

WA Operating Requirements Version 7

Determined by the Registrar of Titles under Section 22 of
the *Electronic Conveyancing Act 2014*

Explanatory Memorandum Prepared for The Joint Standing Committee on Delegated Legislation



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Hon John Carey
Minister for Lands



Bruce Roberts
Acting Chief Executive



Brad McBride
Delegate Registrar of Titles

For further information relating to this Explanatory Memorandum, please contact:

Diem Kyi
A/Principal Consultant

Registrations
Landgate, 1 Midland Square, MIDLAND WA 6056
Ph 9273 9844
Email diem.kyi@landgate.wa.gov.au

1 Background & Introduction

On 23 February 2024, Brad McBride, Delegate Registrar of Titles made a written determination in accordance with section 22 of the *Electronic Conveyancing Act 2014* (EC Act) that WA Operating Requirements Version 7 (WAORv7) would come into effect in WA on 28 March 2024.

WAORv7 forms part of the legal framework required for providing National Electronic Conveyancing (NEC) in Western Australia. Annexure 1 is a diagram explaining the NEC legal framework.

1.1 What is National Electronic Conveyancing

NEC is a legal and business framework which enables the electronic preparation of real property conveyancing transaction documents and the electronic lodgement of those documents with a Land Registry. Where appropriate NEC also enables the electronic settlement of the real property conveyancing transaction including financial disbursements.

NEC is delivered through on-line business platforms called Electronic Lodgment Networks (Networks).

The Networks are provided and operated by Electronic Lodgment Network Operators (Operators) approved by Landgate. There are currently two Operators approved in WA, Property Exchange Australia Ltd (PEXA) and Sympli Australia Pty Ltd (Sympli).

Only authorised users (Subscribers), which are generally lawyers, conveyancers and financial institutions, are entitled to access the Networks on behalf of their clients or on their own behalf.

1.2 The National Scheme

NEC is an initiative of the Council of Australian Governments (COAG) under the National Partnership Agreement to Deliver a Seamless National Economy 2008.

All States and Territories have signed the Intergovernmental Agreement for an Electronic Conveyancing National Law (IGA). The IGA came into effect on 21 November 2011.

The Australian Registrars National Electronic Conveyancing Council (ARNECC), established under the IGA, is responsible for the ongoing management and maintenance of the Electronic Conveyancing National Law (EC National Law).

1.3 The EC National Law

The key provisions of the EC National Law are as follows.

- authorise the Registrar or the Land Registry to receive and process electronic instruments;
- provide that electronic Land Registry instruments, when digitally signed by a Subscriber under a Client Authorisation, have the same effect as a signed paper document;

- set out the circumstances in which a digital signature is binding;
- authorise Landgate to approve an operator of a network;
- provide that the Registrar can make
 - **operating requirements** binding an operator of a Network; and
 - participation rules binding Subscribers to a Network; and
- require an organisation approved as an Operator to establish and maintain interoperability with each Network operated by another Operator.

1.4 The Electronic Conveyancing Act 2014 ("EC Act")

The EC Act enacts legislation in Western Australia corresponding to the EC National Law. The EC Act was passed by Parliament in March 2014.

Western Australia has a different statutory schema from other Land Registries in Australia. In Western Australia there are three entities whose functions relate to the administration of the Torrens Land Title Register (Register). The Western Australian Land Information Authority (Landgate) is a statutory authority incorporated under the Land Information Authority Act 2006. The Registrar of Titles (Registrar) and the Commissioner of Titles (Commissioner) are both statutory officeholders appointed under sections 7 and 5 respectively of the Transfer of Land Act 1893. Landgate, the Registrar and the Commissioner each have statutory functions and powers relating to the administration, accuracy and integrity of the Register.

In implementing the EC National Law, minor variations were made to the EC Act to reflect Western Australia's statutory schema.

1.5 Model Operating Requirements

The EC Act provides for the making of operating requirements by the Registrar of Titles with which an Operator must comply in operating the Network.

In determining the operating requirements for a jurisdiction, the Registrar must have regard to any model operating requirements published by ARNECC. The statutory requirement for the Registrar to have regard to ARNECC's model operating requirements in determining the operating requirements in the jurisdiction is intended to ensure that Operators operate the Network in the same manner and are subject to the same obligations nationally.

ARNECC has developed and published Model Operating Requirements Version 7 (MORv7) following industry consultation.

2 WA Operating Requirements Version 7

As required by EC Act s24(2), WAORv7 was created having a very close regard to MORv7. WAORv7 is very similar to MORv7. The differences in MORv7 and WAORv7 relate to WA specific governance structures only.

On 23 February 2024, a Delegate Registrar of Titles, Mr Brad McBride, made a written determination that WAORv7 will come into effect in WA on 28 March 2024 as required by EC Act s22(1).

3 Date of Publication & Government Gazette Notice

WAORv7 was published on Landgate's website on 23 February 2024, in accordance with EC Act s25.

Notice of the making and publication of WAORv7 was published in the Government Gazette dated 8 March 2024, in accordance with EC Act s43(3). Annexure 2 is a copy of the Government Gazette notice.

4 Purpose of and Justification for Subsidiary Legislation

Section 15(1) of the EC act empowers Landgate to approve a person as an operator of a Network. The approved person is the Operator. The operating requirements set out the requirements the Operator must comply with in operating the Network to achieve the required regulatory outcomes for the NEC. Those regulatory outcomes are as follows -

- an environment for the completion of transactions that is trusted by the community
- an environment in which transactions are only completed with the authority of lawful parties and conducted and completed in accordance with their instructions
- an environment in which transactions are completed in compliance with the Registrar's requirements
- an environment in which transactions are completed without error, omission or misrepresentation.

The Operator must operate the Network in a jurisdiction in accordance with the operating requirements. There is a statutory obligation on an Operator to comply with the operating requirements under EC Act s18. In addition, an Operator will enter into a contract (Operating Agreement) which incorporates the operating requirements as contractual terms.

4.1 Key changes in Operating Requirements

WAORv7 key changes relate to interoperability. On 12 May 2022, the *Electronic Conveyancing National Law Amendment Bill* passed the NSW Parliament. The Bill enacts a statutory obligation for Operators to interoperate.

Currently, all parties to conveyancing transactions must use the same Network to complete the transaction. Interoperability refers to different Operator's Networks being able to communicate with each other to complete a property transaction. For multiparty transactions, interoperability would allow Subscribers to use the Network of their choosing, without having to subscribe to all Networks to complete a property transaction. Interoperability connections are currently being built between Networks.

The key changes are summarised below.

Definitions

Definitions related to interoperability added or amended as required.

Financial Resources

Amended to reflect the requirement for an Operator to demonstrate sufficient financial resources to meet its obligations under the EC National Law as well as the Operating Requirements.

Technical Resources

Amended to reflect the requirement for an Operator to demonstrate sufficient technical resources to meet its obligations under the EC National Law as well as the Operating Requirements.

Organisational Resources

Amended to reflect the requirement for an Operator to demonstrate sufficient organisational resources to meet its obligations under the EC National Law as well as the Operating Requirements.

National system and electronic Registry Instrument and other electronic Document capability

Amendments to insert timing milestones required for the design, build, test and implementation (where applicable) of the different stages of interoperability between existing Operators who were approved to operate prior to the effective date of WAORv7. Operators that obtain approval after the effective date of WAOR must ensure that its Network enables documents to be interoperable with other Networks as those documents become available for use by Subscribers

General obligations.

Amendments to ensure that existing obligations relating to due skill, care, diligence, and minimising disruption and interference to systems, are extended to other Networks and Operators that an Operator may be interoperating with.

ELNO Service Fees

Amendment of the date in operating requirement 5.4.3, which extends the period during which an Operator may raise its service fees by no more than the consumer price index (CPI). In WAORv6.2, this period expires on 30 June 2024, and is extended to 30 June 2025 in WAORv7.

The Independent Pricing and Regulatory Tribunal NSW has been engaged by ARNECC to review Operator service fees. This step is an interim measure to ensure that ELNO Service Fees remain capped at the rate of CPI increase during the period in which the review is undertaken.

The Independent Pricing and Regulatory Tribunal NSW has completed a review of and issued recommendations relating to interoperability service fees between Operators. ARNECC is considering their recommendations and any necessary amendments to the Operating Requirements relating to interoperability service fees will be made in MORv8.

Interoperability framework

Addition of new requirements relating to the process of requesting interoperability between Operators including the requirement to:

- Promptly enter into good faith negotiations with the other Operator or Potential Interoperable Operator to prepare and execute an Interoperability Agreement; and
- Promptly provide to the other Operator or Potential Interoperable Operator all information reasonably required to enable the other Operator or Potential Interoperable Operator to understand the basis on which the Operator or Potential Interoperable Operator is prepared to Interoperate, including any proposed terms; and
- ensure the Interoperability Agreement entered into with each Operator or Potential Interoperable Operator is entered into on an Equivalent Basis.

Once an Interoperability Agreement is entered into an Operator must –

- Promptly publish on its website a copy of the Interoperability Agreement with any commercially sensitive information redacted as agreed with the Operator with which it has entered into the Interoperability Agreement; and
- take all steps reasonably necessary and within its control to implement Interoperability with the other Operator

An Interoperability Agreement must –

- not include any express or implied terms that could qualify, derogate from or otherwise prejudicially affect the Operator or Potential Interoperable Operator's compliance with any of the obligations under the EC National Law and the Operating Requirements; and
- include terms that deal with the Interoperability Agreement Matters.

Addition of a binding dispute resolution process if Operators are unable to agree on the terms of Interoperability Agreement. The dispute resolution process includes-

- steps for mediation; and
- steps for appointment of a mediator if agreement cannot be reached; and
- requirements for Operators to participate in mediation; and
- the ability for an Operator to submit to arbitration should mediation not resolve the dispute; and
- steps for appointment of an arbitrator if agreement cannot be reached; and
- the matters an arbitrator must take into consideration.

Addition of requirements for an Operator to Interoperate on an Equivalent Basis with all Operators and ensure the standard of performance of its Network in an interoperable transaction is equivalent to its performance in a non-interoperable transaction.

Interoperability Roles

In an interoperable transaction, only one Operator will lodge the documents with the Land Registry at the point of lodgement. They will lodge all the documents in that transaction. They are known as the Responsible ELNO. The other Operator(s) are known as the Participating ELNO(s).

Addition of requirements detailing the roles and responsibilities for an Operator that is the Responsible ELNO and the roles and responsibilities of an Operator that is the Participating ELNO.

Testing

The amendment of the existing Network testing requirements to include a requirement to not implement Interoperability without sufficient testing to the satisfaction of the Registrar.

Security Provisions

Amendment of the provisions relating to security to ensure that the reasonable steps an Operator takes to ensure the security of the system are extended to data exchanged in an interoperable transaction. Addition of a requirement of an Operator to obtain annually a SOC 2 Type 2 Report and take Prompt action to ensure that controls and processes are effective and rectify any identified weaknesses.

Data

Addition of a requirement that data received from another Operator in an interoperable transaction may only be disclosed, stored or used for the purposes of performing any function in the workspace, in accordance with the Operating Requirements, or as required by law.

Notification of Jeopardised Conveyancing Transactions

An amendment of the requirement to immediately notify the Registrar and Subscribers in a Jeopardised transaction to include notification of other Operators if that transaction was an interoperable transaction.

Obligations in relation to Notification of Compromised Security Items

An amendment to add a requirement to notify other Operators in an interoperable transaction of any compromised Security Items.

Data Breach notification

An amendment to require an Operator to notify Subscribers and other Operators its Network interoperates with in the event of a Data Breach.

Risk Management Framework

An amendment to ensure that an Operator's Risk Management Framework includes the identification, mitigation and management of risks in its Interoperability interfaces.

No increased risk of fraud or error

An addition of requirements to ensure that the implementation of interoperability does not result in a greater risk of fraud or error for Interoperable Lodgment Cases compared to non-interoperable lodgment cases.

Data standards

Addition of a requirement to use a specific data standard, the NECIDS, when participating in an interoperable workspace.

Services to enable assessment of integrity

Amendment of provisions to require an Operator to extend the services provided to Subscribers which enable the assessment of integrity of a transaction, to include Subscribers and other Operators in interoperable transactions.

Registry Instrument or other Document templates

Amendment to clarify that a Participating ELNO is not required to provide a document template to a Registry at lodgement.

Land Registry Fees

Amendment to the existing requirement for an Operator to not present a document for lodgement unless fees have been collected or an irrevocable commitment to pay has been given to that Operator has been expanded to either the Operator or the Responsible ELNO in an interoperable transaction.

Implementation plan

Amendment of the existing requirement to provide an implementation plan expanded to ensure that detail in the implementation plan includes the roll out of interoperability.

Release management

A new requirement that the Operator must comply with any reasonable release management requirements specified by the Registrar or Land Registry following reasonable consultation with the ELNO.

Review of Subscribers and suspension or termination

An additional requirement for an Operator to promptly notify any Operator with which it interoperates if the Operator knows or has reasonable grounds to suspect that a Subscriber has, is or is about to commit a Suspension or Termination Event.

Assistance

There is an existing requirement that Operators direct third parties to make available information to the Operator's Independent Expert so that the Independent Expert can provide certifications relating to the Operator. This has been amended to exclude the requirement to direct other Operators that it is interoperating with to provide information.

Minimum requirements of a Transition Plan

An addition to the existing requirements of a Transition Plan to include the requirement of an Operator to provide notice to other Operators that it interoperates with, in the event that the Operator is intending to cease providing and operating its Network.

Schedule 3 – Reporting Requirements

- An additional requirement for an Operator to provide a self-certification confirming it is complying with the requirements relating to system vulnerability assessment and penetration testing prior to commencing operation of the Network, which was previously only required annually after commencing operations.
- The addition of self-certification required in the annual review to include confirmation that the Operator is complying with the requirements relating to the Interoperability Framework, SOC 2 Type 2 report and data standards.

Schedule 8 – Interoperability Agreement Matters

A new schedule in the requirements which sets out the Interoperability Agreement Matters, which are the terms that must be dealt with in an Interoperability Agreement. They are:

- Assistance
- Change Management

- Claims Management
- Dispute Resolution
- Land Registry Fees
- Privacy
- Root cause analysis
- Security
- Service Levels
- Testing
- Training (resources and information)

5 Unusual or Controversial Provisions

There are no unusual or controversial provisions in WAORv7.

6 Consultation

Extensive National and State targeted consultation has occurred in drafting and finalising MORv7. Between 2021 and 2023, there were 3 rounds of consultation that accompanied the publication of 3 draft versions of MORv7. A summary of the consultation feedback is available at Annexure 3. As WAORv7 is virtually identical to MORv7, it was not necessary to conduct any further consultation in relation to WAORv7.

7 Regulatory Impact Assessment

A Regulatory Impact Assessment was not required for the WAORv7 as the introduction of these operating requirements does not have an economically significant impact on Western Australia. Landgate made this determination by assessing the WAORv7 against the provisions of the Better Regulation Unit Guidance Note 1: Economically Significant Impacts finding that the WAORv7 does not meet the criteria to be economically significant. Specifically, WAORv7 does not:

- add significantly to business costs,
- disproportionately impact groups, such as small business or low-income households,
- introduce controls that reduce the number of participants in a market,
- impose higher costs on a business activity or type of product or service, or
- impose restrictions that reduce the available range or price or service quality options.

8 Fees

WAORv7 does not impose any fees.

9 Disclaimer

This explanatory memorandum is only an aid to understanding and must not be substituted for the subsidiary legislation or other instrument gazetted or made available to the public.