

Model Operating Requirements (MOR) Consultation Draft 5.1 Feedback

This table responds to the feedback received on Consultation Draft 5.1 of the MOR published in September 2018

#	Requirement	Issue	Action Taken for MOR	Suggested Response
2.1.2 Definitions				
1	Cloud Service	Remains very broad and captures a wide range of potential non-critical services and tools which may be used by an ELNO. It is recommended that the definition of 'Cloud Service' be defined more narrowly by reference to services critically important to the integrity and fundamental operation of the ELN.	None	MOR 7.12.1 has been amended to limit its application to use of a Cloud Service for the ELNO's 'ELN or to provision its ELN' and not any other part of the system architecture. In light of the highly sensitive and confidential nature of some of the information collected and held by an ELNO, no further amendments will be made, particularly as it would be practically difficult to distinguish between critical and noncritical elements of the ELN.
2	Cloud Services and Cloud Service Provider	The circularity of the definition of Cloud Services and Cloud Service Provider definitions could be broken by adopting an alternative definition for Cloud Services. A version of the Australian Governments definition of cloud computing may suffice – ' <i>Cloud Service means an on-demand service providing network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction.</i> '	The MOR have been amended	The definitions have been amended as suggested.
3	Data Breach	Given the sensitive nature of the data handled by ELNOs and the potential for a breach to impact the integrity of the Land Registry, oversight by ARNECC is appropriate. ARNECC may want to consider whether it is appropriate for the Subscriber to be notified in every instance where notification of ARNECC is required. For example, where an unauthorised access event occurs but is detected and quarantined by an ELNO, and no Notifiable Data Breach obligation arises under the Privacy Act, the need to notify Subscribers is questionable.	None	<p>The requirement to notify Subscribers in MOR 7.11.2 only applies to an 'affected Subscriber' not all Subscribers.</p> <p>The Registrar and affected Subscribers must always be notified of the Data Breach so they can choose to review their own security and policies.</p> <p>Notifying affected Subscribers of actual or potential Data Breaches which have been detected and quarantined by an ELNO will build trust and public confidence in the ELNO's ELN and electronic conveyancing generally.</p>

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4	Data Breach	Remains of the view that this definition is too broad and could mean any 'information' held by the ELN. It is suggested that the type of information caught by the definition should be limited to information which is Land Information and other information which may go to the integrity, security and reliability of the ELN. In addition, neither the definition nor OR 7.11 specifies a materiality threshold, meaning that any breach or unauthorised access is required to be reported, regardless of the likely impact or effect. This is a lower threshold than the mandatory data breach notification regime under the Privacy Act. It is proposed that a materiality threshold be included in the MOR which specifies that a data breach is notifiable if it is likely to cause some harm to Subscribers, Clients, the ELN or the Land Registry.	None	All information stored in an ELN must be secure. In light of the highly sensitive and confidential nature of some of the information collected and held by an ELNO the obligations as drafted in the MOR are considered appropriate. If specific examples can be provided of immaterial events of unauthorised access that have occurred, a materiality threshold could be considered in the future. Current drafting is considered appropriate.
5	Downstream Service	Downstream Service means a service supplied or offered to a Person (including a Related Entity of that Person) which directly or indirectly ...	The MOR have been amended	Partially amended as suggested. Changed "who" to "which".
6	Downstream Service	Given that lodgement occurs towards the end of a conveyancing matter, it is conceivable that other services an ELN may offer would be upstream, rather than downstream. As such, 'Downstream' should be substituted for a more neutral term.	The MOR have been amended	Changed to "Downstream or Upstream" Service
7	Equivalent Basis	Equivalent Basis means equivalence: (d) ... other interfaces and technologies of the ELN , or enhancing ...	The MOR have been amended	Amended as suggested.
8	Independent Expert	Should be removed. A "contractor or agent of the ELNO" creates an unwelcome opportunity for a potential conflict of interest to occur, defeating the purpose of an 'independent' expert.	None	The definition provides for an independent expert to be a contractor or agent of the ELNO only where the expert 'is able to demonstrate to the Registrar's satisfaction that any work to be undertaken as an Independent Expert is independent from any existing work being undertaken for the ELNO'. No amendment has been made. Removing this option would be unnecessarily restrictive where the expert's independence can be established.
9	Person Wishing to Integrate and Person Who Has Integrated	Definitions of "Integrate" and "Integrated" are not defined.	None	MOR 2.2.5 (Interpretation) outlines that "where a word or phrase is given a defined meaning, any other part of speech or grammatical form in respect of that word or phrase has a corresponding meaning." The definition of Integration would therefore apply to "Integrate" and "Integrated". The definitions have been reviewed and the use of the part of speech is considered appropriate in its context.
10	Related Entity	Related Entity means a Related Body Corporate or a Related Party of the ELNO.	None	Feedback noted, however, 'the ELNO' is used throughout the MOR.
11	Related Party	Related Party of a Person means the ELNO's principal shareholders, directors, officers, employees and agents of that Person .	The MOR have been amended	Partially amended as suggested. The definition has been amended to add "shareholders".

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General Obligations				
12	5.3(j)	"Promptly" has no unit of measure and is too subjective and open to interpretation.	The MOR have been amended	A definition for "Promptly" has been added.
13	5.3 (j)	ELNOs are dealing with a broad range of issues as the industry evolves and state governments mandate electronic conveyancing. The notification obligation may be too broad in scope. It's more appropriate for ELNOs to be required to notify the Registrar of all events relating to the ELNO or ELN which have the potential to pose a material reputational risk to the ELN, the Titles Register or the Registrar.	None	No change. The obligation is only for the ELNO to notify the Registrar, not take any other action. It is important that the ELNO notify the Registrar of all events specified in MOR 5.3(j) so that the Registrar can evaluate the information and take necessary steps to protect the integrity and reputation of the Titles Register, ELN, Titles Registry or Registrar.
14	5.3 (j) (ii)	Provides that the Registrar must be notified promptly of any event relating to the ELNO or ELN which has the potential to 'pose a reputational risk to the ELN, the Titles Register or the Registrar', in addition to any event that has the potential to 'affect the integrity of the Titles Register' (which now appears in OR 5.3(j)(i)). Fundamentally opposed to this obligation in principle, and notes that it is not aware of any similar requirement in any other context. A notification obligation of this kind is highly unusual. Further, the drafting of these requirements is extremely vague and subjective. In particular, it is unclear what is meant by 'reputational risk' and how the potential existence of such a risk to 'to the ELN, the Titles Register or the Registrar' might be gauged. As such, it will be difficult for any ELNO to form a view on whether they need to notify an event to the Registrar. As the consequences of failing to comply with OR 5.3 are severe, it is critical from a compliance perspective that an ELNO is able to determine with certainty when and what it is required to do to comply with any notification requirement. It is consequently submitted that the notification requirements set out in in OR 5.3(j)(i) and OR 5.3(j)(ii) should be removed, or at the very least be made subject to clear criteria for assessment and a materiality threshold.	None	No change. The obligation is only for the ELNO to notify the Registrar, not take any other action. It is important that the ELNO notify the Registrar of all events specified in MOR 5.3(j) so that the Registrar can evaluate the information and take necessary steps to protect the integrity and reputation of the Titles Register, ELN, Titles Registry or Registrar.
ELNO Service Fees				
15	5.4	Existing ELNOs should clearly represent how they offer value for money.	None	Covered by MOR 5.3(e) which requires the ELNO to determine any ELNO Service Fees according to a publicly available, equitable and transparent pricing policy. Further guidance as to the principles the ELNO is to apply is in the Model Operating Requirements Guidance Notes.
16	5.4	Agree with the amendment and manner in which price increases will be managed from 2019 to 2022.	None	Feedback noted. Feedback does not require further amendments.

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17	5.4	The basis for the use of a CPI price path is unclear. It is important to consider whether both the initial prices and prices over time reflect efficient costs and productivity improvements. When robust competition is in place, price controls could potentially be removed. Recommend periodic price reviews to ensure cost-reflective pricing outcomes.	None	Price increases are limited to CPI for a three year period. After the three year period it is intended that a review be conducted to determine whether ELNO Service Fees require further regulation. It is considered that the CPI cap will be sufficient in the interim to prevent unfettered increases in ELNO Service Fees. In addition, ARNECC reviews the MORs annually and these reviews will cover this provision.
18	5.4	In relation to 5.4.4 the ability to pass through certain cost increases should not be limited to the 3 items identified in the current draft (including 5.4.5 for LSS). There should be ability to pass through costs imposed on an ELNO should also include any other fees, charges or costs imposed by the Registry (or any private operator) or any other government agency.	The MOR have been amended	MOR 5.4.4(c) has been amended as suggested.
19	5.4	In relation to 5.4.5, ELNOs may not always pass on increases that are caused by Information Fee increases. As such, use of the term must may not be appropriate when dealing with Information Fee increases.	The MOR have been amended	MOR 5.4.5 has been amended as suggested.
20	5.4	A pricing cap based on a pricing table published by each ELNO will not encourage competitive pricing for the following reasons: (a) creates a disincentive to offer lower prices because that pricing (subject to CPI-linked increases) will be locked in for the next four years. (b) Normally, price caps are set by reference to an objective standard, rather than simply from a pricing table published by participants in the relevant market. They are also generally expressed as applying to the incumbent in the market. The approach taken in the MOR is not therefore consistent with regulatory practice. (c) The regime discourages pricing innovation as any initial pricing is 'locked' in for future years. Therefore, introductory pricing or other innovative (but potentially not long term) pricing structures cannot be adopted. Ultimately it is a vibrant and competitive ELNO market which will provide the best price outcomes for users of ELNO services. This is why, in our opinion, creating a level playing field for ELNOs should be ARNECC's main priority.	None	There is significant flexibility in what an ELNO can include in their pricing policy prepared under MOR 5.3(e). Discounts for competitive advantage can be applied and MOR 5.4 does not preclude an ELNO from charging less than the maximum.
21	5.4.5	The ELNO must recalculate the ELNO Service Fees only insofar as the Information Fees are changed. Onus must be on the ELNO to notify Subscribers of any change as per the 20 business day notification period in order for Subscribers to make adjustments to their quoting or notifications to clients.	None	Covered by MOR 5.4.6.

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22	5.4.6	Any changes to the table must be published as soon as reasonably practicable but no later than 20 business days before the pricing table, or changes to it, take effect.	None	No change to current drafting. The 'as soon as reasonably practicable' option is important to accommodate the possibility of delays in the ELNO obtaining relevant information such as the amount of a fee increase under MOR 5.4.5.
Integration				
23	5.5	Robust provisions setting out an ELNOs obligations to integrate its platform with third-party downstream service providers are required	None	No change to current drafting. Specific issues and suggestions will be considered as they arise.
24	5.5	Further clarification required on exceptions to equivalence standard, disclosure obligations by ELNO and integrating entities in regard to any deviations to set standards, services or degree of integration as well as how compliance will be monitored and enforced. The wording "subject only to difference which are attributable to type, level or class of integration" is still ambiguous and is open to interpretation. ARNECC will need to expound on this and set particular disclosure obligations to require the ELNO to transparently report on available services or integration options to the market.	None	Each ELNO is required to publish a set of integration terms and conditions on their website. It is expected that the integration terms and conditions will set out options for different levels, types and classes of integration. Guidance on the content of the integration terms and conditions will be provided in the Model Operating Requirements Guidance Notes.
25	5.5	The addition of 5.5 into the MOR is acknowledged and we believe this will assist in encouraging the ongoing innovation of technology to serve the new electronic settlement and lodgment market. It is noted there are limited powers to enforce compliance by any ELNO or determine if compliance in their dealings with Persons Wishing to Integrate is on an Equivalent Basis.	None	Feedback noted and has been forwarded for consideration through the Intergovernmental Agreement review.
26	5.5	This provides minimal rules in relation to competing ELNOs and is not nearly adequate for the purposes of another ELNO being approved.	None	Feedback noted. Interoperability will be considered as part of the Intergovernmental Agreement review.
27	5.5	Understand that there will be a standardised setting of terms and conditions for integration, so that each upstream and downstream service provider is treated on an equal basis to ensure the playing field was levelled to prevent the integrated ELNO service provider's business receiving greater favour.	None	Each ELNO will publish a set of integration terms and conditions on their website.
28	5.5	An Integration regime is unnecessary if the e-conveyancing market is competitive. However, if ARNECC wishes to introduce an Integration regime along the lines set out in the v5.1 Consultation Draft, it is considered that the operation of the regime should be clarified, preferably in the drafting of the MOR.	None	MOR 5.5 imposes an obligation on an ELNO to publish a set of integration terms and conditions and treat any person the ELNO has integrated with or who wishes to integrate with an ELNO on an Equivalent Basis. Guidance on the content of these terms and conditions will be provided in the Model Operating Requirements Guidance Notes. It is considered that this requirement will create transparency without risking unintended consequences. No further refinement is possible without specific issues being identified.

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29	5.5	The proposed MOR 5.5 will impose a significant compliance burden on ELNOs. ARNECC should consider making it clear that MOR 5.5 does not require an ELNO to integrate concurrently with all requests but is able to prioritise having regard to the resources at its disposal.	None	Prioritisation to be included in the ELNO's set of integration terms and conditions. Further detail regarding inclusion of prioritisation will be included in the Model Operating Requirements Guidance Notes.
30	5.5	Integration plan does not provide an upper timing limit for an ELNO to facilitate an integration plan and rollout integration to a Person Wishing to Integrate. This could allow the ELNO to preclude a person wishing to integrate by delay in provision of the integration plan or other requisite information upon receipt of request to integrate. It is proposed that Integration key steps to be included in any integration terms published by the ELNO with minimum and maximum rollout periods.	None	Further detail will be included in the Model Operating Requirements Guidance Notes.
31	5.5.3	The ELNO must treat a Person Wishing To Integrate or a Person Who Has Integrated on an Equivalent Basis, subject only to differences which are attributable to the type, level, or class of Integration with the ELN provided that if each Person Wishing To Integrate or Person Who Has Integrated with like circumstances have has an equivalent ! opportunity to benefit from choosing between those options compared with each other Person Wishing to Integrate or Person Who Has Integrated.	The MOR have been amended	MOR 5.5.3 has been amended as suggested.
32	5.5.3	Comfortable with the notion of an equivalence requirement, but concerned that this requirement is not sufficiently clear, especially as it inter-relates to standard terms. Integration will be a very important feature of the market going forward, and it is important that the operation of the Integration arrangements are designed to maximise outcomes for users of ELNO services. Primary concerns are the limitations on ELNOs' ability to offer bespoke Integration terms and potential retrospective application of the requirement and timing of the requirement to integrate.	None	No change to current drafting. Guidance on the content of the integration terms and conditions will be provided in the Model Operating Requirements Guidance Notes.

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Separation				
33	5.6	<p>Stop the allowance of downstream services by an ELNO otherwise the CONSUMER will be rendered highly vulnerable in the biggest transaction(s) most of them will ever enter, by the loss of the conveyancing fraternity.</p> <p>Remove the ability of an ELNO to be a subscriber of and provide downstream conveyancing. An ELNO will not be independent and is not bound by any regulatory requirements.</p> <p>Transparent separation arrangements are required if an ELNO becomes involved in downstream services.</p> <p>The process proposed in 5.6 to separate an ELNO from an entity conducting a Downstream Service is grossly inadequate in relation to conveyancing services.</p>	None	<p>Feedback noted. The legal framework for electronic conveyancing has never restricted or prevented an ELNO from providing services additional to those provided by the ELN. This is specifically acknowledged in section 17 (4) of the ECNL. MOR 5.6 is designed to prevent an unfair competitive advantage and requires an ELNO to operate in a manner, which separates its ELN services from any downstream or upstream service. MOR 5.6 also requires the two entities to act independently, at arm's length. It would not be consistent with the legal framework to prohibit a separate business unit or separate legal entity from providing a downstream or upstream service. In relation to legal and conveyancing businesses it is noted that MOR 14.10 provides that an ELNO must not be a Subscriber to the ELNO's ELN.</p>
34	5.6	<p>While acknowledging it would require legislative reform to expressly prohibit an ELNO or related entity from offering conveyancing services, separation continues to be a significant concern as:</p> <p>It is unlikely that there will be more than a small handful of commercially operated ELNOs.</p> <ul style="list-style-type: none"> · The advent of mandating electronic lodgements will mean that Subscribers will have little or no choice about the ELNO to use in the absence of interoperability. · ELNOs may engage in "synchronised swimming" in relation to various 'competitive' practices of the big four banks). · An ELNO receives highly confidential data about a Subscriber, the parties to a transaction and the terms of the transaction itself, most of which is not publicly available. · An ELNO also requires the payment of fees that it may apply in any manner including the training of staff and marketing of services to non-Subscribers and the public. 	None	<p>Feedback noted. The legal framework for electronic conveyancing has never restricted or prevented an ELNO from providing services additional to those provided by the ELN. This is specifically acknowledged in section 17 (4) of the ECNL. MOR 5.6 is designed to prevent an unfair competitive advantage and requires an ELNO to operate in a manner, which separates its ELN services from any downstream or upstream service. MOR 5.6 also requires the two entities to act independently, at arm's length. It would not be consistent with the legal framework to prohibit a separate business unit or separate legal entity from providing a downstream or upstream service. In relation to legal and conveyancing businesses it is noted that MOR 14.10 provides that an ELNO must not be a Subscriber to the ELNO's ELN.</p>

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35	5.6	<p>Draft requirements 5.6.1 through to 5.6.5 require additional rules to address:</p> <ul style="list-style-type: none"> - identify what "services" are currently permissible - mechanisms for how additional "services" can be reviewed by ARNECC prior to being provided by the ELNO or its related party entity - consideration for industry consultation of future "services" being considered by ARNECC. <p>5.6 - 5.6.5 in their current state limits ARNECCs ability to regulate behaviours of an ELNO and reduces confidence that potential abuses will be unavoidable or managed appropriately.</p>	None	<p>Feedback noted. The legal framework for electronic conveyancing, has never restricted or prevented an ELNO from providing services additional to those provided by the ELN. This is specifically acknowledged in section 17 (4) of the ECNL. MOR 5.6 is designed to prevent an unfair competitive advantage and requires an ELNO to operate in a manner, which separates its ELN services from any downstream or upstream service. MOR 5.6 also requires the two entities to act independently, at arm's length. It would not be consistent with the legal framework to prohibit a separate business unit or separate legal entity from providing a downstream or upstream service. In relation to legal and conveyancing businesses it is noted that MOR 14.10 provides that an ELNO must not be a Subscriber to the ELNO's ELN.</p>
36	5.6	<p>Preferred regulatory structure is complete vertical separation between an ELNO and downstream providers, however, if this is not possible then it is necessary to have robust functional separation requirements or ring fencing. Information barriers separating an ELNO from its related entities in the downstream market are also necessary. ELNOs should have obligations to provide non-discriminatory access to downstream users and to interact with all participants on equal terms.</p>	None	<p>Feedback noted. The legal framework for electronic conveyancing has never restricted or prevented an ELNO from providing services additional to those provided by the ELN. This is specifically acknowledged in section 17 (4) of the ECNL. MOR 5.6 is designed to prevent an unfair competitive advantage and requires an ELNO to operate in a manner, which separates its ELN services from any downstream or upstream service. MOR 5.6 also requires the two entities to act independently, at arm's length. It would not be consistent with the legal framework to prohibit a separate business unit or separate legal entity from providing a downstream or upstream service. In relation to legal and conveyancing businesses it is noted that MOR 14.10 provides that an ELNO must not be a Subscriber to the ELNO's ELN.</p>
37	5.6	<p>Supportive of a mechanism by which an ELNO enters into an agreement with ARNECC to pay a considerable financial penalty should they breach any conditions in the 'Separation Plan' and would expect the financial penalty to be such that it is adequate to act as a deterrent.</p>	None	<p>The issue of penalties will be forwarded for consideration through the Intergovernmental Agreement review.</p>
38	5.6	<p>The insertion of 5.6 into the MOR is also acknowledged. However, it is noted that there is no penalty for any ELNO found not to be compliant with the MOR in this aspect, except the threat of suspension or removal of the ELNO license. This needs to be addressed. Without sufficient auditing and commercial deterrents these requirements amount to very little. It is noted that a Self-Certification or No Change Certification is the only requirement for compliance with this clause.</p>	None	<p>The issue of penalties will be forwarded for consideration through the Intergovernmental Agreement review. Schedule 3, Category 1 requires a fit for purpose independent certification for MOR 5.6.3 (c).</p>
39	5.6	<p>Separation provisions do not contemplate procedure if a conflict is identified. It is proposed a formula for excising if a conflict is identified should be prescribed.</p>	None	<p>Feedback noted and has been forwarded for consideration through the Intergovernmental Agreement review.</p>

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40	5.6	The proposed definition of "Related Entity" and "Related Party" does not provide comfort as the word "Related" is a contradiction. Do not have confidence that an ELNO providing Downstream Services through a Related Entity can be completely "arms length". Additional, if there was a conflict of interest or competitive advantage to be gained, does ARNECC have the time and resources to investigate such a breach of the rules.	None	Feedback noted. The legal framework for electronic conveyancing has never restricted or prevented an ELNO from providing services additional to those provided by the ELN. This is specifically acknowledged in section 17 (4) of the ECNL. MOR 5.6 is designed to prevent an unfair competitive advantage and requires an ELNO to operate in a manner, which separates its ELN services from any downstream or upstream service. MOR 5.6 also requires the two entities to act independently, at arm's length. It would not be consistent with the legal framework to prohibit a separate business unit or separate legal entity from providing a downstream or upstream service. In relation to legal and conveyancing businesses it is noted that MOR 14.10 provides that an ELNO must not be a Subscriber to the ELNO's ELN.
41	5.6	While supported in principal, ARNECC should be advised that fully complying with this clause will require significant lead-time due to the operational and technical adjustments that would have to be made. Consideration of the required lead time for ELNOs to implement is required.	None	In the event this does occur, a request for a waiver may be submitted to the Registrar for consideration.
42	5.6	Unless ELNOs self-report breaches of the rules of separation they are not likely to be caught. Concerns were raised at the industry forum that even if ELNOs are caught in breach of the regulatory regime, the consequences are ineffective, as these are limited to revocation or termination of certification in circumstances where there is currently a sole ELNO and the alternative paper system is being phased out.	None	Feedback noted and has been forwarded for consideration through the Intergovernmental Agreement review.
43	5.6	Share industry concerns regarding the issue of an ELNO supply downstream services. It is noted that the Separation obligations would be very difficult for ARNECC to monitor or enforce under the current regulatory structure. For example, it is unclear what consequences a monopolistic ELNO would face if it were to breach the Separation provisions. Without a competitive market, there is no incentive for a monopolistic ELNO to comply with the MOR; in practice the only penalty available might be the revocation of the ELNO's license to operate an ELN, which is ineffective if there is no competing ELNO providing ELN services.	None	Feedback noted and has been forwarded for consideration through the Intergovernmental Agreement review.

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44	5.6	This is a highly contentious issue and one which is considered ARNECC has neither adequately addressed nor evaluated. It is considered this clause to be grossly inadequate in relation to conveyancing services and fully support the position taken by each Division on this matter.	None	Feedback noted. The legal framework for electronic conveyancing has never restricted or prevented an ELNO from providing services additional to those provided by the ELN. This is specifically acknowledged in section 17 (4) of the ECNL. MOR 5.6 is designed to prevent an unfair competitive advantage and requires an ELNO to operate in a manner, which separates its ELN services from any downstream or upstream service. MOR 5.6 also requires the two entities to act independently, at arm's length. It would not be consistent with the legal framework to prohibit a separate business unit or separate legal entity from providing a downstream or upstream service. In relation to legal and conveyancing businesses it is noted that MOR 14.10 provides that an ELNO must not be a Subscriber to the ELNO's ELN.
45	5.6.2	Any supply of a downstream service by an ELNO particularly as a business unit will be subject to conflict. Additionally, it will increase market share and misuse market power. Query whether any business unit will also be a subscriber and therefore precluded by Rule 14.10. It is proposed that Provisions 5.6.2(a)-(d) should be deleted in their entirety. An ELNO should not be able to form a business unit to provide downstream services and should only deal with its core business. Separation should be limited to Related Body Corporate or Related Party.	None	Feedback noted. The legal framework for electronic conveyancing has never restricted or prevented an ELNO from providing services additional to those provided by the ELN. This is specifically acknowledged in section 17 (4) of the ECNL. MOR 5.6 is designed to prevent an unfair competitive advantage and requires an ELNO to operate in a manner, which separates its ELN services from any downstream or upstream service. MOR 5.6 also requires the two entities to act independently, at arm's length. It would not be consistent with the legal framework to prohibit a separate business unit or separate legal entity from providing a downstream or upstream service. In relation to legal and conveyancing businesses it is noted that MOR 14.10 provides that an ELNO must not be a Subscriber to the ELNO's ELN.
46	5.6.3 (c)	(i) manage the ELNO or ELN Business Unit independently from the Related Downstream Service Provider; and (ii) deal with confidential or commercially sensitive information of a Person Wishing To Integrate or a Person Who Has Integrated with the ELN to ensure that information is not available to, or able to be used by or for the benefit of, the Downstream Service Business Unit or Related Downstream Service Provider; and (iii) share personnel, systems and services, with the Related Downstream Service Provider so that at all times the requirements of this clause 5.6 are satisfied; and	The MOR have been amended	The substance of the proposed amendments has been adopted.
47	5.6.3 (e)	5.6.3(e) from Consultation Draft 5 should not be deleted. Furthermore, ELNO and related parties supplying Downstream Services must be subject to additional regulations and continuous disclosure requirements due to inherent competitive advantages.	The MOR have been amended	Feedback noted. MOR 5.6.3(e) from consultation draft 5 is MOR 5.6.3(c) (ii) in consultation draft 5.1. MOR 5.6.3(c)(ii) has been further amended in response to feedback.

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Access to ELN				
48	7.2.1	Welcomed addition, however please consider allowing process automation for digital signing or batch signing subject to a subscriber complying with certification rules and having adequate processes in place to ensure documents are verified prior to being included for batch automated signing, which is to be initiated by the required human user or signatory. The technology may not yet be available; however, we believe that this is the next logical step towards improved efficiency and convenience of the settlement process.	None	Feedback noted. Automated signing is not currently being considered. Instruments need to be considered before they are signed and certified.
Data Breach Notification				
49	7.11	Neither the definition nor OR 7.11 specifies a materiality threshold, meaning that any breach or unauthorised access is required to be reported, regardless of the likely impact or effect. This is a lower threshold than the mandatory data breach notification regime under the Privacy Act. It is proposed that a materiality threshold be included in the MOR which specifies that a data breach is notifiable if it is likely to cause some harm to Subscribers, Clients, the ELN or the Land Registry.	None	All information stored in an ELN must be secure. In light of the highly sensitive and confidential nature of some of the information collected and held by an ELNO the obligations as drafted in the MOR are considered appropriate. If specific examples can be provided of immaterial events of unauthorised access that have occurred, a materiality threshold could be considered in the future. Current drafting is considered appropriate.
50	7.11.2 (a)	Previously recommended that OR 7.11.2(a), which requires that an ELNO must 'immediately' notify the Registrar-General of a data breach, be amended to 30 days, to reflect the similar provisions of the Privacy Act. Repeats and adopts previous suggestion. Similarly, repeats and adopts previous suggestion that ARNECC should adopt a centralised notification regime and be responsible for the coordination of any investigation and assessment process between Registrars.	The MOR have been amended	"Immediately" has been changed to "Promptly" which is now a defined term. Registrars need to be prepared for questions directed to them.
51	7.11.3 & 7.11.4	These requirements are supported. However, there should also be a requirement that the ELNO obtain a written report from that security professional in relation to the assessment and testing and the completed rectification work and provide the Registrar and ARNECC with a copy of those reports within 7 days of receipt. Proposed requirement 7.11.2(d) is not strong enough and an additional clause should be added to the MOR as submitted above.	None	Feedback noted. Provision of a report to a third party is an additional security risk.
Cloud Service				
52	7.12	The obligation on the ELNO in paragraph (a) to continuously mitigate should apply not only to any risks identified in a Risk Assessment but also any other risks known to the ELNO. The undertaking in paragraph (e)(ii) should apply to any security incident or data breach that affects, or may affect, the ELN.	None	Feedback noted. Already adopted.

#	Requirement	Issue	Action Taken for MOR	Suggested Response
53	7.12	AWS does not currently state that it is compliant with ISO 27002, nor is it known to have made a contractual commitment to that affect, including to LRs that are on AWS infrastructure. As such, redrafting of 7.12.1(e)(i) is required. Alternative drafting that would satisfy current arrangements with AWS could be - 'an undertaking by the Cloud Service Provider to maintain an information security program that complies with the ISO 27001 standard (or such successor standards) or such other alternative standards as are substantially equivalent to ISO 27001.	The MOR have been amended	The substance of the proposed amendments has been adopted.
54	7.12.1 (d)	Formerly 7.12.2 (f) is now fit for purpose.	None	Feedback noted. Feedback does not require further amendments.
55	7.12 (e)	Requires ELNOs to have legally binding agreements with its Cloud Service Providers which satisfy the requirements listed in OR 7.12(e)(i)-(iv). These criteria will be satisfied by Cloud Service Providers that are ISO27001 certified. OR 7.12(e) should be amended to provide ELNOs with flexibility where it will be difficult to obtain specific undertakings from large Cloud Service Providers such as Amazon Web Services.	None	A request for a waiver may be submitted to the Registrar for consideration.
56	7.12.1 (e) (i)	Requires ELNOs engage only Cloud Service providers which can demonstrate compliance with ISO27001 and ISO27002. While ISO27001 is industry standard, ISO27002 is an advisory standard that provides guidance based on an organisation's risk profile and will not always be relevant. It is proposed that this requirement be removed.	The MOR have been amended	Feedback noted. MOR 7.12(e) has been amended.
57	7.12.1(e)(ii)	Replace "promptly" with "immediately". Include provisions for ARNECC and/or ELNO to notify Subscribers and key industry stakeholders so that potential copycat breaches do not occur.	None	A definition for promptly has now been included.
ELNO must not be a Subscriber				
58	14.10.2	As previously proposed, strongly suggest the strengthening of Requirement 14.10.2, particularly where a Subscriber has a controlling interest in an ELNO. It is noted that the Requirement has been amended to refer to the newly defined term 'Subscriber Review Process', however, should be further strengthened. For example, a minimum specified frequency for the Subscriber Review Process for this Subscriber should be added. There is concern that potential conflicts of interest are not satisfactorily addressed and reiterates the concerns previously expressed.	None	The ELNO's Subscriber Review Process will outline how often the ELNO intends to review a Subscriber and accordingly how often the Independent Expert's assessment will be required to be undertaken. The ELNO will be required to provide its Subscriber Review Process to the Registrars prior to commencing operation of an ELN under Schedule 3, Category Two. Further guidance will be included in the Model Operating Requirements Guidance Notes.

#	Requirement	Issue	Action Taken for MOR	Suggested Response
Compliance Monitoring and Reporting				
59	15	The regulatory model set up in the MOR is a self-regulatory one with no consideration of a range of regulatory tools tailored to specific risks. There are no penalties for failures or breaches on the part of an ELNO other than to suspend or revoke for a "material breach", which is undefined. Whilst the ELNO is a monopoly it would be difficult to suspend or revoke the approval of the only means to register and lodge documents in Victoria and would leave the industry in chaos. Regulation by self-certification raises the concern that the regulator may not have the resources or the power to regulate the ELNO effectively.	None	Feedback noted and has been forwarded for consideration through the Intergovernmental Agreement review.
60	15.1 & 15.2	Self-monitoring is an unsatisfactory tool for ensuring compliance. These requirements should provide for the Registrar or an independent person to conduct continuous and regular monitoring activities. An independent entity is often best placed to monitor and enforce compliance. Compliance provisions must also contain a credible threat of enforcement. It is important for the MORs to provide for a specific response or sanction for non-compliance.	None	Feedback noted and has been forwarded for consideration through the Intergovernmental Agreement review.

#	Requirement	Issue	Action Taken for MOR	Suggested Response
Transition Plan				
61	21.2 (e)	This change permits the Registrar to determine where the licenses and intellectual property of an ELNO go, while also controlling the ELNO's license. This materially alters the risk position for the owner of an ELNO, as it would be within power for the State to determine that the ELNO should be operated by the State or a third party. In a competitive market, it should be unnecessary for a Registrar to require an ELNO to transfer licences and/or intellectual property to the State. A right of step of a Registrar should offer sufficient protection in extreme circumstances. We therefore think that any right the Registrar has to require the transfer of licences and intellectual property should be limited during the period where there is no effective competition. We also note that in other analogous concession arrangements, compensation would be payable by the State on the occurrence of such a transfer event where there has been no breach or other event of default. It is requested that ARNECC clarify its intentions with regard to the change to OR 21.2(e).	None	No change.
Schedule 1 - Insurance				
62	Schedule 1	Amounts are far too low. As is there would be an expectation that ARNECC (the various state land registries) to provide some form of guarantee, i.e. the state guarantee offered as part of the compensation regime.	None	Feedback is noted. However, altering the insurance requirements in Schedule 1 where the Registrars have not been informed of any events which may give rise to a claim or any claims (MOR 4.7.6) is not considered appropriate at this time. It is anticipated that the insurance requirements will be reviewed if a claim is made.
Schedule 2 - Performance Levels				
63	Schedule 2	"Scheduled maintenance must occur during non-core hours" should not be removed.	None	Refer to definition of Scheduled Maintenance.
64	Schedule 2	Clarification required regarding what constitutes "Service Availability"	None	Refer to the Operational Performance Measures.
65	Schedule 2	The definition of Core Hours in Operating Requirement 2.1.2 is not as expansive in that while it also defines Core Hours as being between 6:00am - 10:00pm, it does not limit this to Australian Eastern Standard Time or Australian Eastern Daylight Time as applicable. The definition in Operating Requirement 2.1.2 should be updated accordingly, or alternatively an interpretation rule should be introduced in Operating Requirement 2.2 to the same effect.	The MOR have been amended	The definition of Core Hours has been updated as suggested.

#	Requirement	Issue	Action Taken for MOR	Suggested Response
Schedule 3 - Reporting Requirements				
66	Schedule 3	Misalignment in Schedule 3, Cat 2 and 3 requirements: * cannot have no change certification in Category 3 if it is not required in Category 1 or 2. * 7.11 Vulnerability and Penetration Testing should be a Category 2 requirement as this is critical before approval to operate.	None	The substance of the proposed amendments has been adopted.
67	Schedule 3	This submission includes additional reporting in clause 7.11.3 & 7.11.4 in relation to assessment and testing and completed rectification work.	None	Feedback noted.
Interoperability				
68	Interoperability	To encourage a multi-ELNO market structure, the review must clearly identify the particular arrangements that will be required to allow new entrants, including interoperability, open access to Registrars' "Data Standards" and "Business Rules", and secure integrations with Registrars' IT systems	None	Feedback noted and has been forwarded for consideration through the Intergovernmental Agreement review.
69	Interoperability	An ELNO will not be viable in the present circumstances unless there is interoperability between it and all other ELNOs as a new platform would overwhelm a significant number of existing and potential Subscribers.	None	Feedback noted and has been forwarded for consideration through the Intergovernmental Agreement review.
70	Interoperability	Interoperability is a potentially effective mechanism for ensuring that the benefits of competition are realised while mitigating some of the adverse implications such as market fragmentation and increased operational costs for participants. It is understood it will be considered as part of the IGA review, however, it will be of benefit to consider interoperability at the present time to prepare the market as early as possible for the transition from a single ELNO to multiple ELNOs operating. Interoperability is an important pro-competitive feature and it is recommended that ARNECC carefully consider the issue of interoperability within the MORs.	None	Feedback noted and has been forwarded for consideration through the Intergovernmental Agreement review.
71	Interoperability	The major concern is the lack of rules around the entry of another ELNO into the market. We are soon to have a situation where we have one ELNO in control of a substantial part of the property industry and no clear path to the entry of any competitor. This is unacceptable and must be addressed as a matter of urgency.	None	Feedback noted and has been forwarded for consideration through the Intergovernmental Agreement review.

#	Requirement	Issue	Action Taken for MOR	Suggested Response
72	Interoperability	<p>With the progress of other entities seeking approval to operate as an ELNO, the issue of interoperability is now critical. While the importance of interoperability is generally acknowledged, there is concern at the lack of visible progress towards an interoperability framework. From the practitioner perspective, it will be unacceptable if practitioners are required to be Subscribers to multiple ELNOs. If a Subscriber chooses to use multiple ELNOs, it should be possible to use the same digital certificate across multiple ELNOs. True interoperability would mean that a transaction could be conducted with the different parties each using a different ELNO. Without interoperability, it appears that parties to a transaction will all need to use the same ELNO and require practitioners and financial institutions to subscribe to every ELNO. This will be exacerbated if linked or simultaneous settlements will need to be conducted in the same ELNO. A lack of interoperability has the potential to negate the efficiencies of electronic conveyancing and to create unacceptable administrative costs for practitioners, financial institutions and clients. Failure to deal with the issue of interoperability has the potential to derail the substantial progress that has been made to date in the implementation of electronic conveyancing. While aware of the substantial obstacles to achieving interoperability, the reality is that these obstacles must be overcome before any other ELNOs commence operations.</p>	None	Feedback noted and has been forwarded for consideration through the Intergovernmental Agreement review.
73	Interoperability	<p>It is critical that fair and effective competition between ELNOs is established and facilitated as soon as possible, and that there are two potential models by which this might occur: horizontal interoperability and 'subscriber picks'. Horizontal interoperability is the preferable model, however, given that ARNECC has not yet addressed the question of interoperability and the advanced stage of the mandating timeline, it is considered that ARNECC should regulate how the market will operate without interoperability. The most efficient course is to implement a temporary 'subscriber picks' model, which would apply until a regulatory framework requiring horizontal interoperability is achieved.</p>	None	Feedback noted and has been forwarded for consideration through the Intergovernmental Agreement review.
74	Interoperability	<p>It is appreciated that the approval of two other potential market entrants as suitable to operate an ELNO has occurred. However, the mechanism in which they will be able to compete for market share where the MPR and <i>MOR rules dictate that the settlement and registration of a conveyance requires the consecutive simultaneous lodgment of the documents can occur</i>. This is not addressed in the MOR 5.1 however needs to be addressed for the industry to function, whilst not increasing the burden on the small business community.</p>	None	Feedback noted and has been forwarded for consideration through the Intergovernmental Agreement review.

#	Requirement	Issue	Action Taken for MOR	Suggested Response
General Comments				
75	General	Thought should be given to understanding the benefits of divesting some of the authority away from a Council comprising exclusively of Land Registrars (or their representatives) to include appropriately skilled and experienced representation from key industry stakeholders to assist in consultation and decision making processes.	None	Feedback noted and has been forwarded for consideration through the Intergovernmental Agreement review.
76	General	Given ARNECC still lacks appropriate resources and legitimacy as an independent Commonwealth statutory authority its capacity to regulate electronic conveyancing is contingent on delivering a robust regulatory framework.	None	Feedback noted and has been forwarded for consideration through the Intergovernmental Agreement review.
77	General	Federally, the Competition Principles Agreement (CPA) seeks to address issues of competition, where, prior to introducing competition into a market that benefits from a public monopoly, there is a requirement to review: <ul style="list-style-type: none"> * the appropriate commercial objectives for the public monopoly; * the merits of separating any natural monopoly elements from potentially competitive elements of the public monopoly; * the merits of separating potentially competitive elements of the public monopoly; * the most effective means of separating regulatory functions from commercial functions of the public monopoly; * the most effective means of implementing the competitive neutrality principles set out in the CPA; the merits of any Community Services Obligations (CSO) undertaken by the public monopoly and the best means of funding and delivering any mandated CSOs; * the price and service regulations to be applied to the industry; and the appropriate financial relationships between the owner of the public monopoly and the public monopoly, including 'rate of return' targets, dividends and capital structure. 	None	The ECNL allows more than one ELNO. Once there is a competitive, robust market in place, the MOR will be reviewed as appropriate.
78	General	Provisions are not sufficient to prevent an existing ELNO from leveraging its position as the monopoly ELNO to the detriment of subscribers and consumers until new ELNOs enter and offer competitive services.	None	Feedback noted.
79	General	The review's focus on a market structure that supports multiple Electronic Lodgement Network Operators (ELNOs) is welcome and encouraging: it is critical that the regulatory framework facilitates a market in which there is effective competition between ELNOs, since that is the only market structure that is likely to result in value-for-money pricing and genuine improvements in functionality over time, for the benefit of end consumers.	None	Feedback noted.

