



Law Council
OF AUSTRALIA

Office of the President

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Dear Ms Cottnam and Ms Cameron

Discussion Papers – Approach to Liability and Governance Issues

The Law Council appreciates the opportunity to provide a submission regarding the Discussion Papers 'Interoperability – Approach to Liability' (**Liability Paper**), and 'Interoperability Agreement between ELNOs – Governance Issues' (**Governance Issues Paper**) (together, the **Discussion Papers**). The Law Council acknowledges 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 notes that the Discussion Papers have been prepared to assist in the ongoing development of an Interoperability Agreement between Electronic Lodgment Network Operators (**ELNOs**) and, in particular, to inform the deliberation of the Interoperability Agreement Working Group of the National Interoperability Industry Panel.

Liability Paper

Preliminary Comments

With the different streams of work currently on foot, it is difficult to comment on liability issues in isolation, particularly without the benefit of reviewing the preliminary draft of the proposed amendments to the *Electronic Conveyancing National Law (ECNL)*. However, the Law Council appreciates the opportunity to make initial comments on this Paper.

Although the Law Council supports the broad premise of the Liability Paper – that intervention is only required where there is a misallocation of liability – the narrow focus that has been adopted is of concern. In the Law Council's view, while the Liability Paper has been prepared in the context of the proposed Interoperability Agreement between ELNOs, the scope of risks considered should be wider, drawing more closely on the perspectives

and insights from the Final Report of Dr Rob Nicholls, the Independent Chair of the Interoperability Working Groups (**Nicholls Review**),¹ and the subsequent Risk Matrix Paper issued in February 2020.²

Section 5.5 of the Liability Paper nominates several risks as existing in the current single ELNO environment and therefore not warranting further investigation. That approach can only be sound if the layer of complexity added by more than one ELNO being involved does not increase the risk, and therefore the impact, of a multi-ELNO transaction on an end user consumer when a transaction does not proceed as planned.

At a practical level, if something does go wrong in an interoperable transaction, the initial question faced by a subscriber is: which ELNO is at fault and from whom should redress be sought? The question of who may potentially be liable is very opaque in an interoperable transaction when compared to a single ELNO transaction. For example, in considering from whom to seek redress there may be difficulties in obtaining the appropriate evidence, and there would be potential exposure for costs if the wrong ELNO is identified. The Law Council understands that these issues will be addressed in amendments being made to the ECNL.

Allocation of Liability

It is noted in the Liability Paper that in considering the new or magnified risks that could arise as a result of interoperability there is not likely to be any general misallocation of liability. However, two exceptions are then identified:

- where an ELNO issues an incorrect instruction (whether due to error or fraud) to draw on a trust account or other account held by a financial institution; and
- where two or more interoperable ELNOs contribute to a loss. While the principles of apportionment will apply to most such instances, this will not be the case for breach of contract (where the breach of contractual duty is not concurrent with a duty of care in tort) or for breach of the Australian Consumer Law (**ACL**)³ guarantees.

The Law Council is concerned that the Liability Paper excludes further examination of the first exception on the basis that this is dealt with in the separate June 2021 paper 'Trust accounting and Interoperability'.⁴ In the Law Council's view, that paper does not sufficiently focus on questions of liability, but rather on the building of a framework for authorisation and reliance. While the issues are related, the analysis in that paper was from a different perspective and therefore further analysis is needed. In this regard, the Law Council notes that there have been some cases where manual intervention by a bank has been necessary to allow a settlement to proceed, but the failure to cancel the automated transaction in PEXA has led to "double dipping" of the Subscriber's trust account. While the money was ultimately recovered, there is a potential loss to other parties and transactions due to the temporary shortfall in available trust account funds.

In relation to the second exception, the Law Council notes, as identified by the authors, that this outcome on apportionment is not unique to an interoperable e-conveyancing environment but is a feature of any liability arising under contract law or the consumer

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

² Office of the Registrar General (NSW), *Risk Matrix for Interoperability* (Paper, 21 February 2020).

³ *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*').

⁴ Office of the Registrar General (NSW), *Trust accounting and Interoperability* (Paper, 17 June 2021). It is noted that this paper has only been provided for consideration in NSW and has not received wider scrutiny.

guarantees in Australia in any context. The Law Council also agrees with the authors' conclusion that in these circumstances, there does not appear to be any compelling reason to reallocate those risks.

Prompt consumer remedy

The Law Council supports the recommendation to include an investigation and escalation regime in the Model Operating Requirements (**MORs**) or the Interoperability Agreement(s) 'to enable problems and incidents connected with interoperability to be promptly assessed and remedied'.⁵ As a general principle, it is preferable to minimise the content of the Interoperability Agreement and wherever possible locate provisions in the MORs, providing transparency and confidence for all stakeholders.

The features of the escalation regime include a role for the land titles authority to direct that certain investigations occur and a mechanism for the authority to 'run or take over a new or existing root cause analysis, including by appointing an expert of its choosing'.⁶

The Law Council is pleased to see the section on root cause analysis included in the Liability Paper. The Law Council supports this concept and also acknowledges that as identified in paragraph 6.3 and 6.4, the land titles authority may also ultimately determine that a regulatory response is required for some incidents to avoid or mitigate future recurrences, such as by amendment to the interoperability data standard.

However, the Law Council suggests that how the section on root cause analysis relates to the Subscriber and the end user needs to be addressed.

The concept of a prompt consumer remedy is particularly important from the perspective of minimising consumer loss. For example, if a vendor's sale transaction fails, and the vendor is using the sale funds to settle a simultaneous purchase transaction, the vendor's loss and that of other parties will potentially be 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, prior to the technical root cause analysis being completed, was an important aspect of end user protection considered by the Nicholls Review.⁷ In the Law Council's view, this proposal should be adopted.

Protection for end users is referenced in section 5.5 of the Liability Paper. While it is problematic that there is a lack of a direct contractual relationship between an ELNO and the end user in a single ELNO environment, there are at least the contractual links between the client and the subscriber, and the subscriber and the ELNO. In an interoperable transaction, as compared to a single ELNO transaction, there are two additional complexities: the subscriber may not have a direct contractual relationship with the ELNO at fault; and there is the question of identifying the ELNO from whom to seek redress. These further complexities mean, in the Law Council's view, that issues around the protections for end users should not be excluded from the analysis. One of the early guiding principles articulated in discussions on interoperability was that there should be no additional risk or cost to subscribers or end users in an interoperable transaction. The Law Council understands that the proposed amendments to the ECNL will address this concern.

⁵ Liability Paper, 11.

⁶ Ibid 12.

⁷ Dr Rob Nicholls, Independent Chair of the Interoperability Working Groups, *Interoperability Between ELNOs* (Final Report, 25 July 2019) 107-8.

However, the Law Council cannot comment further until it has had the opportunity to review the proposed amendments.

The Law Council notes the absence of any discussion of, or potential extension of, the existing vendor guarantee scheme provided nationally by PEXA and adopted as a requirement in New South Wales (**NSW**). Provision of such a scheme is a condition of operation of an ELNO in NSW under the NSW General Conditions of Approval.⁸ In the Law Council's view, consideration should be given to the concepts embedded in the vendor guarantee scheme, particularly the ability to quickly compensate a party. Further, the Law Council does not regard it as appropriate to exclude consideration of fraud despite the limitations set out in section 4.2 of the Liability Paper.

Liability provisions in Participation Agreements

The Law Council supports the commentary on page 10 of the Liability Paper which notes the degree of flexibility in the liability provisions ELNOs choose to incorporate in their Participation Agreements. This is an area which is already problematic, and the Law Council would welcome intervention in this 'relatively unregulated' aspect to better protect consumers, particularly in an interoperable environment. At the very least, the ability of ELNOs to exclude or disclaim certain types of liability (to the extent permitted by law) should be revisited and revised for an interoperable environment. The Law Council has made representations to ELNOs in this respect. Alternatively, the unfair contract terms provisions of the ACL could be of use in seeking to reduce attempts to limit liability.⁹

Governance Issues Paper

The Law Council agrees with the key 'ingredients' or factors for a successful governance arrangement between interconnected parties identified at pages 2-3 of the Governance Issues Paper. In the Law Council's view, it is critical that the proposed interoperability joint working group or committee focus on technical and operational issues and the group should 'sit outside' the formal dispute resolution processes for the relationship. However, the key challenges will be:

- Determining the legal status of documents, such as working procedures and manuals, agreed by the working group. The Governance Issues Paper asks:

Should the interoperability agreement 'automatically' give legal force to the manuals developed by the working group or does there need to be a formal variation process to the interoperability agreement, which then reintroduces legal review as a 'gatekeeper' to ensure the working group documents are capable of having a formal legal standing and are consistent with the interoperability agreement.¹⁰

The Law Council suggests that it should be the latter variation process. An independent legal 'review' process will ensure that any documents developed are clear, precise, capable of certainty and do not step outside of the 'technical and operational' boundaries intended for this arrangement.

⁸ Office of the Registrar General (NSW), *General Conditions of ELNO Conditions of Approval* (1 July 2020) <https://www.registrargeneral.nsw.gov.au/__data/assets/pdf_file/0006/829824/General-Conditions_V2.pdf>.

⁹ *Australian Consumer Law*, pt 2-3.

¹⁰ Governance Issues Paper, 2.

- Identifying at what point an issue needs to be escalated into the dispute resolution process rather than be caught in ongoing discussion at the technical level. The Law Council agrees with the suggestion that there is 'usually an intermediate process of escalation to the senior operations or technology officer in each party' before referral to formal dispute resolution.¹¹ However, it will also be critical to define at what point, and on what issues, this intermediate referral should occur.

The Law Council acknowledges the challenges associated with designing a structure to resolve what are appropriately 'multilateral' issues affecting two or more ELNOS, when there are likely to be many other issues which are more appropriately characterised as 'bilateral' issues for just the two ELNOs affected by the issue.

The Law Council encourages a focus on designing a multilateral forum which is capable of accommodating more than two ELNOs to ensure that the design is appropriately future-proofed.

In relation to the 'potential model' outlined in Part 3 of the Governance Issues Paper, the Law Council agrees that the NBN Co example appears helpful where it is primarily a bilateral relationship issue for discussion.

In relation to Part 4 of the Governance Issues Paper regarding dispute resolution, if a model similar to the example provided was to be adopted, consideration should also be given to:

- ensuring that the ELNO parties are obligated to refer any compliance or regulatory issues arising from the dispute to the Australian Registrars' National Electronic Conveyancing Council (**ARNECC**); and
- conferring on ARNECC, as regulator, the right to be an intervener in any arbitration process which might ultimately be engaged following internal dispute and mediation processes. This will ensure that ARNECC has visibility of the key issues in the dispute and also has the capacity to make submissions to the arbitrator on any systemic or regulatory issues which might be relevant to the resolution of the dispute.

Contact

If you would like to discuss this matter further, please do not hesitate to contact me directly on 0438 301 956 or jacoba.brasch@lawcouncil.asn.au. Alternatively, please contact Mr John Farrell, Senior Policy Lawyer on (02) 6246 3714 or at john.farrell@lawcouncil.asn.au.

Yours sincerely



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President

¹¹ Ibid 3.