



Law Council  
OF AUSTRALIA

Office of the President

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Dear Mr Cox

### **eConveyancing Industry Code and Updated Risk Matrix for Interoperability**

The Law Council is pleased to provide this submission in response to the following documents provided to the Interoperability Agreement Working Group participants on 9 September 2021:

- Risk Matrix for Interoperability (as updated 8 September 2021) (**Updated Risk Matrix**); and
- Gilbert+Tobin paper on the proposed eConveyancing Industry Code (**Industry Code Paper**),

(together, the **Consultation Papers**).

The Law Council acknowledges the assistance of its National Electronic Conveyancing System Committee and the Law Society of New South Wales in the preparation of this submission.

### **General Comments**

In addition to the below comments on the Consultation Papers, the Law Council provides the following general comments.

#### *Changes to the Electronic Conveyancing National Law*

The Law Council remains concerned about the continuing delay in circulating proposed amendments to the *Electronic Conveyancing National Law (ECNL)* which will play a key role in the interoperability regulatory framework. While the Law Council understands the difficulties involved given the different practices in each jurisdiction, the result is that any comments on isolated parts of the framework are made without the benefit of reviewing the preliminary drafting of these key amendments. Given the Law Council's continuing concerns regarding interoperability matters, the failure to provide early access to what is proposed risks delaying the process well into 2022. Indeed, the recently proposed updated implementation timetable which appears to envisage an implementation date now well into 2023 is of significant concern to the Law Council. The anti-competitive detriment

of mandating the use of eConveyancing for all transactions, while only one Electronic Lodgement Network Operator (**ELNO**) is fully operational, as is now the position in NSW and other jurisdictions, is enormous both from a cost point of view as well as from an efficiency and innovation point of view. The suggestion that this state of affairs now be prolonged risks increasing the anti-competitive effects to a point where they become insurmountable by any market entrant.

The Law Council asks that the proposed changes to the ECNL be provided to stakeholders urgently for comment. If that cannot be achieved, then at least the precursor drafting instructions or policy proposals should be to be exposed for scrutiny, noting that the original Ministerial Roundtable resolution that provided for interoperability to be fully implemented by 31 December 2021.

### Consumer protection

For practitioners, questions of liability and the rights of their clients if a transaction does not proceed are immaterially different with interoperability than with a single ELNO. However, if there is any doubt, the simplest way to deal with the issue to avoid further delay to interoperability implementation is to have the ECNL provide for every ELNO to be responsible to its own subscribers, with a statutory right of indemnity from whichever ELNO or third part that might turn out to be at fault. This ensures that consumers are not in the impossible position of having to prove who was at fault.

While the Industry Code is likely to address the ways in which the ELNOs and financial institutions will interact with each other in situations such as where funds are misapplied, the Law Council's understanding is that it will not provide guidance on the manner in which a subscriber is involved in that process, given the Code operates between ELNOs and financial institutions only. The subscriber's ability to access and interact with such processes must be further considered and articulated.

The Law Council would be grateful for clarification of whether the concept of a prompt mechanism of consumer recourse pending the completion of a root cause analysis to determine fault will be provided. A prompt consumer remedy is important to minimise consumer loss. For example, if a vendor's sale transaction fails, and the vendor had intended to use the sale funds to settle a simultaneous purchase transaction, the vendor's loss and those of other parties will potentially be significantly further exacerbated by delay whilst the root cause analysis is completed. The concept of a straightforward mechanism providing an avenue of immediate recourse for the consumer was an important aspect of end user protection considered by the Nicholls Review.<sup>1</sup> Protection for end users should be given a much greater emphasis in the development of the interoperable framework. Again, the Law Council's proposal for immediate recourse to the subscriber's ELNO with a statutory indemnity in favour of that ELNO from whomever turns out to be responsible will achieve that with least effort by inclusion of a few extra provisions in the ECNL.

The Law Council also notes the continuing absence of any discussion of the existing vendor guarantee scheme provided nationally by PEXA and adopted as a requirement in NSW. Provision of such a scheme is a condition of operation of an ELNO in NSW under the NSW General Conditions of Approval.<sup>2</sup> The concepts embedded in the vendor

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<sup>1</sup> Dr Rob Nicholls, Independent Chair of the Interoperability Working Groups, *Interoperability Between ELNOs* (Final Report, 25 July 2019).

<sup>2</sup> Office of the Registrar General (NSW), General Conditions of ELNO Conditions of Approval (version 2.0, 1 July 2020) <[https://www.registrargeneral.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0006/829824/General-Conditions\\_v2.pdf](https://www.registrargeneral.nsw.gov.au/__data/assets/pdf_file/0006/829824/General-Conditions_v2.pdf)>.

guarantee scheme, particularly the ability to quickly compensate a party, should form part of current discussions, placing greater emphasis on protecting the end consumer.

### **Industry Code**

Please find the Law Council's detailed comments in the **attached** table extracted from the Industry Code Paper.

### **Updated Risk Matrix**

The Law Council broadly supports the updates that have been made to the Risk Matrix, subject to the comments below.

The Law Council is pleased to see that risks 4, 5 and 9 in the Updated Risk Matrix have been amended to refer to the following remedy as part of the Regulatory solution:

*Liability regime will ensure that Subscribers have recourse through their own ELNO, in the event that they suffer a loss based on fault occurring on another interoperable ELNO.*

As mentioned above, the Law Council would be pleased to see greater focus on developing this aspect of the framework, including further detail of the liability regime and where it would be located in the regulatory framework. The Law Council's strong preference is for this to be dealt with in the ECNL rather than in the Model Operating Requirements (**MORs**) or the proposed Interoperability Agreement, which will only bind the ELNOS as parties to that agreement. A regulatory solution in the ECNL is more transparent and can better address the relationship and interactions between all the relevant participants. The public interest elements of the Policy are inappropriately relegated to a bilateral agreement between ELNOS and that approach is fundamentally misconceived, as the Law Council has consistently pointed out in consultations and submissions to date.

The Law Council proposes that subscribers have recourse through the ELNO they have chosen to use in the transaction. The Law Council supports this approach and suggests that it will create a clear resolution pathway for subscribers and their clients which is critical to the efficient conduct of transactions and the minimisation of loss.

### **Contact**

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

Yours sincerely



**Dr Jacoba Brasch QC**  
**President**

## Attachment A – Comments on the Industry Code Paper

### 1. Questions about the Code

Issue	Industry Code: Yes/No	Comments	Law Council Comments
<b>Settlement (DvP)</b>	Yes, but to limited extent	<ul style="list-style-type: none"> <li>• The RBA addresses through its rules for RITS the framework for reservation and payment of funds. However the RBA has no visibility of the lodgment process and so it is up to the ELNO to ensure that settlement follows the sequence of reservation – lodgment – payment. Are any issues relevant to FI-ELNO relationship need to be addressed in the Code?</li> <li>• MOR does not fully address DvP. MOR 10.8 provides that lodgment must not occur unless settlement is irrevocable, but there is no complementary obligation for settlement to occur only if lodgment is irrevocable. Put another way, MOR 10.8 protects the person receiving title but not the person paying funds. What role should the Code play in ensuring DvP is more comprehensively?</li> <li>• Are there some additional common issues between FIs and ELNOs that require standardization?</li> </ul>	<ul style="list-style-type: none"> <li>• The relationship, including the contractual relationship, between an individual financial institution (<b>FI</b>) and an Electronic Lodgment Network Operator (<b>ELNO</b>) is not transparent to other participants in the industry. In the Law Council's view, it would be preferable for common issues between the FIs and the ELNOs to be dealt with in the Code to increase transparency.</li> <li>• The Law Council's preference is that the Model Operating Requirements (<b>MORs</b>) fully address the principles of delivery versus payment (<b>DvP</b>). The next best solution is for the Code to bolster the operation of DvP to achieve protection of the person paying funds.</li> <li>• With the multiplicity of participants and contractual arrangements, the Law Council supports a high degree of standardisation.</li> </ul>
<b>Clearing</b>	Yes	<ul style="list-style-type: none"> <li>• Common referencing</li> <li>• Standard timeframes</li> <li>• Circumstances in which instructions can be rejected/queried</li> <li>• ELNO recalling instructions</li> <li>• Others?</li> </ul>	<ul style="list-style-type: none"> <li>• The Law Council supports the inclusion of these matters in the Industry Code.</li> <li>• The circumstances in which any instructions may be rejected, queried or recalled must be made clear for all participants, not just the FIs and ELNOs.</li> </ul>

Issue	Industry Code: Yes/No	Comments	Law Council Comments
<b>Failure to settle</b>	Yes	<ul style="list-style-type: none"> <li>• Common procedures for investigating misapplied/misdirected funds (including timeframes)</li> <li>• Variation to usual settlement process to correct problems?</li> <li>• Any adjustments in client's favour?</li> </ul>	<ul style="list-style-type: none"> <li>• The Law Council supports the inclusion of common procedures for investigating misapplied or misdirected funds in the Industry Code.</li> <li>• Agreed timeframes for responses, and where applicable, the return of funds, will be crucial in minimising the impact upon end consumers (for example where there is a linked settlement). Agreed timeframes will also assist subscribers in understanding and assisting their clients in such situations.</li> </ul>
<b>Handling complaints from subscribers/clients</b>	Partly	<ul style="list-style-type: none"> <li>• Complaints may be made by subscriber/client through ELNO channel and FIs need to be involved or in other direction from client/subscriber through FI and Responsible ELNO and Participating ELNO need to be involved</li> <li>• Focus only on the process between ELNOs/FIs and not customer facing processes of FIs or ELNOs?</li> </ul>	<ul style="list-style-type: none"> <li>• It is important to focus on the customer facing aspect of the processes as well as the process between the ELNOS and FIs. There must be a clear pathway for a subscriber to follow in the event that funds are misapplied, or some other mistake is made. A timely response is crucial in minimising a client's loss. The adjacent comments seem to suggest that the path may be via a subscriber's participating ELNO or via the relevant FI and Responsible ELNO.</li> <li>• In the Law Council's view, the appropriate path would be for the subscriber to contact its participating ELNO and that ELNO would pursue the issue according to the processes set up via the Industry Code. However, as the subscriber is not a party to the Industry Code, this aspect will need to be addressed elsewhere – preferably by a broad provision in the Electronic Conveyancing National Law (<b>ECNL</b>) requiring the subscriber's ELNO to immediately provide redress with a statutory right to be indemnified by any third party subsequently found to be at fault.</li> </ul>

Issue	Industry Code: Yes/No	Comments	Law Council Comments
<b>Onboarding of subscribers</b>	See Law Council comments	<ul style="list-style-type: none"> <li>• Are there common issues between ELNOs and FIs that could or should be addressed in the ELNO onboarding process, particularly in relation to trust accounts?</li> <li>• E.g. standardized trust account registration form?</li> <li>• Consents to allow FI to act on instructions received through responsible ELNO from a subscriber of a Participating ELNO [nb: ECNL amendments also will be relevant]?</li> </ul>	<ul style="list-style-type: none"> <li>• The Law Council supports the standardisation of trust account registration forms, and this could be addressed in the Industry Code.</li> <li>• The trust account registration form will require amendment to ensure an FI is able to act on instructions received through the responsible ELNO from a subscriber of a participating ELNO. In the Law Council's view, the amendment and standardisation of the trust account registration form, together with anticipated changes to the Electronic Conveyancing National Law (<b>ECNL</b>), is a key element that should be considered now.</li> <li>• The Law Council understands that the proposed changes to the ECNL will play a key role in allowing the responsible ELNO to rely on financial instructions, and signed line items, received from a participating ELNO. The Law Council looks forward to reviewing the proposed changes. Regrettably the timetable for this has continually slipped, with a firm date still yet to be provided.</li> </ul>
<b>Security</b>	No	<ul style="list-style-type: none"> <li>• MOR addresses security with third party systems, which would include FIs</li> <li>• As each FI has its own security needs/systems, is this better left to the bilateral ELNO-FI agreement?</li> <li>• If in the bilateral with each FI, do there need to be back to back clauses in the I/Op (which the MOR could require in the I/Op agreement) or will the combination of MOR/I/Op data standard be sufficient?</li> </ul>	<ul style="list-style-type: none"> <li>• The MORs, rather than the Industry Code or bilateral ELNO-FI agreements, should continue to prescribe minimum security requirements.</li> </ul>

Issue	Industry Code: Yes/No	Comments	Law Council Comments
<b>Information</b>	See Law Council comments	<ul style="list-style-type: none"> <li>• What information/data should be collected to help understand how the code is operating? This could attract competition law concerns.</li> </ul>	<ul style="list-style-type: none"> <li>• The Law Council suggests that data should be collected which assists in monitoring compliance with the code, in particular, in relation to response times and resolution of complaints.</li> </ul>
<b>Liability</b>	Supportive provisions only – see Law Council comments	<ul style="list-style-type: none"> <li>• Some payment codes allocate liability between the FI participants.</li> <li>• Is this an analogous situation, given that the Code is not regulating 'horizontal' payment relationships between peers, but transactions between ELNOs and an individual FI?</li> <li>• Should liability be left to the bilateral ELNO-FI agreements? If so, what back to back liability/indemnity clauses are needed in the I/Op agreement?</li> </ul>	<ul style="list-style-type: none"> <li>• Liability must be addressed in a transparent manner so that all participants are aware of the risk and liability allocation. Supportive provisions could be included in the Industry Code, but a comprehensive approach to liability is required across the interoperability regulatory framework, rather than a piecemeal approach which may create problematic gaps.</li> <li>• The Law Council has concerns about the suggestion that liability provisions could be left to the bilateral ELNO-FI agreements and/or the Interoperability Agreement. Risk and liability are key aspects for subscribers and their clients, and must be dealt with in a transparent manner, preferably in the MORs.</li> <li>• In the Law Council's view, it should not be open to individual FIs, or indeed ELNOs, to exclude or disclaim certain types of liability, via an agreement which is opaque to other participants, in an interoperable environment.</li> <li>• As previously recommended, liability allocation must be dealt with in the ECNL. It is entirely inappropriate for public interest provisions to be relegated to MORs or, even worse, a bilateral contractual arrangement between ELNOs which third parties cannot enforce.</li> </ul>

Issue	Industry Code: Yes/No	Comments	Law Council Comments
<b>Privacy/ confidentiality</b>	Yes	<ul style="list-style-type: none"> <li>Should there be common rules about handling, disclosure and use of client/subscriber information (including to exchange between FIs and between FIs and ELNOs in investigating complaints)?</li> </ul>	<ul style="list-style-type: none"> <li>Yes, common rules about these matters should be included in the Industry Code.</li> </ul>
<b>Dispute resolution</b>	Partly, see Law Council comments	<ul style="list-style-type: none"> <li>Should there be a common dispute mechanism in the Code as the best legal vehicle to ensure all FIs and ELNOs involved in a transaction can be brought into a binding dispute resolution process?</li> <li>Alternatively, should dispute resolution between an FI and an ELNMO be left to the bilateral agreement? If so, how would the Participating ELNOs be involved in resolution of the dispute?</li> </ul>	<ul style="list-style-type: none"> <li>The Law Council agrees that there should be a common dispute mechanism in the Industry Code, rather than the individual FI-ELNO agreements, which has the potential for differing dispute mechanisms to operate depending upon the relevant parties.</li> <li>However, the resolution of disputes, needs to be addressed as part of a comprehensive approach to liability across the interoperability regulatory framework. Again, it would be a trivial exercise for the ECNL to mandate a mediation, arbitration or expert determination regime.</li> </ul>



## 2. Questions about the other instruments?

Questions	Law Council Comments
<p>If the issues in table 1 are addressed by the Payments Code, what 'residual' issues are there left to be addressed in the bilateral agreements between each ELNO and each FI?</p>	<p>Whenever the interests of clients or consumers are impacted, such issues or matters should be addressed in a transparent manner, such as in the Industry Code or, preferably, the ECNL, rather than in the bilateral agreements between each ELNO and each FI.</p>
<p>Do any of these 'residual' issues require a back to back provision in the I/Op agreement? If so, should these provisions be required in the MOR – or do these reach beyond the jurisdictional scope of the MOR?</p>	<p>It is the Law Council's strong preference, in the interests of transparency for all participants, that issues should be addressed in the ECNL rather than the MORs or any Interoperability Agreement.</p>
<p>Are there any issues between the FIs and the ELNOs which are better addressed in the MOR and/or I/Op data standard than in the Industry Payment Code?</p>	<p>If issues impact upon end consumers, the Law Council's preference is for them to be addressed in the ECNL rather than the Industry Code.</p>
<p>Is there any issue relevant to the FI-ELNO relationship currently addressed or proposed to be addressed in an I/Op context in the MOR which would be better addressed in the Industry Payment Code?</p>	<p>No, the Law Council does not support moving any matter currently addressed in the MORs to the Industry Code.</p>
<p>If it is assumed that the Industry Payment Code will be developed (and it is also likely to require ACCC authorisations) later than finalization of the MOR, the I/Op data standard and the I/Op agreement, are there matters which the Code is best to address in the long run which need to be addressed in the interim as a temporary measure?</p>	<p>If interoperable transactions are likely to take place prior to finalisation of the Industry Code, interim processes for making claims or pursuing misapplied funds, etc, will be required. The amendment of trust account registration forms could also be implemented prior to finalisation of the Industry Code. It is vital that implementation of interoperability not be continually deferred as additional 'process re-engineering' opportunities are identified. Consumer detriment from the effectively mandated PEXA monopoly is serious and continuing.</p>
<p>It is anticipated that ELNOs will be members of the Code with the FIs. This ensures that Code obligations will apply to ELNOs in their capacity as Responsible ELNO in dealing with an FI, but the Code will also apply when the ELNO is the Participating ELNO and dealing 'indirectly' with the FIs through the Responsible ELNO. Should the requirement to join and comply with the Code be a MOR requirement (which, in turn, may depend on I/Op amendments in the ECNL)? Is there a matching requirement for FI participation in the Code?</p>	<p>The MOR should require all ELNOs and participating FIs to be members of the Industry Code to ensure it is effective. Consideration should be given to what occurs if an ELNO or FI ceases to be a member.</p> <p>The Law Council understands that, unlike PEXA, Sympli will have a separate batch administrator for the payment of funds. The Law Council queries whether the obligation to be a member of the Industry Code should be extended to an ELNO and any separate batch administrator it may utilise, as this is likely to have a significant impact on all aspects of the Industry Code.</p>

Questions	Law Council Comments
	As long as it is clear that an ELNO is liable for and bound by the acts and omissions of its agent, this issue may be more theoretical than real.