

E-CONVEYANCING SANS FRONTIERES

THE DEVELOPMENT OF AN ELECTRONIC CONVEYANCING SYSTEM FOR AUSTRALIA

By

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The development of electronic conveyancing in Australia cannot be understood without an understanding of some of the issues that make Australian property law unique. These issues are:

- the way in which Australia was settled
- the resultant governing structure
- the place of registration of land records (the Torrens system)
- the practice of face-to-face settlements
- stamp duty collection on the sale of real property involving 8 different revenue collectors and the ability of state taxes to become a charge on the land and defeat the Register

Whilst Australia may appear from afar to be one united country (as we are) we are also a federation of states with a unique government structure arising from our European beginnings as colonies of England.

European settlement in Australia commenced in 1776 with NSW becoming a colony of Britain and was governed by British law. Tasmania was the next colony settled. Victoria commenced as part of the colony of NSW and later became an independent colony. Eventually six separate colonies became the nation of Australia. The Commonwealth of Australia commenced on 1 January 1901 after much work and negotiation by the fathers of Federation.

The powers of the Commonwealth of Australia derive from British legislation – the *Commonwealth of Australia Constitution Act 1900* (Britain). As a result of the process of settlement, the laws of the various colonies and the Commonwealth are based in common law with all colonies developing their own laws. The Constitution gave specific powers to the Commonwealth as well as non-exclusive powers which it shares with the States. In the absence of Commonwealth laws the state laws applied. Land issues were considered to be State matters and so land registration issues in Australia are the preserve of the states and territories.

The title of this paper reflects that in Australia the development of a national electronic conveyancing system requires agreement of 8 separate jurisdictions (two territories were added later), each with their own governments, laws, budgets, bureaucracies, taxing powers and stakeholders.

Another difficulty in the Australian environment was the view of the state governments that the sale of land offered an opportunity to raise revenue. Stamp duty is payable on all sales of property in Australia with ad valorem duty rates

varying from jurisdiction to jurisdiction. Unpaid stamp duty and local rates are allowed as a charge on the title of the property and, as such, have an impact on the supremacy of the Register. The need to deal with the requirements of eight different taxing regimes adds a further complication in the process of implementing a national electronic conveyancing system.

The Torrens System

As noted by Bradbrook, MacCallum and Moore¹ the Australian approach to land holding was based on the need to develop the land to settle and stabilize the country. This view, together with the approach to settling South Australia, gave fertile ground for the development of the Torrens System of land registration by Robert Richard Torrens, the first Registrar-General of South Australia.

Bradbrook, MacCallum and Moore² argue that the Torrens system gives Australian real property law a unique approach with fundamental differences from British law – “The essence of Australian real property law is the Torrens System. This system should be seen as changing the nature of interests in land. The system is one where title to land is derived from registration – it is a system of title by registration and not one of registration of title.”³

South Australia was settled as a free colony and in a more ordered fashion than the colonies of the eastern states. The British Government sent surveyor Colonel William Light to Australia on 4 February 1836 and gave him two months to decide on an appropriate place for a settlement and survey the land before settlers arrived. Under the Wakefield scheme land was sold to settlers at a fixed minimum price and the money raised was used to bring labourers to the colony to work.⁴

Robert Richard Torrens arrived in Adelaide in 1840 as Collector of Customs. He held this post for 13 years and during that time developed a strong dislike of the system of land registration in existence noting it was “ingenious juggling replacing the old oppression of the feudal system with the new tyranny of lawyers.”⁵

Torrens was elected to parliament in 1857 and by 1858 the *Real Property Act* 1858 (SA) was passed. Section 10 of the Act states “The objects of this Act are to simplify the title to land and to facilitate dealing therewith, and to secure indefeasibility of title to all registered proprietors.”⁶

Gradually the Torrens System was adopted by each jurisdiction but with differences of interpretation and application in each jurisdiction. Each has evolved in a slightly different way. The processes of conveying property in each jurisdiction are similar. Differences exist in each Land Registry’s requirements and practices and in the regulation of service providers, such as conveyancers and lawyers. As was noted “ ...

¹ Australian Real Property Law Thomson Lawbook Co 3rd edition 2002 p15

² Ibid p1

³ Ibid p1

⁴ www.landservices.sa.gov.au

⁵ Torrens, R R *The South Australian System of Conveyancing by Registration of Title* (1859)

⁶ *Real Property Act* 1858 (SA) s10

the states continue to frame statutes about real property matters with a diversity which can only be described as perverse”⁷

What Happens Next?

After 330 years of the inherited requirement from England for property transactions to be in writing⁸ and almost 150 years of the Torrens System and its manual systems of document processing, the challenge was how to make the next major change in conveyancing practice.

From the early 1980s jurisdictions have been converting their manual title records to electronic systems. Late in the 1980s some jurisdictions introduced remote electronic searches of their electronic title records. From the early 1990s there were proposals for a fully electronic process to prepare and lodge instruments affecting title records. Through the 1990s, deregulation of financial markets and increasing competition in the mortgage industry together with development of the internet, electronic payment systems and electronic commerce generally led to interest in a more convenient and efficient way of completing property conveyances. With the new century, it was only a matter of when electronic conveyancing would be come a reality and how it would be achieved.

Internationally work was being carried out in Canada, New Zealand and the United Kingdom on electronic conveyancing systems. In Australia, the Australian Registrars of Land Titles commenced deliberations and public consultation was undertaken in several jurisdictions, including the involvement of the major banks in a pilot program in Victoria. All this work confirmed the view that an electronic business environment for the property conveyancing and mortgage financing industry must be national and include all jurisdictions to justify the investment needed to develop such a system.

Whilst having noted the differences in each jurisdiction of their land registration systems, the reality is that the fundamental processes in each jurisdiction have much in common. The challenge has become how to develop a national system that can accommodate the differences between the jurisdictions and provide for electronic settlement as well as lodgment.

The National Approach

The impact of the housing market on the Australian economy is very significant. Total real property sales in Australia are approximately 26% of gross domestic product with \$AU214 billion exchanged between parties in 2004-2005⁹. Housing represents 60% of household wealth and is the most significant single item of household expenditure. Sixty-five percent of Australians either fully own their homes or are purchasing them.¹⁰

⁷ "Australian Real Property Law" Bradbrook MacCallum Moore Lawbook Co 2002

⁸ Statute of Frauds 1677 first required property transactions to be in writing.

⁹ Real Estate Institute of Australia 2006, *Australian Property Market Indicators 2004/05*

¹⁰ Australian Bureau of Statistics 2006 Census Quick Stats:Australia

The importance of conveyancing to the economy and the advent of major technological change have made it inevitable that electronic conveyancing was the way of the future. The introduction of commercial multi-lateral clearing systems and their accommodation by the inter-bank settlement systems operated by the Reserve Bank of Australia has paved the way for electronic financial settlement of property transactions.

Australia has a tradition of face-to-face property settlements where representatives of the parties meet at an appointed time and place to exchange cheques for title documents. Cost implications for a change to this practice alone are significant.

Victoria, Queensland and NSW commenced work towards separate systems for electronic conveyancing. However, there is a growing trend in jurisdiction governments for harmonization of processes across the whole of Australia. There is also a move towards a national approach to issues, such as progress towards national recognition of legal qualifications and the issue of a national practising certificate. Banks and large legal firms operate nationally.

The four major banks in Australia made a submission to the NSW Government in 2004 and stated that:

"The Banks operate their businesses on a national basis. The introduction and increasing use by the Banks of information technology and outsourcing functions (such as mortgage processing) means that a national approach to electronic settlement and conveyancing is inevitable...., the Banks' support of a move to an electronic conveyancing system is predicated on the introduction of an effectively operationally seamless national system. If the introduction of electronic conveyancing and settlement results in 7 different, operationally inconsistent, systems, then the Banks (or national businesses) would not favour the move to an electronic environment on that basis.

The interaction between the Banks (and other users) and the electronic system needs to be governed by a standardised national process which clearly defines the entry and exit points. This interaction needs to fully incorporate bank to bank automation using common data standards, processing standards, messaging standards and system interfaces.

A national approach to electronic conveyancing would allow the Banks to operate their businesses across the various jurisdictions in a seamless way and avoiding double handling costs and the need to enter data more than once."¹¹

It was also seen from the experience of other countries that it was considered imperative to involve major stakeholders from the outset.

As a result of these factors a National Steering Committee (NSC) was established with a commitment to define provision and implement a National Electronic Conveyancing System (NECS). The NSC has representatives of all key stakeholder groups – government land administrations, bankers, lawyers, conveyancers, collectors of duties and taxes, law stationers and information brokers. It meets four

¹¹ Australian Bankers' Association Submission to the Department of Lands NSW Public Consultation Process 2004

times a year. The Independent Chair is Mr. Les Taylor, former chief solicitor for the Commonwealth Bank of Australia.

In August 2005 the National Electronic Conveyancing Office (NECO) was established to manage the project and the former Registrar-General of South Australia, Simon Libbis, engaged as its Executive Director.

What NECS is and what NECS is not

NECS will provide for:

- Settlement of property transactions by preparing documents and exchanging settlement monies including disbursements
- Lodgment of instruments with the Land Registry for registration
- Fulfilling associated duty and tax obligations

NECS will not cover the whole of the conveyancing process including:

- Vendor disclosures prior to sale
- Preparation and exchange of contracts of sale
- Pre-settlement investigations by the purchaser
- Loan documentation
- Processes for examining and registering instruments once lodged with a Land Registry

Many legal practitioners, conveyancers, mortgage processors and banks already have electronic systems for preparing their instruments and settlement statements. But these in-house or proprietary systems are not connected to any of the Land Registries and cannot verify that an instrument is compatible with the relevant title records and likely to be accepted for registration. With a connection to each of the Land Registries through a system such as NECS, the preparation of the legal instruments necessary to change title registration records will be more reliable and more certain to avoid having to be augmented or corrected later after lodgment.

Currently NECS is planning to provide the minimum set of instruments at the initial stages. For settlement these instruments are discharge of mortgage, new mortgage, transfer and removal of caveat recording. For lodgment where there is no settlement involved the additional documents proposed are change of proprietor name, proprietor death recording, transmission or survivorship, settlement or priority notice recording and caveat or writ recording.

The Process

The Roadmap Documents are the documents which define the national electronic conveyancing system. They consist of a National Business Model (NBM), National Implementation Strategy (NIS), National Governance Arrangements (NGA) and the National Operations Description (NOD). The NBM outlines the implementation of a national facility for the electronic settlement of property transactions and the electronic lodgment of associated real property instruments anywhere in Australia.

It is the computer system known as NECS which is the basis of the NBM. These documents are available on the website <http://www.necs.gov.au>.

Given the cross jurisdictional issues in Australia the NBM provides for the NECS to be constructed from:

- National components applicable to all users in all jurisdictions
- Jurisdiction-specific components applicable only to users in a specific jurisdiction.

Implementation of this approach requires each jurisdiction to specify, test and certify its jurisdiction-specific component and for the NECS to develop or acquire and commission each jurisdiction's requirement as well as specifying, developing or acquiring, testing and commissioning the national components.

The project has been designed in four stages:

- Set-Up – establishing national governance, confirming National Business Model, developing a funding model and detailed implementation planning
- Building NECS – specifying, provisioning, testing and commissioning NECS
- Readying the jurisdictions – legislative, policy and practice changes in each jurisdiction
- Converting users – educating, training and supporting users in each jurisdiction

Currently the project is finalising the set-up stage having been engaged in an extensive consultation process, including the commissioning of independent assessments of risk, regulation and governance.

With a project of this size and national significance it was considered important to engage with the widest possible diversity of industry and government opinion on electronic conveyancing. With this aim in mind NECO developed a multi-faceted approach to consultation. It has involved:

- A newsletter called *NECSpress* launched in January 2006 with 21 issues published to date.
- Information sessions held in all jurisdictions.
- Publication of a National Operations Description
- Activation of an online discussion forum
- Open industry forums held around Australia
- Receipt of formal feedback from industry and government stakeholders.

It is a challenge in Australia to deal with our differences. When we speak of industry stakeholders in Australia we have the same complication that we have when talking of multiple jurisdictions. Whilst there is a move towards national uniformity in regulation, stakeholders such as lawyers and conveyancers are regulated on a jurisdiction basis and hold professional indemnity insurance on a jurisdictional basis.

A crucial part of dealing with our differences is to involve all the jurisdictions in the planning process. State Project Teams (SPT) have been organized within each

jurisdiction. A State Project Team made up of representatives from each jurisdiction meet regularly to resolve cross-jurisdictional issues. The role of the SPT is to facilitate jurisdictional readiness for NECS. Given that each jurisdiction has its own set of forms and procedures, one of the key issues for the SPT is to develop consistent documentation and practices for such issues as client authorities and certification. The SPTs are invaluable in providing feedback and input into the development of the National Business Model and associated documents.

We are about to start on the development of participation rules, settlement rules and the legal framework for NECS.

The development process will commence with the findings from the independent consultancies on risk and regulation¹² and use these to assist in the development of a statement of principles, consultation with industry groups to validate the principles and develop further detail and further refinement until proposals can be put to the NSC for endorsement.

Governance

Our interim governance arrangement is that of the National Steering Committee which meets once every 3 months. This structure is in place whilst the set-up process is being undertaken. We are planning from the top down with the NBM at the base and using consultation and jurisdiction input to test the model and further refine it. The NBM is an evolving document.

When we move into the building stage of NECS, the independent consultancy on governance¹³ has recommended that NECS should be a body corporate owned by the jurisdiction governments.

The recommendations included:

- Equal shareholdings among the jurisdiction governments
- A skills-based board of directors responsible for the management and operation of NECS
- Six board committees of directors, industry representatives and independent advisers
- Resourcing of NECS services through a comprehensive outsourcing contract secured by competitive tender.

This will, again, be challenging to get agreement of all jurisdiction governments.

Funding Issues

The benefits of an electronic business environment for conveyancing will initially go to those who will use it every day – the industry practitioners and mortgage lenders – but ultimately to the consumers of their services. The industry is characterised by well developed competition for both professional services and financing that will

¹² Published at www.necs.gov.au

¹³ At www.necs.gov.au

inevitably transfer the benefits of a more efficient way of working to the vendors and purchasers of property. An efficiency improvement of just 10% has been estimated to save consumers and the economy \$150 million per annum¹⁴.

These efficiencies will come from the savings that will accrue from having systems available that immediately check the accuracy of prepared documents, not having to obtain bank cheques, not having to arrange and attend settlements, not having to physically deliver documents to the Land Registry, and having the monies from property sales available for other purposes days earlier than at present. Solicitors, conveyancers and mortgage lenders will retain some of these efficiency gains but competition will force the major part to flow through to consumers.

It is intended that NECS be self-sustaining from fees charged. In the early stages, however, it will need capital injection.

A Funding Model is being developed with various proposals for the initial capital investment. Ideally funding would come from the jurisdictions and it is hoped that the Australian Government may provide funding. The Funding Model being developed is based on assumptions regarding market size, take up rates of jurisdictions and industry users, transaction volumes, costs of service delivery, funding required to provision the system and support it in the early stages. The Funding Model has not yet been released or made available for public comment.

The costs of establishing NECS on behalf of all the stakeholders are:

- National costs to benefit all users
- Jurisdiction costs that benefit the users in each jurisdiction
- Industry costs that benefit particular users only.

One of the most critical factors that will influence the assumptions of the Funding Model is the take up rates of the jurisdictions. This, once again, highlights the importance of being able to move all the jurisdictions in the same direction.

Common Data Standards

As this project is required to deal across eight jurisdictions a NEC Data Standard (NECDS) for all electronic communications between the NECS and stakeholders is a key feature of the NBM. The standard will provide a common format for data transfers and will ensure systems can talk to each other reliably without any system needing to know how any other system handles the data. It will also ensure that any changes to one system do not require matching changes to any other system.

NECO has entered into an agreement with LIXI Ltd¹⁵ to facilitate the development of national electronic conveyancing data standards.

LIXI Ltd is a non-profit, independent industry organisation established to develop e-commerce standards and remove barriers to electronic data exchange within the

¹⁴ National Governance Arrangements published at www.necs.gov.au (2006, page 5)

¹⁵ www.lixi.org.au

Australian lending industry. As a not for profit company LIXI is not allowed to make a profit and it operates as a facilitator to assist parties to develop its own standards. Its membership consists of 80% of Australia's mortgage lenders including all the major banks. It operates by membership and all members have equal voting rights on matters affecting the company such as its membership rules. Under the agreement each jurisdiction can become a member of LIXI in its own right.

A unique aspect of the NECS agreement with LIXI Ltd is positioning of a management group between the LIXI Board and the working group. The NECS Data Standards Management Group consists of 10 members – two from LIXI, one from NECO and seven appointed by NECO on the advice of the jurisdictions.

The role of the NECS DS Management Group is to control and define the project. It approves the draft requirements documentation and draft standards for official publication as final requirements and final standards. The LIXI Board formally adopts any standards developed on the recommendation of the Management Group.

Conclusion

This paper highlights the challenges facing the National Electronic Conveyancing Office in implementing a national system. We have to deal with eight legal systems applying to land registration, eight duty systems and stakeholders regulated on a state and territory basis.

We have started with the premise that NECS is a system for the industry and not just the jurisdictions. With this in mind, our approach has been to engage with jurisdictions and stakeholders from the outset, to develop the project from a high level model and gradually add further layers of detail through extensive consultation and get sign off at every stage of the project.

Bringing NECS to fruition will depend very much on the continued collaboration of all stakeholders. Keeping up the momentum of the project while managing the myriad of relationships on which its success relies often involves walking a very fine line.