



Law Council
OF AUSTRALIA

Office of the President

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Dear Mr Cox and Ms Cottnam

Handling of funds in an interoperable ELN environment

1. The Law Council notes that the New South Wales and South Australian Registrars, led by their respective governments, are seeking to develop a national solution to interoperability between Electronic Lodgment Network Operators (**ELNOs**). The Law Council is supportive of this process and is grateful for the opportunity to participate through the Industry Panel.
2. The Law Council is pleased to provide a submission in response to the paper titled *Handling of funds in an interoperable ELN environment (the Paper)*. The Law Council is broadly supportive of the Paper.
3. The Law Council acknowledges the assistance of its National Electronic Conveyancing System Committee and Professional Ethics Committee, the Law Society of New South Wales, the Law Society of South Australia and the Queensland Law Society (**QLS**) in preparation of this submission.

General Comments

Statutory response

4. The Paper proposes that the potential 'gap' in the chain of reliance and authority should be addressed by statutory measures under which an ELNO can rely on information/instructions it receives during an interoperable transaction from another ELNO (including in cases of fraud).
5. The Law Council agrees that a statutory regime is necessary to ensure that all participants in the market, including the ELNOs, have the confidence to rely on information or instructions that are received during an interoperable transaction from another participant in the market, where the lodging ELNO does not have a contractual relationship with the other parties.

6. A statutory solution will ensure transparency and certainty for all participants in the market. If this issue was to be resolved contractually between the ELNO participants, there is the potential that other participants (including legal practitioners) will not have any visibility of the basis on which the ELNOs have contracted and agreed to transfer instructions or information. A statutory regime would provide this transparency by setting out the necessary obligations on the part of the ELNO which receives and executes instructions to deal with settlement funds, and providing assurance to practitioners and their clients who will lose control of their trust funds at the point during the transaction at which one ELNO takes control of everything to complete the settlement. It is considered that intervention of this type will be necessary as contractual arrangements will not adequately provide these protections to the required extent.
7. To the extent any statutory provisions allow an ELNO to rely on information and instructions it receives during an interoperable transaction from another ELNO (including in cases of fraud), the primary concern is to ensure that any proposed provisions do not undercut obligations on practitioners to ensure that they are only acting on their clients' lawful instructions. This obligation, addressed in Rule 8 of the *Australian Solicitors' Conduct Rules (ASCR)*, requires all solicitors in a matter or transaction to 'know their client' and to check that the advice sought is in relation to a lawful activity. This requires practitioners to consider the true purpose of their clients' activities and the extent to which they may be furthering or obscuring any illegal or criminal purpose, such as fraud.
8. Professional obligations such as that addressed in Rule 8, or, for example, professional obligations in respect of confidential information (see Rule 9 of the ASCR) exist alongside any legislation and compliance is required regardless. To avoid inconsistency and confusion, any proposed statutory amendments need to account for such professional obligations.

The transfer process

9. The Law Council considers it imperative that any transfer of funds to conclude an electronic property settlement should be as seamless as possible, even if the participants to the transaction subscribe to different ELNOs.
10. To achieve this objective, it is suggested that it will be necessary to authorise an ELNO to access funds deposited in the trust account operated by the practitioners who respectively represent the vendor and the purchaser, or such other parties as may be involved in the dealing.
11. As such, the national solution should seek to enable or authorise the ELNO responsible for lodgment of the relevant dealings for registration (**the Responsible ELNO**) to collect and disburse all funds to and from all parties involved in the transaction. This includes access to trust funds held by a practitioner representing a party to the dealing who subscribes to an ELNO other than the Responsible ELNO.
12. Once funds are held in trust and the practitioner has in hand all relevant authorisations as to the matter and manner in which these are to be held and disposed on behalf of his or her client, there should be no need thereafter for the practitioner to do anything else over and above the ordinary workings of the electronic platform he or she chooses to use to deliver these funds to an ELNO (i.e. allow the Responsible ELNO to have access to these funds), to enable the completion of the financial transaction in line with the protocols which relate to exchange of funds at the time of settlement.

Direct interoperability

13. The model assumed for the purposes of discussion is that of 'direct interoperability', whereby each ELNO in the market is presumed to have reached agreement with each other ELNO and every State titles registry, revenue office and the major financial institutions. If an ELNO has not established these key relationships with each of these agencies and institutions, the ELNO will not be able to participate in the market in a fully contestable manner on the majority of potential transactions involving a four-party transfer. A typical cottage conveyance will involve four parties - the buyer, the buyer's incoming mortgagee, the seller and the seller's outgoing mortgagee.
14. The Paper has been prepared in this environment, where consideration is being given to the issues arising if interoperability is pursued and achieved. The Paper notes that there is a question as to whether direct interoperability is the most efficient model/approach as the number of ELNOs increases, however this question is beyond the scope of the Paper. This question is being considered by the Australian Registrars' National Electronic Conveyancing Council in the course of its review of industry models.
15. Given that the form of the recommended model for a competitive market is still under discussion, the QLS recommends that the issues in this Paper are re-visited once the model design is further progressed. If a different model is adopted, the Paper will need to be updated and further consultation will be required.

Specific Comments

Client Authorisation

16. At page 14 of the Paper, in the table row 'Vendor instructions to Practitioner 1', the Paper suggests that the:

... current Client Authorisation Form is broadly worded and would not appear to limit the authority given by the Vendor to any particular ELN. However, for transparency, consideration should be given to specifically identifying that transactions can occur through interoperability arrangements.

17. The Client Authorisation Form should be reviewed and should clearly provide that the client authorises their solicitor, their solicitor's ELNO and, if different, the Responsible ELNO for the transaction, to withdraw the necessary funds from the practitioner's account. This is a prudent approach to ensure that the authorisation is clear from the beginning of the transaction.

Power Money

18. In respect of the three rows in Table 7 that appear directly under the subheading 'Destination funds', on page 33 of the Paper, the Law Council's view is that the regulatory status for each of the destination funds described is, 'power money' regarding the vendor's lawyer. In the Law Council's view, vendor funds directed for payment in the financial settlement statement:
 - to the outgoing mortgagee, regardless of whether it is represented by a practitioner Subscriber or is a principal Subscriber, as the distinction is irrelevant to the assessment of the position between the vendor and their representative practitioner;
 - to other third-party accounts (e.g. councils); and

- to the vendor's ADI account,

are all 'power money' for the vendor's practitioner. The vendor's practitioner is signing the financial settlement statement to direct those payments and thereby exercising power over that part of the sale proceeds owing to the vendor.

19. Under the paper-based system, they would have been received in the form of cheques and comprised transit money and, thereby, trust money.
20. Subsections 153(1) and (2) of the *Legal Profession Uniform Law* (not section 152 as referred to on page 33 of the Paper) contain the relevant provisions, (emphasis added):

153 When, how and where money is received

(1) *For the purposes of this Law, a law practice receives money when-*

- (a) the law practice obtains possession or control of it directly; or*
- (b) the law practice obtains possession or control of it indirectly as a result of its delivery to an associate of the law practice; or*
- (c) the law practice, or an associate of the law practice (otherwise than in a private and personal capacity), is given a power or authority to deal with the money for or on behalf of another person.*

(2) *For the purposes of this Law, a law practice or associate is taken to have received money if the money is available to the law practice or associate by means of an instrument or other way of authorising an ADI to credit or debit an amount to an account with the ADI, including, for example, an electronic funds transfer, credit card transaction or telegraphic transfer.*

Conclusion

21. The Law Council notes that further papers are being progressed to discuss further issues and risks arising with interoperability and looks forward to continuing to participate in that process.
22. Please contact Mr John Farrell, Senior Policy Lawyer on (02) 6246 3714 or at john.farrell@lawcouncil.asn.au in the first instance, if you require further information or clarification.

Yours sincerely



Pauline Wright
President