

MODEL OPERATING REQUIREMENTS (MOR)

CONSOLIDATED FEEDBACK

Clause	Comment	SPT response/action
2- Definitions	Review definition of 'insolvency event' .	Amend in accordance with Model Participation Rules (MPR): Reference to an application for winding up or dissolution removed as an insolvency event in para (d).
2.1	Definitions: needs to include definitions of ELN and ELNO	Amended: definitions from ECNL included.
4.7.6	This requirement should be re-considered for cases where notifying the Registrar may conflict with insurance policy requirements and possibly affect the ELNO's entitlement to claim.	ARNECC has held discussions with an insurer in relation to this issue as it affects Subscribers and Participation Rule 7.7. ARNECC understands that, generally, the obligation to notify would not be an admission of liability that would affect a right to claim under the policy. This issue should be raised by an ELNO with its insurer.
5.1	Include "training and education" in ELNO's strategy to encourage industry use.	Clause 5.1 sets out minimum requirements of the plan. It would be in the commercial interests of the ELNO to provide training, education and awareness to prospective Subscribers. Note that clause 14.6 imposes training obligations on an ELNO.
5.2	This clause should be amended to reflect the need for the ELNO to be compatible with industry structures and to promote competition. Further, this clause should be amended to provide that the ELNO must ensure the availability of the ELN to Subscribers on reasonable and competitively neutral terms. Central to this provision is to ensure that there is a requirement for a consistent data standard to be established by the Registrar.	It would be in the commercial interests of the ELNO to ensure that the Electronic Lodgement Network (ELN) is compatible with industry structures. Any specific requirements in this regard of industry participants could be included in the Participation Agreement between an ELNO and Subscribers. Note that the plan referred to in

		<p>clause 5.1 must include matters such as ease of connection and access for different classes of users.</p> <p>Note that clause 5.3(e) obliges the ELNO to determine its fees according to a publicly available, equitable and transparent pricing policy. An ELNO would also be subject to the provisions of the Competition and Consumer Act 2010.</p> <p>Clause 10.3 requires a consistent data standard in relation to interactions with the Land Registries. It would be open to a class of Subscribers to negotiate with an ELNO for the implementation of a common data standard for those Subscribers and specify this in the Participation Agreement.</p>
5.2	<p>It is understood the rollout will be a phased approach, e.g. a 'pilot' state and some Subscribers first then for other states to follow. Jurisdictions are not proposing to mandate electronic conveyancing so it is assumed existing processes will continue to parallel run even after all states are rolled out with continued support by all parties.</p>	<p>The ability to lodge documents in the paper medium will continue for the foreseeable future.</p>
7.1, 7.3, 16	<p>If the ELNO has its Information Security Management System reviewed and certified by an Independent Expert, would that demonstrate compliance of cl 7.3 or are the matters in clause 7.3 additional to having an Information Security Management System?</p>	<p>The certification by an independent expert of the Information Security Management System would encompass the matters in clause 7.3.</p>
7.2	<p>In the event that someone who is not a registered Subscriber and/or not a person authorised by a Subscriber accesses the ELN because the ELNO was not able to secure access contrary to cl 7.2.1 and fraud is perpetrated, what is the effect of the fraud on the transaction? If indefeasibility of title is gained, would the defrauded owner pursue the ELNO or is this a matter for State compensation?</p> <p>Similarly, in the event that a person who is authorised by the ELNO accesses</p>	<p>Depending on the circumstances, a person defrauded may have a claim against a Subscriber, the ELNO or the State.</p> <p>In relation to the second comment, depending on the circumstances, a person defrauded may have a claim against the ELNO and/or the State.</p> <p>Where an instrument has been registered and a</p>

	the ELN to perpetrate fraud OR a person who is not authorised by the ELNO is able to access the ELN to perpetrate fraud, what is the effect of the fraud on the transaction? And if indefeasibility of title is gained, would the defrauded owner pursue the ELNO or is this a matter for State compensation?	fraud has occurred resulting in loss, the same principles and legislative provisions will apply as in the paper medium
7.8	What will be the mechanism for the ELNO to notify Subscribers of a compromise and what will be the notification time frame? For example, will Subscribers nominate an address for service?	This question should be raised with an ELNO.
	<ul style="list-style-type: none"> • There appears to be no mechanism for determining the risk appetite of the ELNO for the purposes of the risk assessment mandated in section 9 and it would appear that the ELNO merely needs to conduct the assessment rather than action mitigation measures in response to a defined level of inherent risk and exposure; and • It seems uncertain whether the obligations on the ELNO to implement a Business and Services Disengagement Plan under clause 21.4 would be binding upon an administrator or receiver of an ELNO. 	<ul style="list-style-type: none"> • Clause 9.1 requires an ELNO to have and implement a system of risk management complying with the relevant Australian Standard. Before commencing operation and annually, the risk management system must be certified as satisfactory by an independent expert. The risk management system would include, in accordance with the relevant Australian Standard, a risk assessment and risk treatment plan. Annexure 3 Category Two has been amended to require the risk assessment and risk treatment plan to be provided to the Registrar prior to commencing operation and annually, unless there is no change to the risk assessment and risk treatment plan. If there is no change, an ELNO may provide a certification to that effect instead. Definitions of risk assessment and risk treatment have been included in clause 2.1. • Clause 3(c) provides that an ELNO must continue to comply with clause 21.4 after it ceases to hold an approval. The Operating Requirements have statutory and contractual

		effect and it is believed that the clause would be binding on an administrator or receiver of the ELNO.
10.7	Is "Settlement transaction" the correct term? Shouldn't it be "electronic documents".	Amended to provide that no Registry Instrument forming part of a Settlement Transaction is presented to the Registrar for Lodgement unless the financial settlement is irrevocable
11	What are the consequences involved with an ELNO failing to meet Performance Levels?	Any breach of the Operating Requirements would constitute a breach of a statutory provision and breach of contract. In addition, the consequence of a breach may be suspension or revocation of the ELNO's approval under clause 20.1.
12	It is desirable that an ELNO also should test this plan and to include Users in this process.	Clause 12.1 has been amended to refer to testing of the Business Continuity and Disaster Recovery Management Program. Whether or not Users are included in any testing is a matter for the ELNO.
13	It is desirable to include in the Change Management Framework a requirement for consultation and agreement by an ELNO with industry with respect to the changes contemplated by this clause.	Whilst the ELNO is required to have a Change Management Framework, the Operating Requirements are deliberately not prescriptive to enable industry and an ELNO to negotiate any specific requirements. These should be addressed between the ELNO and Subscribers in the Participation Agreement.
13.1	It is not clear how changes will be communicated. There should be a requirement for the ELNO to provide notice to Subscribers. Further, it will be necessary to consider what are reasonable time frames to implement changes when notified by the ELNO and for transition time for complex changes.	See comment above.
14.6	What will be the training delivery method and the lead in time for completion?	This is a matter for discussion between prospective Subscribers and an ELNO.
14.7- Monitoring	Clarification is required in relation to what constitutes a 'breach', a 'material	Clause 14.7(b) refers to a "breach". Until an

<p>of Subscribers and Suspension or Termination</p>	<p>breach’ or a ‘significant breach’.</p> <p>It is not clear why a subjective ‘reason to suspect’ threshold is used for the notification action as opposed to an objective ‘reasonable suspicion’ or a ‘reasonable belief’.</p> <p>As the consequences of taking these actions are serious for subscribers, the Law Council recommends that there should be greater clarity and certainty about when they are required to be taken.</p>	<p>assessment is made, it will not be know if that breach is a material breach. What action is taken by an ELNO under clause 14.7(c) will depend on the nature of the breach.</p> <p>Clause 14.7(d) has been amended to refer to the ELNO knowing or having reasonable grounds to suspect that a material breach has been committed, is being committed or is about to be committed.</p> <p>What constitutes a material breach would be determined in accordance with the Common Law.</p>
	<ul style="list-style-type: none"> • Provision should be made in the ECNL, the MORs or MPRs for the Registrar or an ELNO to provide information to appropriate authorities of any decision regarding restrictions, suspensions or terminations, provided appropriate protections are also included in relation to the sharing of this information. • ARNECC should provide stakeholders with an assessment of the costs associated with the creation of liabilities through the ECNL, the MORs and the MPRs. • The ECNL, the MORs and the MPRs should be consistent in relation to the use of the terms ‘digital signature’ and ‘digital certificate’. • Key documents referred to in the MORs should be made available as part of the consultation process. • The IGA also needs to be made available as part of the consultation process on the MORs and the MPRs. • The status of the jurisdiction specific ORs and PRs is not entirely clear, particularly whether they have priority or are subject to the other PRs to the extent of any inconsistency. 	<ul style="list-style-type: none"> • It is not within the Registrar’s statutory powers to impose a requirement in the Model Operating Requirements on an ELNO to provide information to a regulatory authority relating to the restriction, suspension or termination of a Subscriber. Note that if the Registrar becomes aware of any matter in relation to a Subscriber relevant to compliance with the Participation Rules or a case of misconduct with respect to the ELN, the Registrar may refer the matter to the relevant regulatory body under section 35(2) of the ECNL. The intention of the legal framework for Electronic Conveyancing is that there be no overall increased liability on users of the Electronic Lodgement Network. However, it is up to potential Subscribers to assess any perceived risks or costs of

		<p>participation before subscribing.</p> <ul style="list-style-type: none"> • Agreed. MOR and MPR amended to ensure consistency. • The majority of the documents referred to in the MOR are to be prepared by an ELNO. As no ELNO has yet been approved, it is not possible to provide these documents which, in any event, are likely to be regarded as confidential by an ELNO. • The IGA has been published on ARNECC's website. • The ECNL provides that the Registrar in each jurisdiction will determine Operating Requirements, having regard to the Model Operating Requirements, so the entire set of rules is specific to the jurisdiction once adopted. The Operating Requirements may contain "additional requirements" that the Registrar in that jurisdiction has added to the Model Operating Requirements. As these requirements will be additional to those in the Model Operating Requirements, there should be no conflict between the Model Operating Requirements and the additional rules.
14.7, 14.7(d)	<p>Will the ELNO contact the Subscriber prior to notifying the Registrar to gain an understanding of how the breach may have occurred and what the Subscriber is doing to remediate and prevent the breach from reoccurring? Subscribers should have a right to remediate breaches before the ELN restricts, suspends or terminates the Subscriber's access to the ELN.</p>	<p>The MOR regulates the relationship between the Registrar and an ELNO and imposes obligations on an ELNO in relation to the operation of the ELN. The MPR sets out circumstances in which the Registrar may suspend or terminate a Subscriber's</p>

		<p>registration or direct the ELNO to do so. Schedule 7 of the MPR has been amended to include the procedures to be followed before suspension or termination by the Registrar or by the ELNO at the direction of the Registrar.</p> <p>The respective rights, remedies and obligations of an ELNO and a Subscriber and the procedures to be followed on a breach of any participation rules set by an ELNO in relation to a Subscriber's use of the ELN is a matter for prospective Subscribers to agree with an ELNO. Any such rights, remedies, obligations or procedures could be included in the Participation Agreement between an ELNO and its Subscribers.</p>
14.7, 14.9	<p>Where a Subscriber no longer satisfies the eligibility criteria for Subscribers as set out in the Participation Rules but the ELNO is not aware of this or not made aware of this so that the ELNO does not restrict or terminate that Subscriber's access to the ELN and fraud is perpetrated by that Subscriber, would the defrauded owner seek compensation from the State and/or the ELNO? Presumably the ELNO is liable under cl 14.7(a).</p> <p>Cl 14.7(a) places the obligation on the ELNO to ensure it has appropriate arrangements to monitor compliance of Subscribers and this includes the Subscribers meeting their eligibility requirements but perhaps a process/mechanism by which the Law Society and other relevant bodies update the ELNO where for example, a solicitor is struck off the roll and can no longer practice as a solicitor can facilitate this obligation. The authors made a similar point in the MPR Feedback Form.</p>	<p>The person may have a claim against the Subscriber, the State and the ELNO, or any one or more of them, depending on the circumstances of the case and the nature of the fraud</p> <p>It is up to the ELNO to put in place appropriate arrangements, including those with regulatory bodies.</p>
15.1	<p>Will the ELNO be required to provide Subscribers with either immediate or periodic reporting on this requirement, where issues are identified that relate to Subscribers? Is 18.1 - general monthly reporting – intended to provide this type of reporting?</p>	<p>It is up to Subscribers to negotiate with an ELNO any reporting requirements to Subscribers. Any such requirements could be included in the</p>

		<p>Participation Agreement between an ELNO and its Subscribers.</p> <p>No: clause 18.1 encompasses reporting to the Registrar on the matters set out in Annexure 3 Category 4. The monthly report is to be publicly available.</p>
15.7(b)	<p>Depending on the complexity of any non –compliance, 14 days to remedy may not be sufficient, particularly if it is a system driven error and there is a flow on effect to Subscribers.</p>	<p>Amended to provide 14 days, or such longer time determined in the absolute discretion of the Registrar, to remedy breach. Amendment consistent with Participation Rule 10.</p>
18.2.1	<p>Whilst stated to be “its financial year” if “financial year” has the meaning in the ECNL, the financial year definition in the law will need to be amended to cater for banks’ financial year end, for example, 30 September.</p>	<p>Clause 18.2.1 relates only to an ELNO and should not affect banks.</p>
19.3	<p>The Committee notes that the effect of Rule 19.3 is to effectively prohibit an Electronic Lodgment Network Operator ("ELNO") from utilising any of the value added services that it might be able to provide. Whether this is motivated by fraud prevention and compliance concerns is unclear. The Committee queries the motivation for this prohibition and whether its inclusion is in the public interest. The Committee notes that the system does contemplate the existence of several ELNOs yet this prohibition has the potential to discourage competition and the growth of several ELNOs.</p>	<p>No. The clause does not prohibit the provision of value added services, but requires an ELNO to obtain the prior approval of the Registrar, which may not be unreasonably withheld. Land Registries have existing arrangements for the commercial supply of data to other parties and cannot confer a competitive advantage on an ELNO to the detriment of those other parties.</p>
21	<p>BSDP: Will there be a list of minimum requirements to be covered in the Business and Services Disengagement Plan (BSDP)?</p>	<p>Clause 21.2 sets out minimum requirements of a Business and Services Disengagement Plan.</p>
21	<p>BSDP: If an ELNO stops operating, then the BSDP will be activated, which provides that the IP will revert to the Registrar. How will this be handled across different jurisdictions?</p>	<p>In the event of the implementation of the BSDP, ARNECC will undertake a co-ordinating role to ensure the transfer of the intellectual property to the Registrar in the relevant jurisdiction or to a third party.</p>

22	<p>Jurisdiction Specific Requirements: What jurisdiction specific ORs will be added? Why is clause 22 of the MOR needed if it is a national system?</p> <p>If there are jurisdiction specific ORs how will an ELNO operate in different jurisdictions?</p> <p>What will be the NSW jurisdiction specific ORs?</p>	<p>Whilst provision has been made in the MOR for additional operating requirements that may be necessary in a jurisdiction, no jurisdiction intends having jurisdiction specific operating requirements at this time.</p>
22	<p>The authors have made this point in both the MPR Feedback form and the ECNL Feedback form regarding a nationally consistent set of law/rules/operating requirements.</p>	<p>Each Registrar is appointed as a statutory officer pursuant to the relevant legislation in their jurisdiction and it is not permissible to fetter the statutory discretion of the Registrar to determine the Operating Requirements in each jurisdiction. However, all participating States and Territories, in the Intergovernmental Agreement for an Electronic Conveyancing National Law, have committed to implement the MOR and MPR as the applicable rules in their respective jurisdiction and to co-operate, through ARNECC, to co-ordinate amendments to the MOR and MPR and to endeavour to maintain national consistency to the greatest extent possible.</p>
22	<p>Will a breach of a jurisdiction specific OR result in the suspension of the ELNO in that jurisdiction only and not other jurisdictions?</p>	<p>If a jurisdiction has a jurisdiction specific operating requirement, breach of that requirement may result in suspension or termination in that jurisdiction only.</p>
Annex 5, 1.1	<p>The word “of” second mentioned in line one should be replaced with “or”.</p>	<p>Amendment made.</p>
General	<p>Who can act as an independent expert for the purposes of the MOR?</p>	<p>Guidance Notes to be developed by ARNECC will provide guidance to an ELNO on who may be an appropriate independent expert. The Guidance Notes will be a policy document and will be publicly available.</p>

General	Will the Registrar's ability to waive compliance with provisions of the MOR create an uneven playing field? How would a waiver work in practice given that there are multiple jurisdictions?	It is not the intention of ARNECC to rely on the waiver power in the ECNL to give an ELNO advantage over another ELNO. Any waiver of a provision of the MOR is likely to be considered by ARNECC before a Registrar grants a waiver of a provision of the MOR implemented in the Registrar's jurisdiction.
General	Any thoughts to making the Operating Rules binding for an administrator (stepping in rights)?	Section 18 of the ECNL confers a statutory obligation on an ELNO to comply with the Operating Requirements. This obligation would bind an administrator of an ELNO.
General	The Operating Requirements should contain obligations for operators to meet privacy laws and confidentiality requirements. These obligations need to be considered to protect the information / data exchanged between the ELNO and Subscriber.	Clauses 5.3(g) and (h) address these issues.
General	There are no rules established for the interoperability between potential ELNOs. It should be clear that this is the responsibility of the ELNOs to create inter-operability so that it is seamless to Subscribers so as to be consistent with the objective of a national system.	It is not considered necessary, at this time, to include interoperability provisions. However, If more than one ELNO is approved, the MOR may require amendment to require interoperability between ELNOs.
General	Will there be a prescribed list of documentation that can be electronically lodged on the ELN?	The MOR has been amended to include a requirement that a set of minimum documents are to be capable of lodgement through an ELN provided by an ELNO.