

7 September 2021

Ms Jenny Cottnam
Chair
Australian Registrars' National
Electronic Conveyancing Council
C/- PO Box 2222
MIDLAND WA 6936



By email: chair@arnecc.gov.au

Dear Ms Cottnam

MODEL PARTICIPATION RULES – 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 Participation Rules (**MPRs**).

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

The Law Council is broadly supportive of the changes made in the Draft MPRs to support interoperability. Please 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. The Law Council generally supports the changes, except where a comment has been included in the table. The Law Council has also added three new rows to the table, labelled 1a, 15a and 25a, with further suggested amendments for consideration by ARNECC.

The Law Council understands that industry stakeholders will soon be provided an opportunity to comment on the proposed changes to the *Electronic Conveyancing National Law (ECNL)*. The Law Council reserves comments on matters related to the revised ECNL until it has had the opportunity to review the proposed changes.

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 Participation Rules- Consultation Draft 7

#	Rule	Amendments	Explanatory Notes (provided by ARNECC)	Law Council Comments
MPR 2.1 – Definitions				
1a.	Associated Financial Transaction			<p>The Law Council suggests the addition of a definition for 'Associated Financial Transaction' along the following lines:</p> <p style="text-align: center;">Associated Financial Transaction has the meaning given to it in the ECNL.</p> <p>This would support our suggested extension of MPR 7.5.1, referred to in item 15a, that Associated Financial Transactions should be digitally signed, to support the proposed extension of section 12 in the Electronic Conveyancing National Law (ECNL).</p>
2.	Conveyancing Transaction	Amended definition of Conveyancing Transaction to include Interoperable Conveyancing Transactions.	<p>Interoperable Conveyancing Transactions are relevant in the same provisions in the MPR as Conveyancing Transactions.</p> <p>The definition in the next draft of Version 7 of the Model Operating Requirements (MOR) will be amended for consistency (i.e. amended to 'may include').</p>	<p>The Law Council supports amending the definition to mirror the definition in the ECNL and agrees that there should be consistency between the Model Operating Requirements (MORs) and the Model Participation Rules (MPRs).</p>
3.	Electronic Workspace	Amended definition of Electronic Workspace to include Interoperable Electronic Workspace.	<p>Interoperable Electronic Workspaces are relevant in the same provisions in the MPR as Electronic Workspaces.</p> <p>The definition in the next draft of Version 7 of the MOR will be amended for consistency.</p>	<p>The Law Council agrees that there should be consistency between the MORs and the MPRs.</p>

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4.	Information Fees	Replaced 'the ELN' with 'an ELN'.	The definition in the next draft of Version 7 of the MOR will be amended for consistency.	The Law Council agrees that there should be consistency between the MORs and the MPRs.
5.	Interoperability	Added definition of Interoperability.	<p>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:</p> <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. <p>This term is only used in the definition of Interoperable Conveyancing Transaction in the MPR.</p>	<p>As noted in our comments on the draft MORs, the Law Council supports the definition being housed in the ECNL.</p> <p>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).'</p> <p>As noted in the covering letter, the Law Council looks forward to the opportunity to make further comments in relation to the draft changes to the ECNL (including the draft ECNL definition of Interoperability).</p>
6.	Interoperable Conveyancing Transaction	Added definition of Interoperable Conveyancing Transaction.	<p>This definition extends the existing definition of Conveyancing Transaction to Conveyancing Transactions conducted by means of Interoperability.</p> <p>This term is used in the MPR in the definitions of Conveyancing Transaction, Interoperable Electronic Workspace and Interoperable Lodgment Case.</p>	Supported, subject to reviewing the definition of Interoperability.
7.	Interoperable Electronic Workspace	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	The Law Council queries whether the word 'shared' is required. Otherwise, this definition is supported subject to reviewing the definition of Interoperability.

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			<p>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.</p> <p>The term is only used in the MPR in the definition of Electronic Workspace.</p> <p>The definition in the next draft of Version 7 of the MOR will be amended for consistency (i.e. addition of the word 'and').</p>	
10.	Lodgment Case	Amended definition of Lodgment Case to include Interoperable Lodgment Case.	Interoperable Lodgment Cases are relevant in the same provisions in the MPR as Lodgment Cases. The definition in the next draft of Version 7 of the MOR will be amended for consistency.	<p>The Law Council largely supports amending the definition as proposed but suggests the following underlined words be added:</p> <p>Interoperable Lodgment Case means an electronic Registry Instrument or other electronic Document or related electronic Registry Instruments or other electronic Documents, at least one of which <u>is for or connected to</u> an Interoperable Conveyancing Transaction, which are <u>is</u> or will be presented for Lodgment at the same time, together with the relevant Lodgment instructions.</p> <p>The Law Council agrees that there should be consistency between the MORs and the MPRs.</p>

#	Rule	Amendments	Explanatory Notes (provided by ARNECC)	Law Council Comments
MPR 7.1 – Protection measures				
13.	7.1(b)	Replaced ‘the ELN’ with ‘any ELN’.	Interoperable ELNs will communicate with each other through input of data and actions taken by Subscribers. The amendment clarifies that the Subscriber’s obligation to take reasonable steps to not do anything that could adversely affect the operation, security, integrity, stability or the overall efficiency of the ELN extends to any ELN, even those ELNs to which it is not a Subscriber. This is an important aspect of ensuring the security of the electronic conveyancing system.	<p>MPR 7.1(b) and 7.1(c) have been amended to clarify that the relevant obligations apply with respect to the Subscriber’s interactions with ‘any’ ELNO.</p> <p>However, clause 7.1(a) has not been amended.</p> <p>The Law Council queries whether MPR 7.1(a) should be amended to provide that the Subscriber must take reasonable steps to comply with the security policy of:</p> <p>‘each ELNO with which it has a current Participation Agreement.’</p>
14.	7.1(c)	Replaced ‘the ELN’ with ‘any ELN’.	The amendment extends the Subscriber’s obligation in MPR 7.1(c) to any ELN. See MPR 7.1(b) for the rationale for this amendment.	
MPR 7.3 – User access				
15.	7.3.2	Expanded the requirement for a Subscriber to have at least one Subscriber Administrator for each ELN provided and operated by an ELNO with which it has a current Participation Agreement.	A Person may be a Subscriber to more than one ELN. There must be a Subscriber Administrator for each ELN a Subscriber is registered with. It may or may not be the same Person.	<p>Law Council suggests that MPR 7.3.1 be amended to provide:</p> <p>The Subscriber must keep up to date <u>within each ELNO with which it has a current Participation Agreement</u>: ...</p>

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MPR 7.5 – Digital Certificates				
15a.	7.5.1			<p>The Law Council suggests that MPR 7.5.1 be expanded, as underlined below:</p> <p>7.5.1 Electronic Registry Instruments and other electronic Documents to be Lodged through an ELN, <u>and any electronic Documents to effect an Associated Financial Transaction,</u> must be Digitally Signed, where the electronic Registry Instrument or other electronic Document requires a Digital Signature, using a Private Key to create the Subscriber’s Digital Signature.</p> <p>Section 12 of the ECNL regards ‘Reliance on, and repudiation of, digital signatures’. It provides that, in certain circumstances, specified parties can rely on the digital signature and it is binding on the parties. However, the current arrangement where the Financial Settlement Statement (FSS) line items are digitally signed is not a regulatory requirement, but merely a practical arrangement that has been voluntarily adopted. In the Law Council’s view, this current arrangement of digitally signing FSS line items must be elevated to a regulatory requirement, to complement the proposed changes to section 12 of the ECNL. Without this additional change, the proposed extension of section 12 to solve issues of reliance by the financial institutions on a Subscriber’s instructions for financial settlement may not be achieved.</p> <p>The Law Council also considers this change to be necessary to support trust account authorisation and reliance.</p>

#	Rule	Amendments	Explanatory Notes (provided by ARNECC)	Law Council Comments
MPR 7.9 – Compromised Security Items				
20.	7.9.1(a)	Replaced 'the ELN' with 'any ELN affected'.	A Person may be a Subscriber to more than one ELN and its Users may be Users of multiple ELNs. A Compromised Security Item, such as a Compromised Digital Certificate, may affect multiple ELNs. If that is the case, the amendment clarifies that the Subscriber's obligation to immediately revoke the User's authority to access and use an ELN, and to prevent the User from accessing and using an ELN, extends to any ELN affected by the Compromise.	Although 'Compromised' is defined in the MPR, 'Compromise' is not. The word 'Compromise' (capitalised, suggesting it is defined) is now used in both MPR 7.9.1(a) and MPR 7.9.1(b)(iii). The Law Council suggests that the definition of 'Compromised' be updated to incorporate a definition for the word 'Compromise'.
21.	7.9.1(b)(iii)	Extended requirement to apply to all ELNOs who provide and operate an ELN affected by the Compromise.	A Person may be a Subscriber to more than one ELN and its Users may be Users of multiple ELNs. Where the Compromise affects a Digital Certificate, the obligation has been extended to require the Subscriber to notify all ELNOs who provide and operate an ELN affected by the Compromise. The purpose of the amendment is to protect the security of each ELN, as a Compromised Digital Certificate may be used on multiple ELNs. The proposed amendment to MOR 7.10(e) requires that an ELNO notify other ELNOs in an Interoperable Lodgment Case where it is notified by a Subscriber of a Compromised Security Item.	

#	Rule	Amendments	Explanatory Notes (provided by ARNECC)	Law Council Comments
Schedule 4 – Client Authorisation				
25a.	Client Authorisation Form			<p>The Law Council suggests the inclusion of an additional express authorisation in the Client Authorisation Form (CAF), along the following lines:</p> <p style="padding-left: 40px;">to effect lodgment and, where applicable, settlement of the Conveyancing Transaction through Interoperability between two or more ELNs</p> <p>The CAF is one of the main points of interaction between a Subscriber and a Client and the fact that a transaction may be completed via interoperability, depending upon the choice of ELNO of other parties in the transaction, should, in the Law Council's view, be express in the authority given to the Subscriber.</p>