



Law Council
OF AUSTRALIA

Office of the President

11 August 2021

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

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, Law Institute of Victoria, Law Society of South Australia and Queensland Law Society in the preparation of this submission.

Please find below the Law Council's general comments in relation to Consultation Draft 7.

Please also find at **Attachment A**, a table based on the Explanatory Notes document issued by ARNECC to accompany Consultation Draft 7 with a column added to include the Law Council's specific comments on each item.

General Comments

Timeline

The Law Council notes that the target date for interoperability across all documents and jurisdictions that support electronic conveyancing is now 31 December 2022 (as opposed to the previous target of 31 December 2021).

The Law Council agrees that this period of additional time is necessary for certain aspects of the regime. For example, jurisdictions which are yet to mandate eConveyancing, may require additional time. However, the Law Council believes that much of the system (in particular, those transactions already being conducted by PEXA in high volume in at least the Eastern states) could be operational at an earlier date (preferably by 31 March 2022).

Review of Changes to the Electronic Conveyancing National Law

The Law Council understands that stakeholders will not be provided an opportunity to comment on the proposed changes to the Electronic Conveyancing National Law (**ECNL**) before they are approved by all participating jurisdictions in Q3 2021. This is a critical component of the ongoing work to implement interoperability effectively and the Law Council strongly recommends that the proposed changes or, at the least, the drafting instructions, be the subject of consultation in time for our input to be taken into account before the proposed changes are committed.

The Law Council is broadly supportive of the proposed changes to the MORs to support interoperability. However, the Law Council notes that stakeholders are yet to receive detail on key matters referred to in the revised MORs, such as the definition of 'Interoperability'. The Law Council reserves comments on these matters until it has had the opportunity to review the proposed reforms to the ECNL.

Role of the Interoperability Agreement

As a general principle, the Law Council considers it preferable to minimise the content of the Interoperability Agreement and wherever possible locate provisions in the ECNL or, at the very least, the MORs, providing transparency and confidence for all stakeholders. There are numerous public interest aspects to the mandated content items that make it self-evident that they should be imposed by law.

In reviewing the draft MORs, the Law Council is concerned that a number of important aspects of the interoperability framework will be located in the Interoperability Agreement, with the MORs providing little detail on prescribed minimum requirements. These include key issues for practitioners and clients such as privacy, claims management and liability.

The Law Council is concerned that if key elements such as privacy, claims management and liability are left to be matters for commercial negotiation between the Electronic Lodgment Network Operators (**ELNOs**), any agreed arrangement may not sufficiently protect consumers and subscribers and will only focus on rights as between ELNOs. Private ELNOs cannot be left to negotiate the extent to which the public interest is to be protected. For example, the proposed mandatory provision on privacy contemplates the ELNOs will protect their Subscribers' information and not seek to use each other's Subscriber information. That cannot be left to negotiation between private companies. In the Law Council's view underlying public policy elements need to be embedded in statutorily binding terms. In relation to privacy, for example, the ECNL could mandate compliance with the *Privacy Act 1988* (Cth) for ELNOs, whether or not they are over the turnover threshold in the Privacy Act itself.

The possibility of a service fee for Interoperability

The Law Council notes that amendment to paragraph 5.4 of the MORs would permit an ELNO, in addition to charging a fee for using the electronic platform, to also charge an 'Interoperable Service Fee'. If there is to be such a fee, which the Law Council opposes in principle, it is more appropriate for the defined term to be 'Interoperability Service Fees' rather than 'Interoperable Service Fees'.

The Law Council notes its concern that subscribers, and ultimately their clients, should not incur yet another fee in consequence of a conveyancing transaction. In the Law Council's view, such a result would not be acceptable, given the concept of interoperability is meant to bring about a seamless transaction notwithstanding subscribers elect to transact through

an ELNO of their choosing. ARNECC should deny ELNOs any opportunity to introduce new fees ultimately payable by the public.

Perhaps what might be envisaged is that the ELNOs must agree between themselves as to the manner in which the electronic platform lodgement fee is to be shared between them. There may be scope to agree that the Responsible ELNO will take a greater share of the fee in recognition of the fact that it is responsible to lodge the documents and payout the funds and the Participating ELNO is not. However, in the Law Council's view this is misconceived. In any given transaction the incremental cost of performing the role of Responsible ELNO compared to Participating ELNO is negligible. It is to be noted that every Participating ELNO is required to be ready to assume the role of Responsible ELNO at short notice. For this reason all ELNOs have to incur the cost of provisioning for that contingency. From a capital cost point of view all ELNOs therefore incur the same costs regardless of the role they perform in any given transaction. It follows in our view that the cost of such provisioning should be included in the standard fee charged to Subscribers and not be the subject of any supplementary charges. In practical terms, because the Responsible ELNO does not incur any greater costs than a Participating ELNO, there is no logical basis for there to be any Interoperable Service Fees (however described).

Bearing in mind the present dominance of one ELNO, careful regulation will be needed to ensure that the charging of Interoperable Service Fees (however described) does not (inadvertently or deliberately) result in an emerging ELNO being financially disadvantaged by incumbent ELNO(s).

The Law Council looks forward to commenting on any additional requirements and/or restrictions that may become available.

Reliance Regime

A reliance regime of the kind preferred by the Law Council cannot be dealt with by cursory amendment to section 12 of the ECNL. This regime should be included in a new substantive part of the ECNL. Additionally, in the Law Council's view, consideration of the new financial settlement models being explored by the banks does not need to delay codifying the current PEXA/Sympli interoperability arrangements. It is vital that stakeholders be consulted before the draft changes to the ECNL are adopted by participating jurisdictions. If this is not done the practical affect is to preclude stakeholder input because of the low likelihood of suggested changes being the subject of reconsideration by each participating jurisdiction (or the relevant Ministerial Council). The Law Council strongly recommends that the proposed reliance regime be the subject of consultation immediately – before instructions are provided to the drafting jurisdiction and committed to by other jurisdictions.

Dispute Resolution

The proposal that a failure to reach an agreement be referred to mediation is unlikely to be effective. Additionally, arbitration in these circumstances is not suitable as the arbitrator is constrained to apply existing rules and laws which, almost by definition, will not exist in relation to the subject matter. Therefore, the Law Council recommends that the appropriate escalation path where two ELNOs have been unable to reach agreement is for the issue to be referred for expert determination by a determiner with eConveyancing infrastructure knowledge and regulatory experience.

Digital Signing Certificates

Currently, PEXA issues a proprietary digital certificate while Sympli issues a universal gatekeeper certificate. A subscriber should be free to change service providers, or should there be a need to do so, use the services of more than one provider, by means of a single digital signing certificate. Each ELNO should recognise each other ELNO's Subscriber's valid digital signing certificate. In the Law Council's view this should also be included in the ECNL and is not something to be left to a bilateral negotiation between two ELNOs.

Integration of other online systems with the interoperable eConveyancing environment

The Law Council notes that there a small number of online systems related to property transactions which are not integrated into the eConveyancing environment. As an example, the Law Council notes the issue of Not in Common Ownership' (**NICO**) and the use of the Surveying and Planning through Electronic Applications and Referrals (**SPEAR**) online system.

In Victoria subdivision changes boundaries not ownership. A boundary change can mean that the resultant lots can be owned by multiple parties as part owners (i.e. NICO). To fix NICO issues, further transfers are required. These transfers should be able to be done on an ELNO platform. However, currently in Victoria a plan of subdivision can be lodged either through SPEAR or as a residual paper transaction. The Law Council understands that it is envisaged that at some time all subdivision applications will go through SPEAR, making NICO more difficult.

Further consideration is required regarding how to address this issue and incorporate such systems so that they can be undertaken on ELNO platforms.

Schedule 7

An additional item unrelated to interoperability identified by a member of the NECS Committee relates to items 7 and 8 of schedule 7. Both provisions refer to '[registered] power of attorney'. Some clarification of what is meant by '[registered]' would be appreciated.

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

Attachment A – Law Council comments on Model Operating Requirements Consultation Draft 7

#	Rule	Amendments	Explanatory Notes (provided by ARNECC)	Law Council Comments
MOR 2.1 – Definitions				
1	2.1	Added definition of Associated Financial Transaction.	Associated Financial Transaction is already defined in the ECNL. The definition has been added to the MOR to assist in setting out the role of the Responsible ELNO (the ELNO who will be responsible for Lodgment of the Interoperable Lodgment Case and completion of any Associated Financial Transaction).	Supported.
2	2.1	Amended definition of Back End Infrastructure Connection to include connections between ELNOs for the purpose of Interoperability.	It is not intended that connections between ELNOs for the purpose of Interoperability are captured by the Integration and separation provisions in the MOR. This is because Interoperability connections are essential to the operation of an ELN.	Supported.
3	2.1	Amended definition of Conveyancing Transaction to include Interoperable Conveyancing Transactions.	Generally, Interoperable Conveyancing Transaction is relevant in the same provisions in the MOR as Conveyancing Transaction, but a separate definition of Interoperable Conveyancing Transaction is also required for some provisions.	Supported.
4	2.1	Removed definition of Data Standard.	The definition of Data Standard has been replaced with definitions of NECDS and NECIDS.	Supported.

#	Rule	Amendments	Explanatory Notes (provided by ARNECC)	Law Council Comments
5	2.1	Added definition of ELNO Requesting Interoperability.	ELNOs will be required to Interoperate under the regulatory regime. The MOR provides a framework for implementing this requirement. ELNOs may make a request to Interoperate with other ELNOs, which will trigger the commencement of negotiations to prepare and execute an Interoperability Agreement. The framework extends to Potential ELNOs who have satisfied Category Two of Schedule 3, who may request to Interoperate with other ELNOs prior to commencing operation in each Jurisdiction. See MOR 5.7.	The request mechanism is supported for new or future ELNOs. However, arrangements to implement interoperability between the two ELNOs currently holding Category Two approval are well advanced and do not need to be initiated. The current ELNOs should be required to interoperate, and therefore should be excluded from the Request regime.
6	2.1	Moved definition of Incident Response Plan.	The definition has been moved to the correct alphabetical placement.	Supported.
7	2.1	Added definition of Interoperability.	The substance of this definition will be housed in the ECNL. Broadly speaking, it is anticipated that Interoperability will be defined in the ECNL as the interworking of ELNs in a way that allows: <ul style="list-style-type: none"> • Subscribers using different ELNs to complete a Conveyancing Transaction; and • the preparation of documents using data from different ELNs. 	The Law Council supports the definition being housed in the ECNL, and the proposed drafting approach in the MOR that 'Interoperability has the meaning given to it in the ECNL.' By way of general comment, the Law Council suggests that the ECNL definition should incorporate financial settlement. If the definition is based on the adjacent Explanatory Note, the first dot point should be expanded to read 'Subscribers using different ELNs to complete a Conveyancing Transaction (including financial settlement) '.
8	2.1	Added definition of Interoperability Agreement.	In addition to the regulatory regime contained in the ECNL and the MOR, the relationship between Interoperable ELNOs will be managed by a contract known as an Interoperability Agreement. The MOR will specify	Please see the comments in the Law Council's covering letter in relation to the content of the Interoperability Agreement and the broader approach taken in relation to the Interoperability Agreement.

#	Rule	Amendments	Explanatory Notes (provided by ARNECC)	Law Council Comments
			certain topics that ELNOs must address in their Interoperability Agreements.	
9	2.1	Added definition of Interoperability Agreement Matters.	Schedule 8 sets out the matters which must be dealt with in an Interoperability Agreement.	Again, please see the comments in the covering letter in relation to the content of the Interoperability Agreement and the broader approach taken in relation to the Interoperability Agreement.
10	2.1	Added definition of Interoperable Conveyancing Transaction.	This definition extends the existing definition of Conveyancing Transaction to Conveyancing Transactions conducted by means of Interoperability.	Supported, subject to reviewing the definition of 'Interoperability'.
11	2.1	Added definition of Interoperable Electronic Workspace.	This definition extends the existing definition of Electronic Workplace to a shared Electronic Workspace containing at least one Interoperable Conveyancing Transaction. Note the possibility of a combination of Lodgment Cases (e.g. one containing a Priority Notice) and Interoperable Lodgment Cases (e.g. one containing a discharge/release, transfer and mortgage) in a single Electronic Workspace.	Supported, subject to reviewing the definition of 'Interoperability'.
12	2.1	Added definition of Interoperable Lodgment Case.	This definition extends the existing definition of Lodgment Case found in the Model Participation Rules (MPR) to a Lodgment Case that contains at least one Interoperable Conveyancing Transaction. Note there may be multiple Conveyancing Transactions in a single Lodgment Case (e.g. a	Supported.

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			discharge/release, transfer and mortgage).	
13	2.1	Added definition of Interoperable Service Fees.	ARNECC is currently determining its policy around Interoperable Service Fees. Additional requirements and/or restrictions may be included in Version 7 of the MOR. Current amendments ensure any fees for Interoperability are equitable, transparent and published in the same way that ELNO Services Fees are. See MOR 5.3(e) and 5.4.	A definition is appropriate. However, the Law Council suggests that it may be more appropriate to describe the defined term as 'Interoperability Service Fees' rather than 'Interoperable Service Fees'. It opposes them in principle for the reasons provided in the Law Council's covering letter.
14	2.1	Amended the definition of Licensed Conveyancer.	This change is not related to the interoperability reform. This definition was amended because: <ul style="list-style-type: none"> • a Licensed Conveyancer is not known as such in every Jurisdiction; • the new wording is consistent with other definitions in the MPR and MOR referring to other legislation; and • of changes to the mutual recognition scheme. 	Supported.
15	2.1	Added definition of Lodgment Case.	For consistency, this definition has been copied across from the MPR. Note there may be multiple Conveyancing Transactions in a single Lodgment Case.	The Law Council supports consistency between the MPR and the MOR. Rather than copying across the definition from the MPR, it may be preferable to incorporate the definition by reference, that is, state that Lodgment Case has the meaning given to it in the MPR.
16	2.1	Added definition of NECDS.	This replaces the generic term Data Standard to refer to the National Electronic Conveyancing Data	Supported.

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			Standard. The NECDS specifies data items and enables communications between ELNOs and Land Registries.	
17	2.1	Added definition of NECIDS.	This replaces the generic term Data Standard to refer to the National Electronic Conveyancing Interoperability Data Standard. The NECIDS will specify data items and enables communication between Interoperable ELNOs.	Supported.
18	2.1	Added definition of Participating ELNO.	<p>The Interoperability framework in the MOR provides for a Responsible ELNO who is the ELNO responsible for Lodgment of the Interoperable Lodgment Case and completion of any Associated Financial Transaction. A Participating ELNO is any other ELNO taking part in an Interoperable Conveyancing Transaction.</p> <p>Some of the roles and responsibilities of the Responsible ELNO and Participating ELNO are covered in the NECIDS, and, for this reason, are not replicated in the MOR.</p>	Supported, noting that the NECIDS has a more comprehensive list of the role and functions of a Participating ELNO.
19	2.1	Amended definition of Pricing Table.	The definition has been expanded to include Interoperable Service Fees. ARNECC is currently determining its policy around Interoperable Service Fees. Additional requirements and/or restrictions may be included in Version 7 of the MOR. Current amendments ensure any fees for Interoperability are equitable, transparent and published in	Noted. As suggested in the Law Council's response to item 13, it would be more appropriate use the term 'Interoperability Service Fees' rather than 'Interoperable Service Fees', but the Law Council is opposed to such fees in principle.

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			the same way the ELNO Services Fees are. See MOR 5.3(e) and 5.4.	
20	2.1	Added definition of Responsible ELNO.	A Responsible ELNO is the ELNO responsible for Lodgment of the Interoperable Lodgment Case and completion of any Associated Financial Transaction.	<p>It is important that there is transparency and predictability in the way the Responsible ELNO is determined in a transaction, particularly as the Responsible ELNO may need to change during the course of a transaction. While this issue could be addressed by a business rule in the NECIDS, the Law Council's preferred approach is the addition of a provision to the MOR to facilitate transparency for all stakeholders and participants.</p> <p>In the Law Council's view, the new provision should recognise that the Responsible ELNO may change during the course of a transaction, and include the following elements:</p> <ul style="list-style-type: none"> • The Responsible ELNO will be the ELNO that hosts the Responsible Subscriber for the Conveyancing Transaction, subject to capacity to carry out the role. • Capacity includes the capability to prepare and lodge all Registry Instruments and to effect all Associated Financial Transactions for the Conveyancing Transaction. • A Responsible ELNO must conduct a capability check following a change to the transaction or the addition of a financial line item to ensure that it continues to be able to carry out that role. • Where the Responsible Subscriber changes and is hosted on a Participating ELN, that ELN will carry out a capability check before requesting to become the Responsible Subscriber.

#	Rule	Amendments	Explanatory Notes (provided by ARNECC)	Law Council Comments
				The Law Council suggests that an appropriate location for such a provision could be in MOR 5.8.
21	2.1	Added definition of Responsible Subscriber.	Added the existing definition of Responsible Subscriber used in the MPR.	Rather than duplicate the MPR definition, Responsible Subscriber should be defined as having the meaning given to it by the MPR.
22	2.1	Removed definition of Settlement Transaction.	For consistency, this definition has been removed in favour of Associated Financial Transaction as defined in the ECNL.	Supported.
MOR 4.4, 4.5 and 4.6 – Financial resources, Technical resources and Organisational Resources				
23	4.4, 4.5, and 4.6	Amended MOR 4.4, 4.5 and 4.6 so that an ELNO must demonstrate sufficient financial, technical and organisational resources to meet its obligations under the ECNL as well as under the MOR.	These provisions were amended to clarify that any requirements set out in the ECNL form part of the obligations in relation to which the ELNO must demonstrate sufficient resources.	Supported.
MOR 4.7 – Insurance				
24	4.7	No amendment.	While no amendment has been made to this MOR, ARNECC may further review the insurance requirements in Schedule 1 in light of Interoperability.	The Law Council notes that no amendment has been made in this version. The Law Council supports the foreshadowed review of the insurance requirements in Schedule 1 in light of Interoperability, particularly as the requirements have remained largely unchanged since 2013.
MOR 5.2 – Minimum system and electronic Registry Instrument and other electronic Document capability				
25	5.2.1	Moved the qualification regarding reasonable staging in accordance with the ELNO's Business Plan to MOR 5.2.4.	The qualification will now apply to MOR 5.2.1, 5.2.2 and 5.2.3.	The Law Council supports moving the qualification to MOR 5.2.4 and the addition of MOR 5.2.2 and MOR 5.2.3.

#	Rule	Amendments	Explanatory Notes (provided by ARNECC)	Law Council Comments
				However, the Law Council queries whether the words 'by 31 December 2022' in MOR 5.2.2(a) should instead apply to MOR 5.2.2 and 5.2.3.
26	5.2.2	<p>Added a requirement that any ELNO that has obtained Approval prior to the MOR Version 7 effective date must ensure that it releases Interoperable Registry Instruments and other electronic Documents:</p> <p>(a) under MOR 5.2.1(b), by 31 December 2022; and</p> <p>(b) under MOR 5.2.1(c), as they are released, if they have a receiving Party and a relinquishing Party or are capable of forming part of a Lodgment Case containing more than one electronic Registry Instrument or other electronic Document.</p>	<p>To achieve the benefits of competition amongst ELNOs for all participants, including Subscribers and their Clients, ARNECC considers that work to implement Interoperability should commence as soon as possible.</p> <p>The documents listed under MOR 5.2.1(b) are considered priority documents as they represent the highest volume of Lodgments in most jurisdictions. ELNOs that have obtained Approval will be required to prioritise implementation of Interoperability with respect to these documents and implement them by 31 December 2022.</p> <p>It is also important that documents that involve a receiving Party and a relinquishing Party, and documents that are capable of forming part of a Lodgment Case containing more than one document, are capable of forming part of an Interoperable Lodgment Case or Interoperable Electronic Workspace. Otherwise, Subscribers will have to resort to registering with multiple ELNOs and would have to agree with other parties on which ELNO to use. This is not ARNECC's intention. ELNOs that have obtained Approval will be required to ensure that these documents are Interoperable as they are released.</p>	<p>Supported.</p> <p>The requirement under MOR 5.2.2(b) will be of particular relevance to transactions where a lease is to be registered by the vendor/transferee before the property is transferred to the transferee.</p>

#	Rule	Amendments	Explanatory Notes (provided by ARNECC)	Law Council Comments
27	5.2.3	<p>Added a requirement that any ELNO that has obtained Approval after the MOR Version 7 effective date must ensure that it releases Interoperable Registry Instruments and other electronic Documents:</p> <p>(a) under MOR 5.2.1(b), as they are released; and</p> <p>(b) under MOR 5.2.1(c), as they are released, if they have a receiving Party and a relinquishing Party or are capable of forming part of a Lodgment Case containing more than one electronic Registry Instrument or other electronic Document.</p>	<p>An ELNO that obtains Approval after the MOR Version 7 effective date may not be in a position to implement Interoperability for the priority documents listed under MOR 5.2.1(b) by 31 December 2022. Instead, it is reasonable to require the ELNO to ensure that any documents released under MOR 5.2.1(b) are capable of being Lodged as part of Interoperable Lodgment Cases or Interoperable Electronic Workspaces as and when they are released.</p> <p>Under Operating Requirement 20.1(a)(viii), the Registrar has the power to suspend or revoke an ELNO's Approval if it fails to meet the timeframes for the release of documents listed under MOR 5.2.1(b).</p> <p>See note above under MOR 5.2.2 regarding the rationale for the inclusion of 5.2.3(b).</p>	Please see response to item 26.
28	5.2.4	<p>Moved the qualification regarding reasonable staging in accordance with the ELNO's Business Plan from MOR 5.2.1 to MOR 5.2.4.</p>	<p>The qualification will now apply to MOR 5.2.1, 5.2.2 and 5.2.3. Reasonable staging in accordance with the ELNO's Business Plan will provide ELNOs with the capacity to effectively plan releases of functionality.</p> <p>It will also provide Registrars with visibility over the ELNO's plans to implement Interoperability.</p>	Supported.

#	Rule	Amendments	Explanatory Notes (provided by ARNECC)	Law Council Comments
MOR 5.4 – ELNO Service Fees				
29	5.4.1, 5.4.2, 5.4.3 and 5.4.5	Addition of Interoperable Service Fees alongside ELNO Service Fees as fees that may be charged in accordance with an ELNO's equitable, transparent and published pricing policy.	ARNECC is currently determining its policy around Interoperable Service Fees. Additional requirements and/or restrictions may be included in Version 7 of the MOR.	Please also see comments provided in the Law Council's covering letter. The Law Council is opposed to Interoperable fees in principle.
MOR 5.6 – Separation				
30	5.6.2(b)(v)	Addition of Interoperability to the list of items the ELN business unit must have control over and responsibility for.	MOR 5.6.2(b) requires that, where an ELNO is supplying a Downstream or Upstream Service and implements functional separation, certain functions must remain with the ELN business unit. Interoperability has been added to this list because Interoperability connections are essential to the operation of an ELN.	Supported.
MOR 5.7 – Interoperability framework				
31	5.7.1	Added a requirement that an ELNO or Potential ELNO that complies with Operating Requirement 15.4(b) publish on its website details of the process for any ELNO Requesting Interoperability to make a request to Interoperate.	This requirement will provide transparency and information to ELNOs Requesting Interoperability about how to commence the process of requesting Interoperability with another ELNO.	Supported.

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32	5.7.2	<p>Added a requirement for an ELNO or Potential ELNO that complies with Operating Requirement 15.4(b) to:</p> <p>(a) Promptly enter into good faith negotiations with the ELNO Requesting Interoperability; and</p> <p>(b) take all steps reasonably necessary to implement Interoperability with the ELNO Requesting Interoperability; and</p> <p>(c) ensure the Interoperability Agreement entered into with each ELNO or Potential ELNO is on the same basis.</p>	<p>Negotiation in good faith is a phrase used and considered in Australian common law. It requires that the ELNO make an honest and genuine attempt at coming to an agreement. All steps reasonably necessary to implement Interoperability includes all technical work required to implement Interoperability. ELNOs will not be permitted to offer one Interoperable ELNO more favourable terms than another.</p>	Supported.
33	5.7.3	<p>Added the requirement that the Interoperability Agreement must:</p> <p>(a) not include any express or implied terms that could affect the ELNO's compliance with any of its obligations under the ECNL and the Operating Requirements; and</p> <p>(b) include terms that deal with the Interoperability Agreement Matters, which are listed in Schedule 8 of the MOR.</p>	<p>The requirement that the Interoperability Agreement not include terms that could affect the ELNO's compliance with its obligations under the MOR clarifies the position that the MOR takes precedence over the Interoperability Agreement.</p> <p>There are some matters which ARNECC considers must be provided for in the Interoperability Agreement. See Schedule 8.</p>	The Law Council is not supportive of Interoperability Agreements in principle – see cover letter.
34	5.7.4	<p>Added a process to resolve disputes between the ELNO or the Potential ELNO that complies with Operating Requirement 15.4(b) and the ELNO Requesting Interoperability where they are unable to agree on the terms of the Interoperability</p>	<p>There may be instances where the ELNO or the Potential ELNO that complies with Operating Requirement 15.4(b) and the ELNO Requesting Interoperability fail to come to an agreement on the terms of an Interoperability Agreement. MOR 5.7.4</p>	Supported if Interoperability Agreements are to be maintained, but query whether referral to mediation is likely to be effective. Additionally, arbitration in these circumstances is not suitable as the arbitrator is constrained to apply existing rules and laws which, almost by definition, will not exist in relation to the subject matter.

#	Rule	Amendments	Explanatory Notes (provided by ARNECC)	Law Council Comments
		<p>Agreement and have not agreed to a binding dispute resolution process. The process includes the ELNO, Potential ELNO or the ELNO Requesting Interoperability:</p> <ul style="list-style-type: none"> (a) providing notice in writing detailing the particulars of the disagreement and requesting mediation; and (b) attempting to agree on a mediator, and if they cannot agree within 20 Business Days after the issuing of the notice, to request the chair of the Resolution Institute, or designated representative, to appoint a mediator; and (c) being represented by a Person having authority to settle the dispute; and (d) participating in the mediation process in good faith and complying with any rules and procedures determined by the mediator; and (e) meeting their own costs of and in connection with mediation, irrespective of the outcome. 	<p>sets out a process for resolving disputes between them at the pre-contractual stage to assist them in coming to an agreement.</p> <p>The timeframe and notice requirements ensure that the process is efficient in that it requires issues for determination to be particularised. It provides certainty about when they should take the next step; that is, to request that the chair of the Resolution Institute appoint a mediator.</p> <p>The Resolution Institute is a dispute resolution membership organisation operating in Australia and New Zealand. Providing the mechanism of referring selection of the mediator to the chair of the Resolution Institute ensures that the dispute resolution process can continue in an efficient manner.</p> <p>The other requirements in MOR 5.7.4, such as the requirement that the ELNO or Potential ELNO and ELNO Requesting Interoperability be represented by a Person having authority, also provide confidence that the issues can be settled efficiently.</p> <p>Mediation is one form of dispute resolution and would enable the ELNO or Potential ELNO and ELNO Requesting Interoperability to discuss their issues and find areas of agreement. The mediator generally has no authority to make binding decisions. Mediation is generally a more efficient</p>	<p>A further option for an appropriate escalation path where two ELNOs have been unable to reach agreement is for the issue to be referred for expert determination by a determiner with eConveyancing infrastructure knowledge and regulatory experience.</p>

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			<p>process than litigation and has the added benefit of keeping commercially sensitive or security matters between ELNOs confidential.</p> <p>ARNECC is currently considering whether to include arbitration provisions under MOR 5.7 and Schedule 8 as an additional step in the dispute resolution process. ARNECC invites stakeholder comment on this issue.</p>	
35	5.7.5	<p>Added a requirement that the ELNO must Interoperate with all ELNOs on the same basis and ensure the standard of performance of its ELN in the course of Interoperable Conveyancing Transactions is equivalent to the performance of its ELN in the course of Conveyancing Transactions conducted solely on its ELN.</p>	<p>The purpose of MOR 5.7.5 is to address the concern commonly expressed in interconnection regimes in other sectors that an existing provider may seek to disadvantage interconnected parties relative to its own business, or relative to other businesses it interconnects with, by offering a discriminatory grade of interconnection.</p> <p>MOR 5.7.5 ensures that Subscribers do not receive a lower level of performance of the ELN in Interoperable Conveyancing Transactions.</p>	Supported.
MOR 5.8 – Interoperability roles				
36	5.8.1	<p>Added the role of the Responsible ELNO, being to:</p> <p>(a) Promptly send and respond to all messages and calls relating to the Interoperable Lodgment</p>	<p>The roles of the Responsible and Participating ELNO are fundamental to the Interoperability model.</p> <p>The main difference between the role of the Responsible ELNO and that of the Participating ELNO is that the</p>	Supported.

#	Rule	Amendments	Explanatory Notes (provided by ARNECC)	Law Council Comments
		<p>Case or any Associated Financial Transaction; and</p> <p>(b) Lodge all the electronic Registry Instruments or other electronic Documents in the Interoperable Lodgment Case; and</p> <p>(c) Promptly notify all other Participating ELNOs of any Incident that affects the Interoperable Lodgment Case, including the details of the Incident.</p>	<p>Responsible ELNO must Lodge all the electronic Registry Instruments or other electronic Documents in an Interoperable Lodgment Case and perform the Associated Financial Transaction aspect of the transaction. The majority of the functions of the Responsible and Participating ELNOs will be specified in the NECIDS and do not need to be replicated in the MOR. MOR 10.3 includes a general obligation to use and comply with any requirements in the NECIDS.</p> <p>The requirement to notify all participating ELNOs of any Incident that affects an Interoperable Lodgment Case will enable the ELNOs to attempt to prevent further issues where possible, and to effectively deal with the Incident.</p>	
37	5.8.2	<p>Added the role of the Participating ELNO, being to:</p> <p>(a) Promptly send and respond to all messages and calls relating to the Interoperable Lodgment Case or any Associated Financial Transaction; and</p> <p>(b) Promptly notify all other Participating ELNOs of any Incident that affects the Interoperable Lodgment Case, including the details of the Incident.</p>	See MOR 5.8.1.	Supported.

#	Rule	Amendments	Explanatory Notes (provided by ARNECC)	Law Council Comments
MOR 6.2 – Further testing				
38	6.2	Added an obligation to test functionality to implement Interoperability prior to its implementation.	This addition extends the existing requirement to test new functionality to Interoperability.	Supported.
MOR 7.2 – Access to ELN				
39	7.2.1	Added the words ‘it has’ to clarify that the ELNO must ensure that only Subscribers it has registered are able to access and use its ELN.	Where multiple ELNOs exist, a Subscriber may be a Subscriber to only one ELNO, or multiple ELNOs. This amendment has been made to clarify the position that the ELNO is only responsible for ensuring that Subscribers it itself has registered are able to access and use its ELN.	Supported.
MOR 7.3 – Security of ELN				
40	7.3.2	Added a requirement that the ELNO obtain a SOC 2 Type 2 report at least once a year and Promptly take any action required to ensure the ELNO’s controls and processes are effective and rectify any identified weaknesses.	A SOC 2 Type 2 examination is an audit procedure that ensures that an organisation is securely managing data. Given Interoperability involves the exchange of data between ELNs, ARNECC considers that the requirement for each ELNO to obtain a SOC 2 Type 2 report is appropriate. The requirement to Promptly take any action required to ensure the ELNO’s controls and processes are effective and rectify any identified weaknesses is intended to ensure controls remain effective over time and in light of any changes to risks. The measures under	Supported.

#	Rule	Amendments	Explanatory Notes (provided by ARNECC)	Law Council Comments
			7.3.2 will support greater confidence in the system by ELNOs, Registrars, Subscribers, Users and Client.	
MOR 7.4 – Data				
41	7.4.2	Added a new requirement that Data an ELNO receives from another ELNO in an Interoperable Electronic Workspace may only be used for certain narrow purposes.	Existing MOR 7.4.1 limits the ways in which an ELNO may use data from a Land Registry. New MOR 7.4.2 limits the ways in which an ELNO may use data received from another ELNO in an Interoperable Lodgment Case. The aim of this addition is to protect the data sent by Subscribers to their ELNO from inappropriate use by another ELNO.	<p>The Law Council affirms the importance of enhanced privacy protections in an interoperable environment. However, in the Law Council's view this should be included in the ECNL. Please see the covering letter for further information.</p> <p>In the text of the MOR 7.4, the word 'information' rather than 'data' is used. Should MOR 7.4 be maintained in its current form, the Law Council suggests that the word 'data' should be used.</p>
MOR 7.9 – Notification of Jeopardised Conveyancing Transactions				
42	7.9	Added a requirement for an ELNO to notify other ELNOs in an Interoperable Lodgment Case of a Jeopardised Conveyancing Transaction.	This addition extends the existing requirement for ELNOs to notify the Registrar and Subscribers involved in a Jeopardised Conveyancing Transaction to ELNOs involved in such a transaction. This will enable the ELNOs to attempt to prevent further issues where possible, and to effectively deal with the matter.	Supported.

#	Rule	Amendments	Explanatory Notes (provided by ARNECC)	Law Council Comments
MOR 7.10 – Obligations in relation to Notification of Compromised Security Items				
43	7.10(e)	Added a requirement for an ELNO to notify other ELNOs in an Interoperable Lodgment Case where it is notified by a Subscriber of a Compromised Security Item.	This addition extends the existing requirement for ELNOs to notify the Registrar of a Compromised Security Item to ELNOs involved in an Interoperable Lodgment Case that may be affected by the Compromise. This will enable the ELNOs to attempt to prevent further issues or losses where possible, and to effectively deal with the matter.	Supported.
MOR 7.11 – Data Breach Notification				
44	7.11.2(a)	Added a requirement for an ELNO to provide details of Data Breaches with ELNOs it Interoperates with.	This addition extends the existing requirement for ELNOs to notify the Registrar and affected Subscribers of a Data Breach to ELNOs it Interoperates with. This will enable the ELNOs to attempt to prevent further issues where possible, and to effectively deal with the matter.	The concept is supported. However, the Law Council questions why some notifications (e.g. of Compromised Security Items in clause 7.10(e)) are to occur 'immediately', whereas a Data Breach Notification has the timeframe of 'Promptly'.
MOR 7.12 – Cloud Service				
45	7.12.1(e)	Amended the requirement to specify that the Cloud Service Provider is to use the ISO 27001, or, if superseded, comply with the ISO Standard that has superseded it.	This change is not related to the interoperability reform. This amendment has been made for clarification purposes and prevents the potential use of a lesser or less appropriate Standard.	The clarification provided is welcome.
MOR 9.2 – No increased risk of fraud or error				
46	9.2(b)	Added a requirement for an ELNO to use reasonable endeavours to	This addition is an extension of the existing obligation on ELNOs to ensure	The Law Council supports extending the existing obligation.

#	Rule	Amendments	Explanatory Notes (provided by ARNECC)	Law Council Comments
		ensure that the design and implementation of Interoperability between its ELN and another ELN does not result in a greater risk of fraud or error for Interoperable Lodgment Cases compared to the risk of fraud or error for comparable Conveyancing Transactions conducted solely on its own ELN or lodged in a paper medium.	that Lodgment using their ELN does not increase the risk of fraud or error compared to the paper medium. An ELNO must design and implement Interoperability in such a way that it does not increase the risk of fraud or error compared to another type of Conveyancing Transaction. The purpose of this extension is to protect Clients and the integrity of the Titles Register.	In 9.2(b), the words 'Interoperable Conveyancing Transactions' should replace 'Interoperable Lodgment Cases' to maintain consistency with 9.2(a) and the later reference in (b).
MOR 10.3 – Data Standards				
47	10.3.2	Added a requirement for ELNs to use the NECIDS for Interoperable Lodgment Cases and to comply with the business rules and any requirements in the NECIDS.	The NECIDS is the data standard currently being developed to facilitate Interoperability between ELNOs. In addition to enabling data to be exchanged for Interoperable Lodgment Cases, the NECIDS may also contain business rules and other requirements, for example related to security or performance, which the ELNO will be required to comply with.	Supported.
MOR 10.8 – Presentation once Associated Financial Transaction is irrevocable				
48	10.8	Amendment of this provision to use definition Associated Financial Transaction, as defined in the ECNL, instead of Financial Settlement. Minor rewording of this provision.	This is a minor change to adopt the definition of Associated Financial Transaction that is already in the ECNL, and to reflect the fact that only the Responsible ELNO (who undertakes Lodgment with the Land Registry) in an Interoperable Conveyancing Transaction is able to ensure the correct sequencing between settlement and Lodgment.	Supported.

#	Rule	Amendments	Explanatory Notes (provided by ARNECC)	Law Council Comments
			ARNECC is currently determining its policy around requiring Independent Certifications that an ELNO's System is fit for purpose or complies with the relevant industry code in relation to Associated Financial Transactions.	
MOR 10.9 – Presentation following Duty payment or commitment				
49	10.9	Minor rewording of this provision.	This is a minor change to ensure consistency with the wording changes at MOR 10.8.	Noted. (As duty applies to instruments it is probably not appropriate to refer to Lodgment Case, especially as it is the instrument rather than the case that is 'assessed'.)
MOR 10.10 – Land Registry Fees				
50	10.10(a)	Amendment of this provision to provide for the payment of Lodgment Fees in an Interoperable Electronic Workspace.	In an Interoperable Electronic Workspace, it is the ELNO providing the ELN used by the Responsible Subscriber who is responsible for the payment/irrevocable commitment of Lodgment Fees to the Land Registry. Mostly this will be the Responsible ELNO but it may be a Participating ELNO.	<p>The Law Council submits that the responsibility for ensuring that Lodgment Fees are paid should be borne by the Responsible ELNO (which in some cases may not be the ELNO hosting the Responsible Subscriber). As Lodgment Fees must be paid at lodgment, ensuring that they are paid can only be accomplished by the Responsible ELNO. Where a Participating ELNO that represents the Responsible Subscriber is not the Responsible ELNO, it is not in a position to pay the fees separately to the lodgment of the case.</p> <p>MOR 10.10(b) may need to be revised depending on how Information Fees ('LSS fees') are to be charged, i.e. to the Responsible ELNO or to the ELNO that first acquires the LSS package.</p> <p>It may be clearer to rework MOR 10.10 to differentiate between the Responsible ELNO and any Participating ELNO(s), and LSS Fees and Lodgement Fees.</p>

#	Rule	Amendments	Explanatory Notes (provided by ARNECC)	Law Council Comments
MOR 21.2 – Minimum requirements of a Transition Plan				
51	21.2(f)	Inclusion of Interoperability in the list of matters that a Transition Plan must provide for.	ARNECC considers it important that when an ELNO is winding down, the Transition Plan takes into account Interoperable connections with other ELNOs. The purpose is to avoid or minimise the impact of possible disruptions to other ELNOs and their Subscribers.	Supported.
SCHEDULE 3 – Reporting requirements				
52	Schedule 3, Category, Three	Added three new Category Three Self-Certifications in relation to MOR 5.7, 7.3.2 and 10.3.	There is an obligation to self-certify compliance with additional MOR 5.7, 7.3.2 and 10.3 relating to Interoperability.	Supported.
SCHEDULE 8 – Interoperability Agreement Matters				
53	Schedule 8	Added Schedule 8, which lists the matters that must be dealt with in Interoperability Agreements.	<p>The subject matters specified in Schedule 8 are the minimum matters that must be contained within Interoperability Agreements. They have been included because they are essential to the efficient or effective implementation or operation of Interoperability, or because they protect other parties.</p> <p>Schedule 8 does not specify any specific mandatory terms, as these are to be agreed between the ELNO and ELNO Requesting Interoperability. However, it does specify some detail as to the types of matters that must be</p>	Supported.

#	Rule	Amendments	Explanatory Notes (provided by ARNECC)	Law Council Comments
			<p>included. It also requires that terms be drafted in such a way as to achieve a desired outcome (e.g. efficiency or effectiveness).</p> <p>ARNECC is of the view that this level of regulation will achieve the best outcome in the current electronic conveyancing environment.</p>	
54	Assistance	<p>The Interoperability Agreement must include a mutual obligation for ELNOs to provide reasonable assistance to one another to enable each ELNO to comply with the ECNL and the Operating Requirements.</p>	<p>This subject matter is important as an ELNO may require assistance from another ELNO to ensure that its ELN remains secure and operational and to ensure that it can comply with its obligations under the MOR and ECNL.</p> <p>For example, under MOR 7.13, an ELNO must ensure that vulnerability and penetration testing is completed. The ELNO is likely to require assistance from all other Interoperating ELNOs to complete the testing and comply with this requirement.</p> <p>Inclusion of this requirement will also ensure that obligations arising in future versions of the MOR are accounted for under this general clause.</p>	<p>Broadly supported. However, the Law Council suggests that 'reasonable assistance' should be replaced with 'all necessary assistance'.</p>
55	Dispute resolution	<p>The Interoperability Agreement must include a dispute resolution process for resolution of disputes arising under the Interoperability Agreement, including a process for mediation.</p>	<p>A dispute resolution process in the Interoperability Agreement will provide the Interoperating ELNOs with a clear pathway to manage and resolve disputes. The detail of the process will be left to the ELNOs to negotiate.</p> <p>The requirement to include a process for mediation ensures that there is a timely and inexpensive process for</p>	<p>The Law Council supports the inclusion of a dispute resolution mechanism (noting comments against 34 above).</p> <p>However, if mediation is unsuccessful, the Law Council is not convinced that arbitration would provide a better mechanism for resolving the issue than the courts.</p>

#	Rule	Amendments	Explanatory Notes (provided by ARNECC)	Law Council Comments
			<p>involving an independent third party to manage the dispute and assist with its resolution.</p> <p>Also see MOR 5.7 for notes about the benefits of mediation. As noted above, ARNECC is currently considering whether to include arbitration provisions under MOR 5.7 and Schedule 8 as an additional step in the dispute resolution process. ARNECC invites stakeholder comment on this issue.</p>	<p>It is also noted that it is important that there is no disruption to the operation of the ELNOs whilst a dispute is resolved.</p>
56	Claims management	<p>The Interoperability Agreement must include a process for the management of Subscriber, Client and third-party claims arising in relation to Interoperability. This must include obligations to cooperatively investigate and resolve claims and share information where reasonably required.</p>	<p>The main purpose of including claims management as a mandatory subject matter in Interoperability Agreements is to protect Subscribers, Clients and third parties who may be impacted by an issue arising as a result of Interoperability.</p> <p>The extent or detail of the issue may not be known without information sharing and cooperative investigation between the Interoperating ELNOs.</p>	<p>The Law Council notes that this does not appear to encompass the swift compensation of end consumers envisaged by the Nicholls Review, in that the provisions merely flag the ELNOs obligations to investigate co-operatively and share information. It would be helpful if the procedures that follow that investigation could be articulated, including how redress is provided to the end consumer.</p> <p>Please also see comments provided in the covering letter in relation to the Law Council's concerns regarding locating provisions regarding claims management in the Interoperability Agreement. Appropriately, the provisions for claims management specifically relate to claims made by 'Subscribers, Clients and third parties arising in relation to Interoperability'. In the Law Council's view, the provisions must be located in the MORs, not in a bilateral agreement between the ELNOs.</p>

#	Rule	Amendments	Explanatory Notes (provided by ARNECC)	Law Council Comments
57	Change management	The Interoperability Agreement must include a process for the management of changes between Interoperable ELNOs, including implementation of changes related to Interoperability required by another Person, such as a Land Registry, Duty Authority or financial institution (other than in its capacity as a Subscriber).	Changes to an ELN may impact Interoperating ELNOs and their Subscribers. It is therefore important that the Interoperating ELNOs agree on a process for the management of changes.	Supported.
58	Root cause analysis	<p>The Interoperability Agreement must include a process for the identification and rectification of any fault, issue or failure (including an Incident) affecting Interoperability between ELNs or the provision of any Interoperability service between ELNs, including:</p> <p>(a) a mutual obligation for ELNOs to conduct root cause analysis; and</p> <p>(b) the appointment of an independent expert to identify the cause where the ELNOs are unable to do so, and the making and implementation of recommendations for rectification.</p>	<p>The main purpose of including root cause analysis as a mandatory subject matter in Interoperability Agreements is to protect Subscribers, Clients and third parties who may be impacted by an issue arising as a result of Interoperability.</p> <p>An independent expert may provide helpful assistance with carrying out an investigation to determine the root cause of an issue. This is particularly so where there are technical issues that may require specific technical knowledge about the workings of the ELN and may not be understood by a layperson or another dispute resolution authority, such as a mediator.</p>	<p>Supported. However, providing for the root cause analysis does not go far enough unless it is coupled with further mechanisms providing redress for the end user.</p> <p>Please also see the comments in the covering letter which outline the Law Council's concerns regarding locating important matters in the Interoperability Agreement when they should more appropriately be located in the MORs.</p>
59	Testing	The Interoperability Agreement must include a process for the testing of functional and non-functional requirements of Interoperability, including a mutual obligation for the ELNOs to:	MOR 6.2 has been expanded to include a requirement that, before the ELNO implements Interoperability functionality between its ELN and another ELNO's ELN, it must first undertake testing of the new functionality. It follows that it is critical	Supported.

#	Rule	Amendments	Explanatory Notes (provided by ARNECC)	Law Council Comments
		<p>(a) cooperate and provide reasonable assistance to enable each ELNO to comply with its testing obligations; and</p> <p>(b) notify the other Interoperating ELNO of changes or enhancements to its systems that may impact Interoperability; and</p> <p>(c) use reasonable endeavours to meet timelines agreed upon between the ELNOs for the performance and completion of testing.</p>	<p>for the effective implementation of Interoperability that the ELNOs include testing obligations and terms within the Interoperability Agreement.</p> <p>It is important that it be included as a standalone and specific subject matter in addition to the general obligation to provide reasonable assistance.</p> <p>A requirement to notify other Interoperating ELNOs of changes to its systems that may impact Interoperability ensures that other ELNOs are able to accommodate and assess any impacts on their ELN and act accordingly.</p> <p>The obligation on an ELNO to use reasonable endeavours to meet timelines agreed upon between the ELNOs for the performance and completion of testing ensures that ELNOs do not disrupt attempts of ELNOs to implement enhancements. Any such enhancements to functionality are likely to benefit others, such as Land Registries and Subscribers.</p>	
60	Security	<p>The Interoperability Agreement must include a process for the management of security risks that may impact Interoperable Electronic Workspaces, including cyber security risks. The process must specifically address the management of security controls to prevent and detect such risks and</p>	<p>Management of security is an essential component of the electronic conveyancing framework and is a critical inclusion in Interoperability Agreements. The effective management of security risks benefits ELNOs as well as Subscribers and their Clients.</p>	Supported.

#	Rule	Amendments	Explanatory Notes (provided by ARNECC)	Law Council Comments
		the communication between ELNOs where the risk may impact on an Interoperable Electronic Workspace.	<p>Given that the failure of security controls has the potential to impact Interoperable ELNOs, it is essential that Interoperating ELNOs work together to ensure their controls are effectively implemented and are maintained, monitored, reviewed and kept updated. Continuous review and improvement are especially important in the context of cyber security risks, which may have the potential to evolve quickly.</p> <p>The requirement to include a process for communication between ELNOs where the risk may impact on Interoperable Electronic Workspaces also ensures that the eventuation of any risk is able to be mitigated where possible.</p>	
61	Privacy	The Interoperability Agreement must include an acknowledgement by each ELNO that it will comply with the Privacy Laws in relation to any Personal Information sent or received in relation to Interoperable Electronic Workspaces.	Some of the information exchanged between ELNOs will be Personal Information within the meaning of the Privacy Act. A mutual acknowledgement by each ELNO to comply with the Privacy Laws may alleviate any concerns that ELNOs may have in relation to the management of data sent by it to another ELNO, and any concerns Subscribers and Clients may have with respect to the exchange of their Personal Information.	The Law Council affirms the importance of enhanced privacy protections in an interoperable environment. However, in the Law Council's view this should be included in the ECNL. Please see the covering letter for further information.

#	Rule	Amendments	Explanatory Notes (provided by ARNECC)	Law Council Comments
62	Fee sharing	The Interoperability Agreement must include a framework for managing the allocation and sharing of Lodgment Fees between Subscribers in an Interoperable Electronic Workspace and Information Fees between ELNOs in an Interoperable Electronic Workspace.	A specific framework around the allocation and sharing of fees will provide certainty to both ELNOs and Subscribers as to the costs they are liable to pay.	The Law Council supports the establishment of a framework regulating the sharing of Information Fees, but suggests that it is unclear as to what 'sharing' of Lodgment Fees would entail. Lodgment Fees attach to dealings and should be allocated to the Responsible Subscriber.