attribution rule as originally drafted provided for no possibility of repudiating a digital signature where it was created by an employee, agent, contractor or officer of the subscriber.</li> </ul> <p>Paper conveyancing documents are required to be signed <u>personally</u> by the person dealing with an interest in land or by a person who holds their power of attorney. However, in e-conveyancing, a representative subscriber (solicitor) will be able to sign documents on their client's behalf, if authorised in accordance with the participation rules.</p> <p>E-conveyancing transactions will therefore be undertaken in a different, fully electronic environment, with documents digitally signed by subscribers to be lodged directly into the freehold land register. This register is kept under the Torrens system of registered title and is backed by a State guarantee, with reliance on the integrity and security of the register an essential element.</p> <p>The policy position is that the common law rules applying to signatures on paper documents are not adequate in this environment to achieve the level of security and confidence required for conveyancing transactions. Therefore the national law places responsibility on subscribers for matters within their control, including the authorisation of employees and contractors to use digital signatures and compliance with rules for the use of e-conveyancing. This will ensure that e-conveyancing transactions can be relied on with the high level of confidence required for the continued effective functioning of Queensland's land titling system.</p> <p>The strong attribution rule included in the national law is consistent with the policy agreed by Queensland and the other jurisdictions participating in national e-conveyancing to ensure that parties transacting through e-conveyancing can rely on digitally signed documents created in the system.</p>



