

Industry Engagement Forum Consultation Drafts 5.1 MOR & MPR

Questions and answers

- 1. Is the introduction of downstream services just an opportunity for an Electronic Lodgment Network Operator (ELNO) to operate a conveyancing service and compete with conveyancers?**

The Electronic Conveyancing National Law (ECNL) has always allowed for an ELNO to offer downstream, or upstream, services. This is not a new concept arising from changes to the Model Operating Requirements (MORs). The regulatory review revealed that this could give rise to issues around competition and misuse of information. The new separation provisions are designed to provide a level playing field so that if an ELNO wants to undertake conveyancing, it will need to do it the same way as any other conveyancing firm, and not be able to take advantage of its role as an ELNO.

- 2. Why weren't downstream services defined in the proposed MORs? Do downstream services include conveyancing services?**

ARNECC did not want to be overly prescriptive as to the types of downstream services which may be offered, due to the changing market. The definition has therefore been left broad. A downstream service includes conveyancing services.

- 3. Will the definitions be updated to include a conveyancing service as an example of a downstream service?**

ARNECC will consider this.

- 4. Can the definition of downstream services be changed to prevent an ELNO offering conveyancing services?**

ARNECC is not in a position to prevent ELNOs from providing conveyancing services under the ECNL. They have always had this ability. The only way to change this is to amend the ECNL, which takes time.

Introducing functional ELNO separation provisions is intended to remove the risk of an operator using the information they have to monopolise a downstream service. Currently, an ELNO could offer conveyancing services. The proposed amendments make it clear an ELNO cannot use the information it holds from operating as an ELNO.

Enabling downstream services allows consumers to have a choice. The separation provisions will help remove risks so that conveyancers and any conveyancing company set up by the ELNO have the same access to the same information.

- 5. Why mandate the use of an ELNO for lawyers and conveyancers if an ELNO can offer the same conveyancing services as solicitors and conveyancers.**

Enabling downstream services allows consumers to have a choice. Since the use of an Electronic Lodgment Network (ELN) has been mandated in some jurisdictions, ARNECC has introduced separation provisions to help remove the risk, so that conveyancers and any

conveyancing company set up by the ELNO have the same access to the same information. There is an opportunity for substantial innovation.

6. How is ARNECC checking that ELNOs are complying with regulations? Is an ELNO self-regulated?

ELNOs are not self-regulated. There has always been a requirement in place for ELNOs to provide yearly compliance certifications. ELNOs are not audited. However, ARNECC monitors compliance with the regulations. The current compliance regime will be considered as part of the review of the regulatory framework.

7. How can we be certain an ELNO will not take advantage of their market share when offering a downstream service and breach the Model Participation Rules (MPRs)?

From a regulatory perspective, ARNECC cannot assume an ELNO would blatantly operate outside the law. Competition, and the separation provisions attempt to put everyone on a level playing field and prevent an ELNO from having a competitive advantage, including any advantage of having a customer database. If people are concerned that an ELNO is not doing the right thing, they may make a formal complaint. ARNECC will take any complaint seriously and provide a response.

8. Is allowing ELNOs to provide downstream conveyancing services a regulatory oversight? Can the ECNL be amended to prevent ELNOs providing downstream services?

There has been no regulatory oversight. The intention is to regulate downstream service providers, not prohibit them. Even if the ECNL were to prohibit the supply of downstream services in legislation, this would take time. A regulatory response is needed in the meantime.

9. Do the separation principles go far enough? Industry want to see something in place that can prevent an ELNO from providing conveyancing services.

ARNECC appreciates that industry is concerned about downstream conveyancing services. However, government wants to encourage competition and not lock people out of the market.

The separation regime is intended to address competition concerns. The regulatory regime builds upon accepted competition law principles applicable to integrated service providers. The separation principles in the MORs are typical in this type of situation (and others, e.g. Telstra). This includes rules about pricing, information and resource sharing. ARNECC intends to provide a level playing field.

Also, the MORs provide integration and equivalency provisions which means ELNOs must treat everyone with equivalence.

10. What leverage does ARNECC have if someone does not comply with the MORs? Are there any alternative options to suspending or revoking a subscription to an ELNO, particularly if minor non-compliance may not trigger these remedies? There is a lack of deterrents available.

Currently, the only consequences for failure to comply with the MOR's are termination or suspension. This can make it difficult to find an acceptable remedy when a breach is not material. This is also why competition is important, as further remedies are more realistic when there is more than one ELNO, particularly in a transforming industry.

ARNECC have recognised this as an issue and it has been incorporated into the review of the regulatory framework.

11. Who is undertaking the regulatory review?

ARNECC cannot release the name of the reviewer at this time. A governance framework will be published soon. ARNECC intends to make the review process as transparent as possible.

12. Will ARNECC make the annual review of ELNOs under the MORs more transparent to help improve confidence in the industry? For example, will ARNECC make an announcement that the review has been completed?

ARNECC will consider ways to make the process more transparent and improve communications with industry. Our current stakeholder engagement policy is published on the website. This may need to be reviewed.

13. Why would the use of an ELN be mandated when it results in the market power of small businesses being eroded?

ARNECC did not make the decision to mandate use of an ELN. Mandating is a result of the policies of land registries and governments in each jurisdiction. Certain jurisdictions are not mandating the use of ELNs.

14. Will ARNECC receive further resources given ARNECC's new/emerging role as a regulator?

ARNECC recognises that resourcing is an issue. ARNECC does not exist at law so cannot receive funding for itself. ARNECC is funded under a cost sharing arrangement arising out of cooperation between the States and Territories and under an Intergovernmental Agreement (IGA). This is an ongoing issue and will be addressed in the review of the IGA.

15. As independent representation on ARNECC is lacking, will ARNECC consider including 2 or 3 industry representatives as members or operating at a federal level?

If industry is supportive of these measures, ARNECC encourages stakeholders to provide formal feedback. There will be an opportunity for industry to provide this feedback and any other feedback during the review of the IGA.

16. The definitions of attorney and donor in the MPRs are very general. When should a particular client authorisation be used? If the client authorisation – attorney form is mandated, what does this mean for existing client authorisations that are held?

Use of the Client Authorisation – Attorney form will not be mandated. A Representative Subscriber (conveyancers and lawyers) should continue to use the Client Authorisation – Representative form. An example of when the Client Authorisation – Attorney form would be

used is if there were interrelated companies and the head office did conveyancing for a subsidiary company.

17. When will the attorney regime come into operation?

Although the regime will be included in the MPRs, there are system changes required by both ELNOS and Land Registries to implement these changes. It is difficult to say when these changes will be implemented.

18. How will the attorney regime apply for non-ADI subsidiaries?

Non-ADI subsidiaries fit within the Subscriber as attorney regime.

19. What is the rationale behind the Client Authorisation – Attorney regime?

A power of attorney is required to satisfy the laws of agency. A Client Authorisation - Attorney is required to satisfy the ECNL.

20. How will interoperability between ELNOs work? Will practitioners have to subscribe to more than one ELNO?

Interoperability is a difficult issue and a major challenge. It has been raised in the review of the regulatory framework.

There are two prospective ELNOs which have not entered the market yet, and each ELNO will operate independently. Unless there are changes to the current regulatory framework, it is possible that practitioners will need to subscribe to multiple ELNs.

ARNECC does not currently consider that there will be any change to the MORs to allow interoperability until the regulatory framework review is complete.

21. Is ARNECC considering any greater regulation of source accounts?

The Registrars do not regulate financial settlement.

22. Will the operating rules introduce a mandatory consumer guarantee similar to the one introduced by PEXA?

The introduction of a mandatory consumer guarantee has not been discussed. PEXA Ltd has taken the initiative and introduced the consumer guarantee to try and improve consumer confidence. It is up to each ELNO to decide whether or not a similar guarantee will be offered. The Victorian Land Registry does not believe that the Registrar has the power to make this a requirement for ELNOs.