2 December 2021

Law Council
OF AUSTRALIA

Office of the President

Ms Jenny Cottnam
Chair
Australian Registrars' National
Electronic Conveyancing Council
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By email: chair@arnecc.gov.au

Dear Ms Cottnam

MODEL OPERATING REQUIREMENTS – CONSULTATION DRAFT 7.1

Thank you for the opportunity to provide a submission to the Australian Registrars' National Electronic Conveyancing Council (**ARNECC**) regarding Consultation Draft 7 of the Model Operating Requirements (**MORs**).

The Law Council is grateful for the assistance of its National Electronic Conveyancing System (**NECS**) Committee and the Law Society of New South Wales in the preparation of this submission.

In the Law Council's view, some of the amendments made in this revised version of the MORs adopt a restricted concept of interoperability, limited to the titling and registration aspects of the conveyancing process. For interoperability to be appropriately regulated, the Law Council submits that this narrow focus is not appropriate. The regulatory framework should effectively provide for the completion of the whole of a conveyancing transaction, including 'associated financial transactions', by interoperable Electronic Lodgment Network Operators (**ELNOs**).

Please find below detailed comments on the MORs and some additional comments regarding financial settlement.

MOR 2.1 - Definitions

Interoperability Service Fees

The Law Council is pleased to see that the term 'Interoperable Service Fee' has been replaced with the term 'Interoperability Service Fees'. However, the narrow drafting of the below definition of 'Interoperability Service Fees' is of concern:

> **Interoperability Service Fees** means fees charged, directly or indirectly, by an ELNO to another ELNO or to a Subscriber in relation to:
>
> (a) establishing and maintaining Interoperability with the other ELNO; and
>
> (b) carrying out the functions of the Responsible ELNO.

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As currently drafted, the definition does not appear to capture a fee charged by a 'Participating ELNO' for its participation in an interoperable transaction. The Law Council suggests that a more comprehensive definition is required, particularly as ARNECC has now prohibited Interoperability Service Fees to Subscribers in MOR 5.4.7 (which is supported by the Law Council).

Responsible ELNO

In response to the Law Council's suggestion that the MORs contain provisions regarding the way in which the Responsible ELNO is determined in a transaction, ARNECC has stated that it considers this unnecessary, as the National Electronic Conveyancing Interoperability Data Standard (**NECIDS**) sets out the roles of each ELNO. Additionally, MOR 10.3.2 requires compliance by the ELNOs with the NECIDS. However, the degree to which the NECIDS will be accessible to, and meaningful for, subscribers is unknown. In the Law Council's view, information about which ELNO is the Responsible ELNO in an interoperable transaction should be transparent and predictable for all parties to a workspace, not merely the ELNOs. The Law Council therefore maintains its position that provisions regarding the determination of the Responsible ELNO should be located in the MORs. Perhaps a Schedule to the MORs would be a reasonable mechanism to ensure more transparency of the allocation rules for determining the Responsible ELNO.

The Law Council notes that ARNECC has indicated that it will consider providing more information on the roles of the Responsible ELNO and Participating ELNO in the MOR Guidance Notes. As Guidance Notes are provided to assist compliance only, and are subservient to the MORs, the Law Council submits that this material should be located in the MORs.

Interoperable Conveyancing Transaction and Participating ELNO

The Feedback Table at item 91 states that the term 'Interoperable Conveyancing Transaction' has been removed from the MORs. The Law Council notes that this term was used in a number of the definitions in version 7 of the MORs. The Law Council prefers the use of the term 'Interoperable Conveyancing Transaction' as it connotes both the titling and financial aspects of settlement, whereas the alternative term that has been used, 'Interoperable Electronic Workspace', appears to focus only on the titling aspects of settlement by referring to the 'Lodgment Case' and, through use of the defined term 'Electronic Workspace', to the narrowly defined 'ELN'.

The definition of 'Participating ELNO' proposed in version 7.1 overlooks the Participating ELNO's involvement in financial settlement by providing the following more limited definition:

> **Participating ELNO** means an ELNO involved in an Interoperable Electronic Workspace that is not the Responsible ELNO. (emphasis added)

The Law Council submits that the definition of 'Interoperable Conveyancing Transaction' should be reinstated and that 'Participating ENLO' be defined in accordance with version 7, that is:

> **Participating ELNO** means an ELNO involved in an Interoperable Conveyancing Transaction that is not the Responsible ELNO. (emphasis added)

If the Law Council's suggestion to use the version 7 definition of 'Participating ELNO' is not adopted, the definition of 'Participating ELNO' should be reworked to acknowledge the Participating ELNO's involvement in any 'Associated Financial Transaction' in an 'Interoperable Electronic Workspace'. The definition of Responsible ELNO contains reference to both the titling and financial aspects of settlement and the definition of 'Participating ELNO' should be similarly broad. Further, MOR 5.8.2 specifically refers to the role of the Participating ELNO in relation to 'any Associated Financial Transaction'.

MOR 5.7 – Interoperability framework

Interoperability Agreements between ELNOs

The Law Council remains of the view that the content of Interoperability Agreements between ELNOs should be minimised and, wherever possible, provisions should be located in the MORs, providing transparency and confidence for all stakeholders, and benefit to any potential entrant to the ELNO market. Some operational matters may need to be included in Interoperability Agreements but matters impacting upon subscribers and their clients should not be left to negotiation between the ELNOs.

The Law Council continues to oppose the relegation of Claims Management to be dealt with in the Interoperability Agreement. The description of this topic in the Schedule 8 list of topics is:

> A process for the timely and equitable management of **Subscriber, Client and third-party claims** arising in relation to Interoperability, including obligations on Interoperating ELNOs to:
>
> (a) Promptly and cooperatively investigate and resolve claims; and
>
> (b) share information where reasonably required. (emphasis added)

In the Law Council's view, provisions regarding Claims Management should be located in the MORs rather than in bilateral agreement(s) between the ELNOs. Subscribers, Clients and other third parties, such as financial institutions, will be impacted by the Claims Management process, yet they will not be a party to enforce that process if it is articulated in an Interoperability Agreement.

For the limited matters that are appropriate to include in an Interoperability Agreement, standard provisions should be adopted where possible. The Law Council recommends that the MORs should mandate the language of standard provisions.

In addition to the above, for transparency, Interoperability Agreements should be publicly available. The Law Council supports new MOR 5.7.3(a) which requires an ELNO to promptly publish on its website a copy of the Interoperability Agreement, with any agreed 'commercially sensitive information redacted'. ARNECC should play a supervisory role to ensure that publication is prompt and the level of redaction appropriate.

Revised Schedule 8, which prescribes the matters to be included in an Interoperability Agreement, includes this new topic:

Training resources and information	A process for the provision and communication of any training resources and information necessary to inform Subscribers of both Responsible ELNOs and Participating ELNOs about differences in service offering, business rules and user experience between an Interoperable Electronic Workspace and an Electronic Workspace conducted on a single ELN.

The Law Council welcomes the provision of this information to Subscribers, but queries whether this information should be included in the Interoperability Agreement.

MOR 5.8 – Interoperability roles

Consistent with the above, the Law Council suggests that MOR 5.8.1, which describes the role of the Responsible ELNO, should be expanded to specifically include the completion of any Associated Financial Transaction, consistent with the (revised) definition of 'Responsible ELNO', and fundamental to the concept of the Responsible ELNO.

Additional comments – Financial settlement

The Law Council submits that there are two aspects of financial settlement that require further attention in relation to the regulatory framework for interoperability.

First, the MORs should include obligations for the digital signing of financial line items. Currently, MOR 7.6.2(a) relates only to the use of Digital Certificates in the ELN which, by definition in section 13 of the *Electronic Conveyancing National Law* (**ECNL**), excludes the part of the ELNO System used to conduct Associated Financial Transactions. In the absence of specific obligations, the digital signing of financial line items emerged in the current single ELNO environment as a practical solution to the parties' need for a means of reliance in a 'closed loop' system, but in an interoperable environment, this should be regulated. This 'gap' in the expanded reliance regime under section 12 of the ECNL must be addressed in a multi ELNO environment. Of course, the absence of a signed line item relating to financial settlement makes the changes to section 12 of the ECNL to include financial settlement in the reliance regime irrelevant – there will be no signature to rely upon.

Secondly, the various trust accounting requirements of solicitors and conveyancers across participating jurisdictions need to be further examined in relation to the information that solicitors and conveyancers will need in an interoperable transaction to satisfy the record keeping requirements for a trust account. For example, in New South Wales, under rule 43(4)(d) of the *Legal Profession Uniform General Rules 2015* (NSW), solicitors are required to keep written records of all electronic funds transfers from a trust account, which includes the name and number of the account to which the amount was transferred and relevant BSB number. In the single ELNO environment, the particulars of the clearing accounts for each financial institution at which a law practice operates a trust account are published, enabling compliance with trust account record requirements. However, in an interoperable environment, questions arise as to how the relevant information will be ascertained and whether a more rigorous approach is needed in a multi-ELNO environment. For example,

should each ELNO be compelled to publish the particulars for all its clearing accounts to assist compliance with trust account regulation? The Law Council would welcome further discussion of these issues. Certainly there must not be *any* risk that practitioner subscribers will be non-complaint with their trust account obligations by participating in an interoperable transaction.

Contact

Please contact John Farrell, Senior Policy Lawyer, on (02) 6246 3714 or at john.farrell@lawcouncil.asn.au, in the first instance, should you require further information or clarification.

Yours sincerely



Dr Jacoba Brasch QC
President