

Model Operating Requirements (MOR) Consultation Draft 6 Feedback

This table responds to the feedback received on Consultation Draft 6 of the MOR published in December 2019

#	Rule	Stakeholder Feedback	Action taken	ARNECC Response
MOR 2.1 – Definitions				
1.	New	Consequential drafting amendments and definitions.	The MOR have been amended	New definitions of Australian Legal Practitioner, Law Practice and Licensed Conveyancer included for use in revised definition of User. New definitions of Local Government Organisation and Statutory Body included for use in revised definition of Back End Infrastructure Connection.
2.	New	"Officer" to be defined.	The MOR have been amended	New definition included in the updated consultation draft. Consequential amendments made to delete terms which fall within the definition of officer i.e. director and partner.
3.	Back End Infrastructure Connection	<p>The definition of Back End Infrastructure Connection may be too narrow. An ELNO may develop connections within its own systems, utilising SaaS (software as a service) or connections with systems of service providers. For example, gateway providers, security providers, monitoring and alerting tools or cloud service providers. Note also the ATO is now an integrated party for back-end validation of transactions.</p> <p>Rather than rely on a definition for Back End Infrastructure Connection which is excluded from OR 5.5, make clear that OR 5.5 applies only to 'Front End Integration'. Develop a definition for 'Front End Connection', being integration between a Subscriber's system and an ELNO, or integration between a software provider authorised by a Subscriber to access an ELNO and that ELNO. Alternatively, build this into the definition for Integration.</p>	The MOR have been amended	<p>Suggestion of developing a definition of Front End Connection not adopted as it would significantly narrow the application of the requirements.</p> <p>Additional connections identified in this submission (Cloud Service Providers; Commonwealth, State or Territory government agencies; Local Government Organisations; and Statutory Bodies), have been included in the definition of Back End Infrastructure Connection where the submission provided sufficient detail or where it was clear what their nature and purpose was.</p> <p>Other specific inclusions will be considered if sufficient details and reasoning are provided (what the connection is and how it interacts with the ELN).</p>
4.	Business Plan	Drafting amendment	The MOR have been amended	Addition of an explicit requirement for an ELNO's Business Plan to include an assessment of the likely costs for development and ongoing expansion of a fully functional ELNO System, including costs to meet regulatory requirements and costs associated with Back End Infrastructure Connections. This amendment partially implements recommendation 3 of the Dench McClean Carlson Review of the Intergovernmental Agreement for an Electronic Conveyancing National Law .
5.	Client Authorisation	Drafting amendment	The MOR have been amended	Amended to align with changes to MPR definition.

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6.	Downstream or Upstream Service	Instead of Downstream or Upstream Service substitute Lodgment Input Service and define that term. The definition of Downstream or Upstream Service should be replaced to focus on a service which is closely tied to inputs to electronic lodgment where the ELNO may have a competitive advantage. Such a definition would much better fit the policy that ARNECC has outlined. It is proposed that separation obligations should only apply to Lodgment Input Services and that these be defined as the types of services stakeholders are concerned about ELNOs providing i.e. an ELNO acting as a conveyancer or lawyer Subscriber, acting as a Lender, providing practice management software which directly integrates with the ELN and providing land information broking services (other than as a reseller or agent).	None	<p>Suggestion of developing a definition of Lodgment Input Service not adopted.</p> <p>The proposed definition would significantly narrow the scope of the requirements and limit the ability of the definition to capture products which might be developed in the future and where an ELNO might have an unfair competitive advantage.</p> <p>Specific exclusions will be considered if sufficient details and reasoning are provided (what the connection is and how it interacts with the ELN).</p>
7.	Incident Response Plan	Electronic conveyancing relies on a series of interconnected systems and not just the ELNO's own systems. The requirement to have an Incident Response Plan should be a requirement for Land Registries (or their operators) also. Although this requirement would not reside in the MOR, we would be pleased to see confirmation that this standard will be applied to state systems as well as ELNO systems.	None	No change to the MOR required.
8.	Independent Expert	Drafting amendment	The MOR have been amended	Consequential amendment in light of new definition of Officer.
9.	Integration	<p>An alternative may be to include the following definition:</p> <p>Integration means system-to-system communication through software defined connections between an ELN and:</p> <ul style="list-style-type: none"> (i) A Subscriber's system; or (ii) A system of a person authorised by a Subscriber to access an ELN under a pre-agreed data exchange arrangement. <p>Guidance should clarify that subs (ii) refers to software providers such as practice management systems. Guidance should also clarify that Integration does not include communication or accessing functionality via a user interface (such as logging in to PEXA via the web interface).</p>	None	<p>Suggestion of revising the definition as shown not adopted. The proposed definition would significantly narrow the scope of the requirements to only connections directly related to Subscribers accessing the ELN.</p> <p>Other specific exclusions that should be included in the definition of Back End Infrastructure Connection will be considered if sufficient details and reasoning are provided (what the connection is and how it interacts with the ELN).</p> <p>It is understood that no change to the MOR is required to exclude an ELNO's user interface as it forms part of the ELN. If this is not the case, then further information about why this is not the case should be provided.</p>
10.	Integration	Inclusion of the words 'system to system communication' to clarify definition.	The MOR have been amended	Inclusion of the words 'system to system communication' to clarify definition.

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11.	Insolvency Event	Drafting amendment	The MOR have been amended	Amendment to align with MPR changes in response to consultation which indicated definition of Insolvency Event may be too broad. As originally drafted it might capture a temporary arrangement to defer mortgage repayments.
12.	Land Information	<p>This definition is unreasonably broad and captures, for example, Subscriber name (as it appears in the execution panel on an instrument).</p> <p>Land Information should mean Registry Information as it is supplied from the Land Registry (drawing on reference to data provided by the Land Registry in the definition of Information Fees) and include that information which, when Lodged (and registered) will become Registry Information for future transactions.</p>	None	No change made to the definition of Land Information in consultation draft Version 6 of the MOR. The breadth of the definition is intentional and is considered appropriate to protect Land Information.
13.	Land Registry	Drafting amendment	The MOR have been amended	Minor drafting amendments made to clarify definition and accommodate range of possible delegation arrangements i.e. Land Registry could be an agency of a State or Territory responsible for maintaining the Jurisdiction's Titles Register or a delegate or both.
14.	Person Wishing to Integrate	<p>This appears to be a complex description of what is a 'Potential Integrator'. Consider amendment for consistency with other proposed definitions in the MOR, such as 'Potential ELNO' and 'Potential Subscriber'.</p> <p>'Potential Integrator' means a person who has applied to an ELNO to integrate its system with the ELN.</p> <p>Consider also replacing 'person who has integrated' with 'integrator'</p>	None	<p>Suggested amendment not adopted. Amending the definition to focus on a person who has <u>applied</u> would significantly narrow the ambit of the definition.</p> <p>The intent is that an ELNO be required to provide a copy of the ELNO's Integration terms and conditions and/or principles to any person who wishes to Integrate their system with the ELN (provided the requirements in MOR 5.5.1 are met). This is intended to allow persons potentially wishing to integrate to understand the ELNO's requirements prior to making an application to the ELNO.</p>
15.	Related Entity	While the intention here is understood, the definition does not work. Related Entity includes 'a related body corporate of a related party', however, there cannot be a related body corporate of an individual. A Related Party is an individual.	None	No change required. Related Party means the ELNO's principals, shareholders, directors, officers, employees or agents. A shareholder can be a body corporate.
16.	Related Party	Drafting amendment	The MOR have been amended	Consequential amendment in light of new definition of Officer.
17.	Supplier	<ol style="list-style-type: none"> 1. Use of the words 'relevant to the ELN' is overly broad and will apply to almost all agreements. 2. Consider including SaaS (software as a service) in the definition of supplier. 3. Amend to "handles, stores or processes Land Information" 4. Add "Australian Taxation Office" (or tax authority) after "Duty Authority". 	The MOR have been amended	<ol style="list-style-type: none"> 1. Partially adopted. Definition refined to directly relate to particular services in relation to the ELN (development, operation, maintenance and security). 2. Use of SaaS (a software distribution model in which a third-party provider hosts applications and makes them available to customers over the Internet e.g. some cloud services) was not considered appropriate as it would either make the definition too narrow or replace a defined term (Cloud Service Provider). 3. Amendment adopted. 4. Amendment adopted.

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18.	Supplier	<ol style="list-style-type: none"> The current drafting of the amendment creates an impractical obligation for suppliers that do not have a critical impact on the operation of the ELN. It is suggested that “Supplier” should be defined more narrowly by reference to services critically important to the integrity and fundamental operation of the ELN, such as core computing infrastructure, or where the supplier handles and stores Land Information or Personal Information. To achieve this, ARNECC could consider a test similar to APRA’s CPS 231 Outsourcing Standard for ADIs. There, a critical supplier is one who performs a “material business activity”. A material business activity is one that has the potential, if disrupted, to have a significant impact on the regulated entity’s business operations or its ability to manage risks effectively, having regard to certain factors, like an adverse effect on users. Given the nature of commercial relationships and negotiations, it would also not be reasonable for ARNECC to expect immediate compliance with this change. It would be sufficient for ARNECC to allow 12 months from the date the MOR v6 is published to comply with the requirement. 	The MOR have been amended	<ol style="list-style-type: none"> Partially adopted. Definition refined to directly relate to particular services in relation to the ELN development, operation, maintenance and security). No change is required to be made to the MOR. ELNOs should request a waiver where necessary.
19.	User	<ol style="list-style-type: none"> What is intended by the word ‘officer’ in this definition? – is this intended to apply to employees with seniority and if so, how do these differ from employees more generally (as employee is also part of the definition)? Or is this intended to mean ‘officeholders’ in a company – though it is noted that directors are already included. The definition now appears to require users to be a member of the Subscriber. ARNECC should consider whether it is ever acceptable for a third party to be a user in a Subscriber profile. It is recommended that “officer” is removed from the definition and ARNECC consider all use cases and modify the definition if considered appropriate. 	The MOR have been amended	<ol style="list-style-type: none"> Officer was intended to mean a person with a level of control within a corporation or other entity. New definition included in the updated consultation draft and amendments made to delete terms which fall fully within that new definition of “officer” in the <i>Corporations Act 2001</i> (Cth) i.e. director, partner and officer. The intent of the changes to the definition of User was to clarify that there must be a legal relationship between the Subscriber and the individual User. An additional type of User (a manager of a legal or conveyancing practice) has been added. <p>Consequential amendment in light of new definition of Officer also made.</p>
MOR 3 – Compliance with Operating Requirements				
20.	3	Suggest this is restructured so that sub-para (a) only applies to a Potential ELNO whilst (b) and (c) only apply to an ELNO.	The MOR have been amended	Section not restructured as (a), (b) and (c) are ongoing obligations and variously apply to ELNOs and Potential ELNOs. MOR 3(a) amended as the obligation continues to apply to the ELNO once approved.
MOR 4 – ELNO Eligibility Criteria				
21.	4.3	<ol style="list-style-type: none"> Remove 4.3.1 (viii) and (ix) from corporate character requirements but include moderate provisions in Registrar’s Powers (20.1) for Registrar to exercise reasonable discretion in relation to suspension or revocation where the ELNO has had approval suspended or revoked in another jurisdiction. This should be exercised only where the trigger for suspension or revocation in the other jurisdiction has direct 	The MOR have been amended	<ol style="list-style-type: none"> MOR 4.3.1 (a) (vii) and (ix) limited to grounds for suspension or revocation which are fundamental to an ELNO’s character, a material breach of the MOR, a false, misleading etc representation and ongoing threat to the Titles Register. These need to be character requirements, not just grounds for suspension or revocation to permit the Registrar to refuse an application from a Potential ELNO where they have been

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		<p>bearing on the continued operation of the ELN in the jurisdiction.</p> <ol style="list-style-type: none"> Amend 4.3.1 (c) to be timebound – so that the ELNO’s directors etc have not, in the past five years, been a director etc of an ELNO which was, at the time that person was a director, subject to any of the matters listed. Why is ‘electronic lodgment service’ used in 4.3.1 – how is this intended to differ from operating an ELN? To give effect to proposed changes relating to character and suspension, it is necessary to include a provision that Registrars must create a register of all suspensions/terminations/ revocations (of ELNOs and Subscribers) which is accessible by other Registrars and by ELNOs. 		<p>suspended or their approval has been revoked in another jurisdiction.</p> <ol style="list-style-type: none"> Qualification included that the relevant officer must have materially contributed to the suspension of the approval, revocation of approval etc. This is considered more appropriate than a time limit. The MOR Guidance Notes will be amended to suggest one way for an ELNO to satisfy this requirement may be to obtain statutory declarations from those individuals. Electronic lodgment service is intended to capture possible other state (or federal or international) based electronic lodgment services and is therefore intended to be broader than just operating an ELN. Not adopted as it is not considered that the Registrars have the power to create a register of all suspensions/terminations/ revocations (of ELNOs and Subscribers), particularly in view of the privacy implications. The MOR Guidance Notes will be amended to suggest one way for an ELNO to satisfy this requirement may be to obtain statutory declarations from those individuals. Understood this is current practice by ELNOs for other character requirements.
22.	4.3.1 (c)	<ol style="list-style-type: none"> Seems too broad – for example an officer may have done nothing wrong and is seeking work at another ELNO because of the suspension/termination. This would prohibit them from doing so. Can this be limited to those that contributed to the suspension/termination? Why refusal? 	The MOR have been amended	<ol style="list-style-type: none"> Qualification to be included that the relevant officer must have materially contributed to the suspension of the approval, revocation of approval etc. The MOR Guidance Notes will be amended to suggest one way for an ELNO to satisfy this requirement may be to obtain statutory declarations from those individuals. Refusal of an application to provide an electronic lodgment service is intended to capture possible state or federal or international based electronic lodgment services.
23.	4.3.1	Drafting amendment	The MOR have been amended	<p>Amended to include ‘any determination of a disciplinary action...’ to align with MPR amendment.</p> <p>Amended to include requirement for disciplinary action which may impact on the ELNO’s ability to operate an ELN or the integrity of the Titles Register to align with MPR.</p>
24.	4.3.2	Drafting amendment	The MOR have been amended	Amended to replace requirement for an ELNO’s governance requirements to be ‘suitable for their intended use’ with a requirement for them to be Fit for Purpose. This will mean an ELNO’s governance arrangements and processes and procedures will be required to align with Australian or international standards.
25.	4.7.4	Drafting amendment	The MOR have been amended	Consequential amendment in light of new definition of Officer.

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MOR 5 – Operation of an ELN – National system and electronic Registry Instrument and other electronic Document capability				
26.	5.2	<ol style="list-style-type: none"> 5.2 (c) should confirm that where other electronic documents can be enabled via a residual documents framework, they will not be required to be developed as separate standalone registry instruments. 5.2 (d) insert 'reasonably' before 'required'. 	The MOR have been amended	<ol style="list-style-type: none"> Not adopted. Amended to include reasonably.
27.	5.2	The amendment should not be included in a way that disadvantages new entrants to the ELN market. The combination of an ELNO having to create additional electronic Documents and functionality as potentially directed by multiple jurisdictions at any given time, as well as complying with existing obligations to maintain the ELN, and responding to customer requirements and business objectives could result in an unreasonable burden on an ELNO which could stifle the viability of new entrants in the market. Further, document capabilities and functionality are often dependent on third parties which an ELNO may have no control over. It is requested that the timeframe for the ELN to ensure lodgment be extended to at least two years, to allow all participants in the market to comply with the implementation requirements.	The MOR have been amended	Requirement to deliver specified functionality in specific timeframes omitted and replaced with requirement for an ELNO to develop an implementation plan setting out timeframes for implementing new Registry Instruments and other functionality, deliver it to the Registrar and make any changes required by the Registrar. See new MOR 13.3.
28.	5.2 (b)	Should the time period of 5 years be added to be consistent with 5.2 (c)?	None	Not adopted. The way this MOR is intended to work is for the ELNO's Business Plan to set out a time period in which the ELNO will deliver the minimum set of documents (ideally less than five years). The five year timeframe in MOR 20.1 (a)(viii) is intended to be a maximum period, triggering a possible suspension.
29.	5.2 (c)	If this means providing functionality for all residual docs in one year in all jurisdictions, this is unlikely to be able to be done.	None	Requirement to deliver specified functionality in specific timeframes omitted and replaced with requirement for an ELNO to develop an implementation plan setting out timeframes for implementing new Registry Instruments and other functionality, deliver it to the Registrar and make any changes required by the Registrar. See new MOR 13.3.
MOR 5 – Operation of an ELN – General obligations				
30.	5.3	Drafting amendment	The MOR have been amended	New requirement for ELNOs <i>to comply with</i> licences and regulatory approvals required by any appropriate authority to provide and operate the ELNO System. Existing requirement was to obtain and maintain all necessary licences and regulatory approvals required by any appropriate authority to provide and operate the ELNO System. Amendment made in light of comments made in item 65.

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MOR 5 – Operation of an ELN – ELNO Service Fees				
31.	5.4	ELNOs should not require Registrar approval to make changes in the events listed in 5.4.4 (a) – (c). A review of pricing by the ELNO would be reasonable in the context of any of these events and it is difficult to envisage how a Registrar could withhold approval for something which amounts to a change in underlying costs for an ELNO, driven by external factors and in circumstances where contractual arrangements and protections exist to support the pricing review. Remove the words ‘at any time, request the Registrar’s approval, which may not be unreasonably withheld for proposed changes’	None	Not adopted. It is appropriate that the Registrar have a degree of visibility over changes to an ELNO’s Pricing Table. The Registrar’s approval cannot be unreasonably withheld.
32.	5.4.5	Drafting amendment	The MOR have been amended	Amendment to clarify that the capacity for an ELNO to adjust its ELNO Service Fees following a change in information fees is not subject to the price cap in MOR 5.4.3 and does not require the Registrar’s approval under MOR 5.4.4.
33.	5.4.6	Drafting amendment	The MOR have been amended	Removal of the words ‘for any year commencing 1 July’ to clarify that the requirement to publish the new or revised Pricing Table at least 20 Business Days, or as soon as reasonably practicable, before it takes effect applies to all changes including those under MOR 5.4.4. & 5.4.5.
MOR 5 – Operation of an ELN – Integration				
34.	5.5	“a particular type, level or class of integration” is confusing and should be modified to refer to a class of integrator and particular purpose of integration. ‘Not possible’ is an overly high threshold and should be amended to ‘not practicable’	The MOR have been amended	The suggestion to replace type, level or class of integration with class of integrator and particular purpose of integration is not adopted. The MOR Guidance Notes will be updated to provide further guidance. “Not possible” has been replaced with not ‘reasonably possible’. Further guidance will be included in the MOR Guidance Notes as to circumstances where it might not be reasonably possible to develop a set of Integration terms and conditions for a particular type, level or class of Integration.
35.	5.5.1(d)	Drafting amendment	The MOR have been amended	Addition of a requirement for an ELNO to maintain records of who made a request for a copy of the ELNO’s Integration terms and conditions and principles in addition to records regarding outcome of the request.

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MOR 5 – Operation of an ELN – Separation				
36.		<p>ARNECC has inadequately addressed the issue of downstream services. The absence of appropriate robust regulation in the MOR exposes a situation that could easily be exploited, limits competition and provides for poor consumer outcomes. the definition of 'downstream service' in clause 2.1.2 of the MOR must, in relation to an ELNO or an entity related to the ELNO, expressly exclude conveyancing services which should be defined in clause 2.1.2 to include acting as a Representative or signing a Registry Instrument on behalf of a Representative or Party.</p> <p>The major issue raised by our members is the issue of "competition", not between ELNO's but competition to conveyancing services being developed via "Downstream services" of an ELNO into "conveyancing practice". We do not consider that the current wording will prevent an ELNO from utilising deep market data to establish a conveyancing business and compete directly with Subscribers. There are currently several "conveyancing factories" operated by national legal firms that have a digital, "hands-off" client model, that could utilise emerging digital contract and AI technology to effectively compete with licenced conveyancers and drive them from the market. Despite concerns raised previously the wording of 5.6 Separation in relation to this issue remains open and ambiguous and capable of being worked around commercially.</p> <p>ARNECC has inadequately addressed the issue of downstream services through the provision of a separation framework in MOR v.5. It is considered these provisions demonstrate a reluctance, on behalf of ARNECC, to undertake further regulatory change. Rather than enacting unambiguous amendments to the ECNL, preference appears to be avoidance of the actual issue, and as such providing preference to the commercial interests of ELNO's. It is believed that the ECNL or at minimum the MOR should expressly prohibit an ELNO or any entity related to it from providing conveyancing services.</p> <p>Despite ELNOs declaring that they have no intention of opening conveyancing businesses, this offers no assurances to the industry, as the ability for an ELNO to do so still exists, despite the 'arm's length' rule.</p> <p>Again highlight concerns regarding inadequate provisions for downstream services. Do not support of an ELNO providing "downstream service" as it contradicts the purpose and intent for which the Electronic Lodgment Network (formerly NECDL), was developed under the COAG Agreement. A situation whereby an ELNO could compete or have a proprietary interest in a Subscriber conveyancing firm is unacceptable.</p>	None	<p>MOR 14.10 provides that an ELNO must not be a Subscriber to the ELNO's ELN.</p> <p>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.</p> <p>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.</p> <p>Any specific proposals to refine or strengthen the requirements will be considered.</p> <p>However, it would not be consistent with the legal framework to absolutely prohibit a separate business unit or separate legal entity from providing any services additional to those provided by the ELN.</p>

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37.	5.6	<p>The main concern from a competition perspective that needs to be addressed in the MOR is the ability for related parties of ELNOs to provide upstream and downstream services. As currently provided by MOR 5.6, allowing related entities of ELNOs to provide upstream or downstream services is inadequate protection for consumers and upstream and downstream providers. While section 17(4) of the Electronic Conveyancing National Law (ECNL) says: “The approval of a person as an ELNO does not restrict or prevent the provision, by that person, of services additional to those provided by the ELN”, most importantly, section 17(5) of the ECNL says: “Subsection (4) <u>is subject to the operating requirements</u>”. Accordingly, ARNECC has the ability through the MOR to put limits on what ELNOs or their related parties can do. With the above in mind, we strongly urge ARNECC to put more effective vertical integration protections in version 6 of the MOR. The MOR should be amended such that the prohibition on providing upstream or downstream services is extended to ELNOs and their close associates.</p>	None	<p>As this submission notes, section 17(5) of the ECNL allows the Registrar to impose limitations and conditions on an ELNO’s provision of services additional to those provided by the ELN. The Registrars / ARNECC has exercised that power by including the restrictions in MOR 5.6.</p> <p>Any specific proposals to refine or strengthen the requirements will be considered.</p> <p>However, it would not be consistent with the legal framework to absolutely prohibit a separate business unit or separate legal entity from providing any services additional to those provided by the ELN.</p>
38.	5.6	<p>It is considered that the definition of Downstream or Upstream Service should be replaced to focus on a service which is closely tied to inputs to electronic lodgment where the ELNO may have a competitive advantage. Such a definition would much better fit the policy that ARNECC has outlined. It is proposed that separation obligations should only apply to Lodgment Input Services and that these be defined as the types of services stakeholders are concerned about ELNOs providing i.e. an ELNO acting as a conveyancer or lawyer Subscriber, acting as a Lender, providing practice management software which directly integrates with the ELN and providing land information broking services (other than as a reseller or agent).</p> <p>5.6.1_—If a Related Entity supplies or proposes to supply a Lodgment InputDownstream or Upstream Service, the ELNO must not be involved in the supply or development of the Lodgment InputDownstream or Upstream Service other than to the extent of providing access to, or use of, the ELN in accordance with Operating Requirement 5.5, <u>or providing access to, or use of the ELNO’s systems for facilitating the preparation of financial settlement.</u></p> <p>5.6.2_—If the ELNO supplies or proposes to supply a Lodgment InputDownstream or Upstream Service, the ELNO must establish a Related Entity or:</p> <p>(a) establish an ELN business unit that is separate from a Lodgment InputDownstream or Upstream Service business unit; and</p>	None	<p>Suggestion of developing a definition of Lodgment Input Service not adopted.</p> <p>The proposed definition and amendments suggested in this submission would significantly narrow the scope and effect of the requirements.</p> <p>Specific exclusions or amendments will be considered if sufficient details and reasoning are provided.</p>

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		<p>(b) ensure the ELN business unit has control over and responsibility for:</p> <ul style="list-style-type: none"> (i) the provision and operation of the ELN; and (ii) the performance of the functions and responsibilities of an ELNO under the ECNL and these Operating Requirements; and (iii) the ELNO's Participation Agreement relationship with Subscribers authorising and persons properly authorised by Subscribers to have access to, and use of, the ELN; and (iv) the ELNO's relationship with a Person Wishing To Integrate or a Person Who Has Integrated; and <p>(c) ensure the Lodgment Input Downstream or Upstream Service business unit has control over and responsibility for:</p> <ul style="list-style-type: none"> (i) promoting and supplying a Lodgment Input Downstream or Upstream Service; and (ii) customer support for a Downstream or Upstream Service; and (iii) <u>(ii)</u> the ELNO's agreement relationship with customers under which they are authorised to use the Lodgment Input of a Downstream or Upstream Service; and <p>(d) ensure the Lodgment Input Downstream or Upstream Service business unit does not perform any of the required functions of the ELN business unit or vice versa.</p> <p>5.6.3_ If either Operating Requirement 5.6.1 or 5.6.2 applies, the ELNO must:</p> <ul style="list-style-type: none"> (e) not give, or operate in a manner which gives, an unfair commercial advantage to the Related Lodgment Input Downstream or Upstream Service Provider; and (f) deal with the Related Lodgment Input Downstream or Upstream Service Provider on an arm's length basis; and (g) prepare, publish, implement, review and keep current a Separation Plan which outlines how the ELNO will comply with this Operating Requirement, including how the ELNO will: 		

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		<p>(i) manage the ELNO or ELN business unit independently from the Related Lodgment InputDownstream or Upstream Service Provider; and</p> <p>(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 Lodgment Input Service business unit or Related Lodgment InputDownstream or Upstream Service Provider; and</p> <p>(iii) share personnel, systems and services, with the Related Lodgment InputDownstream or Upstream Service Provider; and</p> <p>(iv) implement suitable governance frameworks.</p> <p>It is the very nature of IT and data services that they allow new innovation through the seamless integration of systems and the transfer of data. A structural separation regime that requires artificial separation within these systems runs entirely contrary to the very benefit of these innovative technologies. Any data services supplied are already regulated from all relevant policy perspectives and various consents and approvals have to be obtained for particular data sets. To the extent it comprises "Land Information" there is already a regulatory consent power available to Registrars so there is no logic in a separation regime being an additional, unnecessary and inefficient regulatory layer.</p>		
MOR 6 – Testing				
39.	6	<ol style="list-style-type: none"> 1. Consider including reference to the Change Management Framework for implementation of functionality which affects the Land Registry System. 2. Insert the word 'reasonable' before 'satisfaction of the Registrar' 3. In 6.1, change "the ELNO" to the "Potential ELNO" 	None	<ol style="list-style-type: none"> 1. Not adopted. Unclear what the purpose of adding a reference to Change Management Framework to this MOR would be. Requirement to have a Change Management Framework is addressed separately (see MOR 13.1). 2. Not adopted. The Registrar must be satisfied that the ELN, Registry Instruments and other functionality which affects the Land Registry System has been tested to the standard required to protect the integrity of the Titles Register and electronic conveyancing process. As a statutory authority Registrars are bound by rules of administrative law in decision making. 3. Not adopted. The obligation in MOR 6.1 arises upon commencement of operation of an ELN. Accordingly, it is an obligation for an ELNO not a Potential ELNO.

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40.	6.2	Agree with the amendment and manner in which testing of any new functionality will be managed.	None	Noted. No change to the MOR required.
MOR 7 – Obligations regarding System Security and Integrity – ISMS				
41.	7.1	<p>Object to:</p> <ul style="list-style-type: none"> ▪ the reference to ‘secure usage of email’ as email is inherently insecure; and ▪ reference to ensuring Subscribers and Users ‘understand’ obligations. While obligations can be provided and read, it is not possible to ensure understanding. <p>Monitoring should be at the Subscriber level, not the user level.</p> <ol style="list-style-type: none"> 1. 7.1 (b) (ii) (D) change “Users” to “Subscribers”. 2. 7.1 (b) (ii) (D) remove the words “secure use of email”. 3. 7.1 (b) (ii) (E) remove reference to “understanding” obligations. 	The MOR have been amended	<ol style="list-style-type: none"> 1. Not adopted. The introductory wording for the obligation in MOR 7.1(b)(ii)D. has not changed. 2. Not adopted. The revised MOR recognises that email is inherently insecure and requires specific training covering how to use email securely. 3. Requirement for ELNO to <i>ensure</i> Subscribers and Users ‘understand’ obligations replaced with requirement for ELNO to <i>assist</i> Subscribers and Users ‘understand’ obligations. The expectation is that ELNOs will take steps and put appropriate structures in place e.g. training rather than just making the Subscriber security policy available.
42.	7.1 and 14.6 (b)	It is recommended ARNECC impose specific requirements regarding cyber security awareness training, in terms of course content and the training provider(s). It is important that the training provider is suitably qualified and independent of the ELNO’s. However, the provider should be approved by the ELNO’s. There are concerns that one ELNO may support one training provider but the other ELNO does not. For this reason, it is important that the ELNOs agree on the training provider(s) and the course content. This is necessary to ensure Subscribers only need to undertake one course – otherwise red tape and cost will be an impediment. It is also important to ensure a consistent and up to date message and advice is being provided across the property industry.	None	Not adopted. ARNECC’s role and expertise is generally limited to land titling and related matters. ARNECC does not have the appropriate skills or expertise to prescribe course content or accredit training provider(s) for cyber security awareness training.
MOR 7 – Obligations regarding System Security and Integrity – Access to ELN				
43.	7.2	Welcome the inclusion of requirements to ensure the ELNO provides a training and monitoring program in relation to cyber security awareness and also the requirement to explain the process which will ensure that Subscribers and Users understand their obligations in relation to the security of the ELN.	None	Noted. No change to the MOR required.
MOR 7 – Obligations regarding System Security and Integrity – Security of ELN				
44.	7.3	7.3 (g) should apply only to agreements entered after commencement of MOR v6.	None	No change is required to be made to the MOR. ELNOs should request a waiver where necessary.
45.	7.3 (g) and 2.1.2	The tightening up of the wording in agreements between ELNOs and individuals and companies that provide services to the ELNO is welcomed. All incidents that may affect an ELN must be notified immediately. This is especially essential with regard to suppliers storing or handling sensitive data.	None	Noted. No change to the MOR required.

#	Rule	Stakeholder Feedback	Action taken	ARNECC Response
46.	7.3 (g)(ii)	The undertaking in paragraph (g)(i) and (g)(ii) are supported, although we note that it may be difficult for an ELN to assess a Suppliers actual due diligence.	None	Noted. No change to the MOR required.
MOR 7 – Obligations regarding System Security and Integrity – Protection of Land Information				
47.	7.5 and 7.12.1 (b)	Presently, AWS offers one option for secure computer infrastructure located within the Commonwealth of Australia (in the Sydney region). The likelihood of a total loss of access to this infrastructure is very low (Rare), though the consequence would be Major for industry, ELNOs and registries. ARNECC should consider whether replication of data to another AWS region outside of Australia is appropriate, to safeguard against this unlikely, yet significant scenario.	None	For legal and security reasons it is necessary for all data to be located within the Commonwealth of Australia. Options to reduce risk would include backing up data with a second Cloud Service Provider.
MOR 7 – Obligations regarding System Security and Integrity – Digital Certificate Regime				
48.	7.6.2	<ol style="list-style-type: none"> 7.6.2 (b) should be expressed as including functionality to impede breach of PR 7.5.5, rather than not including functionality which could enable a breach. Functionality to support access to the ELN via user credentials is the same functionality which could enable a breach, unless coupled with additional functionality to make that more difficult, such as Multi-Factor Authentication (which also supports detection of breaches). Change 7.6.2 (b) to “take all reasonable steps to implement functionality which impedes Subscribers from breaching Participation Rule 7.5.5.” Add “7.6.2 (c) ensure the ELNO Subscriber Security Policy contains reasonable provisions in relation to the secure use of Digital Certificates.” 	The MOR have been amended	<ol style="list-style-type: none"> MOR amended to add requirement for ELNOs to implement functionality which prevents Subscribers from breaching MPR 7.5.5, where reasonably possible. Not adopted. This is already a requirement under MOR 7.1(b)(ii)C.
49.	7.6.2 (b)	Guidance is sought as to the kinds of reasonable steps an ELNO could take or not take to meet the proposed 7.6.2(b) of the MOR v6, noting that ELNOs are not in a position to control the matters addressed by PR7.5.5.	None	Possible steps an ELNO could take are using Multi-Factor Authentication or other functionality which limits the ability for Signers to save their Access Credentials or requires Digital Certificate PINs to be entered separately. The proviso of ‘where reasonably possible’ recognises that an ELNO is not required to take all possible steps to impede Subscribers from breaching MPR 7.5.5.
50.	7.6.3	Support this amendment and believes it is consistent with the principles of competition and will be a cost and efficiency benefit to Subscribers.	None	Noted.
51.	7.6.3	7.6.3 should be expressed to be subject to an ELNO’s right to require a certain standard of Digital Certificates for security reasons. PEXA’s security policy requires use of ‘hard token’ Digital Certificates, unless an exemption is granted to allow use of ‘soft certificates’. Use of soft certificates creates a security risk unless appropriate controls are in place. PEXA already allows the use of ‘open’ Digital Certificates, provided they comply with PEXA’s security policy.	The MOR have been amended	MOR amended to be ‘subject to any reasonable requirements in the ELNO’s Subscriber security policy’. Reasonableness included to ensure ELNOs do not introduce unreasonable requirements which undermine the intent of the amendment.

#	Rule	Stakeholder Feedback	Action taken	ARNECC Response
52.	7.6.3	<p>The only open Digital Certificate in the market is DigiCert. It would be appreciated if ARNECC could confirm that the amendment is intended to capture the use of DigiCert certificates only for use in any ELN. It is suggested that, for the reasons set out below, Digital Certificates that are issued on a closed basis for use to a particular ELN be opened for Subscribers to use with the ELN:</p> <ul style="list-style-type: none"> ▪ it reduces switching costs for Subscribers who wish to use a different ELN; ▪ it reduces the risks associated with Users maintaining and keeping secure multiple digital certificate credentials; and ▪ it aligns with the key object of the e-conveyancing reform, to promote efficiency throughout Australia in property conveyancing. 	None	The amendment is intended to capture any open Digital Certificate which complies with the requirements. It is understood that DigiCert is the only open Digital Certificate currently available in the market. This may change in the future.
MOR 7 – Obligations regarding System Security and Integrity – Cloud Service				
53.	7.12 (d), (e) and (f)	Given ELNOs and Land Registries use AWS and have assessed its capabilities and offerings, ARNECC should consider a deeming provision for any ELNO that uses AWS. ELNOs that use AWS as a Cloud Service provider are deemed to comply with the Cloud Service provider requirements.	None	Not adopted. A deeming provision is not considered appropriate. Agreements and arrangements with AWS may differ for different customers. Some requirements e.g. MOR 7.12 (d) are also obligations which require the ELNO to take certain steps.
MOR 7 – Obligations regarding System Security and Integrity – vulnerability assessment and penetration testing				
54.	7.13 (a)	Drafting amendment	The MOR have been amended	Amendment to expand requirement for the ELNO to undertake a vulnerability assessment and penetration testing of both its ELNO System <u>and</u> any other systems and networks that store or process Land Information.
MOR 10 – Minimum System Requirements				
55.	10.1 (a) (iii)	Not aware of any obligations conferred on ELNOs under the Land Titles Legislation and believes the reference to Land Titles Legislation at paragraph 10.1(a)(iii) should be removed.	None	Not adopted. The Land Titles Legislation contains requirements about Registry Instruments for which the ELN may need to provide sufficient functionality.
MOR 14 – Subscribers				
56.	14.1	<p>14.1.3 should be clarified to confirm that the Person representing may have previously been identified when representing another Subscriber or Potential Subscriber.</p> <p>14.1.3 The ELNO need not verify the identity of the Potential Subscriber, or any Person(s) representing the Potential Subscriber, in accordance with the Subscriber Identity Verification Standard if the ELNO:</p> <p>(a) _____ has verified the identity of the Person(s) representing the Subscriber within the previous two years for any other purpose by applying the Subscriber Identity Verification Standard, provided the ELNO takes reasonable steps to ensure it is dealing with the same Person; or</p>	None	Not adopted. It is considered that the intent as reflected in this comment (that the Person representing may have previously been identified when representing another Subscriber or Potential Subscriber) is achieved by the existing wording.

#	Rule	Stakeholder Feedback	Action taken	ARNECC Response
		(a)(b) has complied with Operating Requirement 14.1.2(b)(i) within the previous two years; and takes reasonable steps to ensure it is dealing with the Potential Subscriber, or the Person(s) representing the Potential Subscriber.		
57.	14.6	Object to reference to ensuring Subscribers and Users 'understand' obligations. While obligations can be provided and read, it is not possible to ensure understanding	None	Not adopted. This requirement does not require the ELNO to ensure Subscribers and Users understand their security obligations. It requires ELNOs to make adequate training resources and information available to Subscribers and Users in relation to their use of the ELN with the intention that Subscribers and Users may understand their security obligations.
MOR 15 – Compliance Monitoring and Reporting – ELNO may provide certified copies of original documents				
58.	15.10	Drafting amendment	The MOR have been amended	Consequential amendment in light of new definition of Officer.
MOR 20 – Registrar’s Powers				
59.	20.1	<ol style="list-style-type: none"> The five year period in 20.1 (viii) is inconsistent with timeframes in 5.2 (c) and (d) – change to “three years”. To give effect to proposed changes relating to character and suspension, it is necessary to include a provision that Registrars must create a register of all suspensions and revocations (for ELNOs and Subscribers) which is accessible by other Registrars and by ELNOs. 	None	<ol style="list-style-type: none"> Not adopted. The five year timeframe in 20.1 (a)(viii) is intended to be a maximum period triggering a possible suspension. The ELNO will still be permitted to stage development of the Registry Instruments and other electronic Documents in MOR 5.2 Not adopted as it is not considered that the Registrars have the power to create a register of all suspensions/terminations/revocations (of ELNOs and Subscribers), particularly in view of the privacy implications. The MOR Guidance Notes will be amended to suggest one way for an ELNO to satisfy this requirement may be to obtain statutory declarations from those individuals. Understood this is current practice by ELNOs for other character requirements.
60.	20.1(a)(iv)	Drafting amendment	The MOR have been amended	Consequential amendment in light of new definition of Officer.
61.	20.1 (viii)	Should another suspension event be added to cover 5.2 (c) and 5.2 (d). The alternative is to not include these at all, ie, would this be followed through with if an ELNO was missing a couple of documents and had say 1,000 Subscribers? Would financial penalties be a much better approach for which we need an ECNL power?	The MOR have been amended	Requirement to deliver specified functionality in specific timeframes omitted and replaced with requirement for an ELNO to develop an implementation plan setting out timeframes for implementing new Registry Instruments and other functionality, deliver it to the Registrar and make any changes required by the Registrar. See new MOR 13.3.
MOR Schedule 3 – Reporting Requirements				
62.	Schedule 3, Category One, Two & Three 4.3.1(a)	Drafting amendment	The MOR have been amended	Consequential amendment in light of new definition of Officer.

#	Rule	Stakeholder Feedback	Action taken	ARNECC Response
63.	Schedule 3, Category Two & Three	Drafting amendment	The MOR have been amended	New reporting requirement for MOR 13.3.
Additional Comments				
64.	General	As with the current and previous consultation reviews stakeholders would have benefited greatly from explanatory notes to accompany the proposed draft changes, as is it not always understood why changes are being made and to what ends.	None	Noted. Consideration will be given to providing explanatory notes on substantive changes in the future.
65.	General	We propose that the MOR recognise that SRO's may impose requirements or obligations on ELNOs that compliment or are supplementary to the requirements contained within the MOR. It is important that the MOR does not in any way constrain the ability of SRO's to impose such requirements that are seen as necessary for Revenue Offices.	None	The ECNL limits the scope of the MOR. ARNECC would welcome information about whether any of the existing requirements have been identified as constraining Revenue Offices.
66.	Market Structure	<p>Supportive of interoperability and welcomes efforts to progress towards the next phase of a workable model with the hope that the outcomes will serve as a resource for ARNECC to facilitate interoperability nationally:</p> <ul style="list-style-type: none"> - An interoperable model should not be delivered at the additional expense of consumers or Subscriber conveyancers nor should it increase the likelihood of any additional risk to these parties. - Prior to delivering a workable interoperable model the establishment of a properly resourced Independent Regulator with support from a skilled Advisory Board will significantly contribute to the ongoing future of electronic conveyancing as it expands nationally. - An interoperable model must uphold the principles of the Torrens System in delivering indefeasibility of title and not jeopardise the integrity of the land title system. - An effective regulatory model for facilitating interoperability is reliant upon standards that are upheld and supported by appropriate penalties in the event a breach occurs. <p>Careful oversight of the existing ELNO and the continued establishment of further viable ELNOs is supported. Furthermore, competition in the ELNO marketplace and an efficient and cost-effective market must be achieved to support consumers of electronic conveyancing services. However, whilst supporting the idea of interoperability, it is yet to be proven interoperability is the best mechanism to achieve this and it is essential and incumbent on all persons operating in this sphere to consider further the options, costs, benefits and risks associated with an interoperable model.</p>	None	<p>ARNECC has recently published statements on the subject of electronic conveyancing market structures. These statements are available online at:</p> <p>Electronic Conveyancing Market Structures - September 2020</p> <p>Ministerial Direction - eConveyancing Market Structure - September 2020</p>

#	Rule	Stakeholder Feedback	Action taken	ARNECC Response
67.	Market Structure	<p>It is strongly urged that ARNECC proactively do all it can to ensure a competitive marketplace between ELNOs. There is currently only one realistic ELNO in the market, being PEXA. The existence of only one fully operational non-government owned ELNO poses serious risks for all stakeholders, particularly as mandating of electronic lodgment rolls out. A failure of the PEXA infrastructure, or a breach by PEXA of the MOR, would have very serious immediate and longer-term consequences for economies and individuals. As the body charged with oversight of the electronic conveyancing industry, we appeal for ARNECC to provide leadership in this space, to fully explore, evaluate and lead the discussion and analysis to determine whether interoperability is a feasible option to enabling competition in the market and providing Subscribers with a secure alternative.</p> <p>The conditions are now in place for ARNECC to establish a path forward on competition through interoperability. Despite the long history of discussion on interoperability, the proposed MOR v6 does not include a framework for, or acknowledgment of, the establishment and maintenance of a market structure that promotes competition between ELNOs.</p>		<p>ARNECC has recently published statements on the subject of electronic conveyancing market structures. These statements are available online at:</p> <p>Electronic Conveyancing Market Structures - September 2020</p> <p>Ministerial Direction - eConveyancing Market Structure - September 2020</p>