## Model Operating Requirements (MOR) Consultation Draft 7.1 Feedback

This table responds to the feedback received on Consultation Draft 7.1 of the MOR published in November 2021.

| # | Rule | Stakeholder Feedback | Action | ARNECC Response |
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| **MOR 2.1 – Definitions** | | | | |
| 1. | Interoperable Electronic Workspace / Interoperable Conveyancing Transaction | The Feedback Table at item 91 states that the term 'Interoperable Conveyancing Transaction' has been removed from the MORs. It is noted that this term was used in a number of the definitions in version 7 of the MORs. It is preferred the use of the term 'Interoperable Conveyancing Transaction' as it connotes both the titling and financial aspects of settlement, whereas the alternative term that has been used, 'Interoperable Electronic Workspace', appears to focus only on the titling aspects of settlement by referring to the 'Lodgment Case' and, through use of the defined term 'Electronic Workspace', to the narrowly defined 'ELN'. | None | Feedback noted but not adopted. ARNECC considers that the term Interoperable Electronic Workspace is broader than the term Interoperable Conveyancing Transaction and better suits the purpose of the MORs where it is used.<br><br>The term Interoperable Conveyancing Transaction was removed as it is narrow in the sense that it could be seen as limited to a single document (refer to the definition of Conveyancing Transaction in the ECNL). This limitation means that the term Interoperable Conveyancing Transaction would not capture a scenario in which there are two single party documents executed on different ELNs which together form an Interoperable Lodgment Case – for example, a refinance in which a discharge/release of mortgage is undertaken on one ELN and a mortgage on another ELN. |
| 2. | Interoperability Service Fees | Pleased to see that the term 'Interoperable Service Fee' has been replaced with the term 'Interoperability Service Fees'. However, the narrow drafting of the definition of 'Interoperability Service Fees' is of concern.<br>As currently drafted, the definition does not appear to capture a fee charged by a 'Participating ELNO' for its participation in an interoperable transaction. It is suggested that a more comprehensive definition is required, particularly as ARNECC has now prohibited Interoperability Service Fees to Subscribers in MOR 5.4.7 (which is supported). | Change to MOR and future review | The Independent Pricing and Regulatory Tribunal NSW has completed a review and issued recommendations in relation to Interoperability service fees. ARNECC is considering those recommendations and any necessary amendments to the MOR will be made in MOR Version 8.<br><br>In the meantime, ARNECC has removed references and provisions relating to Interoperability service fees from MOR 5.3(e) and MOR 5.4.<br><br>The definition of 'Interoperability Service Fees' has been removed. |
| 3. | Participating ELNO | The definition of 'Participating ELNO' proposed in version 7.1 overlooks the Participating ELNO's involvement in financial settlement by providing the following more limited definition:<br>**Participating ELNO** means an ELNO involved in an Interoperable Electronic Workspace that is not the Responsible ELNO. (*emphasis added*)<br>It is submitted that the definition of 'Interoperable Conveyancing Transaction' should be reinstated and that 'Participating ENLO' be defined in accordance with version 7, that is:<br>**Participating ELNO** means an ELNO involved in an Interoperable Conveyancing Transaction that is not the Responsible ELNO. (*emphasis added*)<br>If the suggestion to use the version 7 definition of 'Participating ELNO' is not adopted, the definition of 'Participating ELNO' should be reworked to acknowledge the Participating ELNO's involvement in any 'Associated Financial Transaction' in an 'Interoperable Electronic Workspace'. The definition of Responsible ELNO contains reference to both the titling and financial aspects of settlement and the definition of 'Participating ELNO' should be similarly broad. Further, MOR 5.8.2 specifically refers to the role of the Participating ELNO in relation to 'any Associated Financial Transaction'. | None | Feedback noted but not adopted. ARNECC considers no amendment is necessary here given the definition of Responsible ELNO. The definition of Participating ELNO is intended to capture any ELNO in an Interoperable Electronic Workspace who is not responsible for presentation for Lodgment of an Interoperable Lodgment Case and facilitating completion of any Associated Financial Transaction. |
| 4. | Responsible ELNO | In response to the suggestion that the MORs contain provisions regarding the way in which the Responsible ELNO is determined in a transaction, ARNECC has stated that it considers this unnecessary, as the National Electronic Conveyancing Interoperability Data Standard (NECIDS) sets out the roles of each ELNO. Additionally, MOR 10.3.2 requires compliance by the ELNOs with the NECIDS. However, the degree to which the NECIDS will be accessible to, and meaningful for, Subscribers is unknown. Information about which ELNO is the Responsible ELNO in an interoperable transaction should be transparent and predictable for all parties to a workspace, not merely the ELNOs. Therefore the position is maintained that provisions regarding the determination of the Responsible ELNO should be located in the MORs. Perhaps a Schedule to the MORs would be a reasonable mechanism to ensure more transparency of the allocation rules for determining the Responsible ELNO.<br>It is noted that ARNECC has indicated it will consider providing more information on the roles of the Responsible ELNO and Participating ELNO in the MOR Guidance Notes. As Guidance Notes are provided to assist compliance only, and are subservient to the MORs, it is submitted that this material should be located in the MORs. | None | Feedback noted but not adopted. In general, the ELNO hosting the Responsible Subscriber will be the Responsible ELNO, however for a variety of complex reasons this may change.<br><br>As such, ARNECC reiterates that it is unnecessary for more detailed information about the role of each ELNO to be set out in the MOR. |

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| | | | | Again, ARNECC will consider providing more information on the roles of the Responsible ELNO and Participating ELNO in the MOR Guidance Notes. |
| 5. | 5.2 | Concerns tabled regarding any agreed timetable that it provides sufficient timing buffer or contingency to allow for robust and complete testing of the interoperability operating platform. A comprehensive and exhaustive operational testing plan including full transactional scenario testing must be completed and reviewed prior to any implementation of the system.<br>We are concerned at accelerating the timeline for political expedience at the expense of the integrity of the system. We know that any issues, inconsistencies, or other problems associated with a rushed policy implementation will fall onto conveyancing practitioners to resolve with additional cost imposed through additional consultation time with clients etc. This has occurred in the past with previous reforms, and we know that it is not the Government agencies that bear the problems of rushed policy implementation. It is the practitioner that interacts with the consumer.<br>However, we are also commercially realistic and mindful that the incumbent ELNO may be perceived to be dragging their knees. Whilst having fully supported and attended innumerable meetings on the Interoperability journey we continue to maintain a clear objective of interoperability that for conveyancing practitioners, no matter how many ELNOs operate, the system MUST be 100% secure, reliable and simple to use with no additional cost to the conveyancer or consumer. | Change to MOR | Feedback noted.<br>The timing for the implementation of Interoperability in ARNECC's 7 July 2023 announcement: https://www.arnecc.gov.au/wp-content/uploads/2023/07/ARNECC-announcement-July-2023.pdf has superseded the timetable previously outlined in MOR Consultation Draft 7.1. Accordingly, ARNECC has removed some of the amendments to MOR 5.2 that were contained in MOR consultation drafts Version 7 and Version 7.1, and has made subsequent amendments to MOR 5.2 in MOR Consultation Draft 7.2. Please refer to that version and the accompanying Explanatory Notes.<br>ARNECC has inserted a note in MOR 5.2 stating that implementation of MOR 5.2 will be subject to the Registrar being reasonably satisfied that independent system readiness reviews recommend that Interoperability is ready to commence in the Jurisdiction for the types of Registry Instruments referenced.<br>Independent system readiness reviews will be conducted before the rollout of Interoperability. These reviews are likely to recommend if and when Interoperability is ready to commence in a Jurisdiction. ARNECC will have regard to the recommendations arising from these reviews. |
| 6. | 5.2 | Support the requirement that by 30 June 2023 all MOR 5.2.1(b) Registry Instruments and Documents are required to be interoperable.<br>Noted that the inclusion of a mandated date in MOR 5.2.1(c) Registry Instruments and Documents may create unintended complexity in its application.<br>The ability for an ELNO to meet this requirement is subject to the availability of data specifications for residual documents and any other documents captured under MOR 5.2.1(c). If unable to obtain access to these data specifications, the ability to fully scope and plan a development roadmap to include these documents, and therefore the ability to meet the delivery of these documents, by the mandated timeframe will be impeded.<br>It is proposed that this either be addressed in the drafting of MOR 5.2.2(b), or consideration is given to this factor to accommodate the circumstance outlined above by way of a waiver or similar mechanism. | None | Feedback noted. ARNECC has inserted MOR 5.2.3 which enables the Registrar to extend the date of compliance if the Registrar determines a delay is outside of the ELNO's control.<br>See row 5 above. |
| 7. | 5.2 | There has not been any evidence from ARNECC or any experts that a 30 June 2023 date is in any way achievable. When concerns were raised with that date, it has been confirmed to be "top down".<br>Any date imposed by a regulator for an activity to occur must be supported by evidence to confirm that the date is realistic, reasonable and achievable by all stakeholders and will not cause harm to market participants (including ELNOs, end-consumers or those responsible for the integrity of Titles Registers).<br>As at 3 December 2021, any intelligible plan that demonstrates how an ELNO will move from building 25 APIs for a Day 1 transaction in September 2022 (which has already been advised is aggressively optimistic) to building a further 50+ APIs in half that time has not been received. | None | See row 5 above. |
| 8. | 5.2 | As previously advised, there should be more certainty about when and to what extent ELNOs will be required to offer interoperable transactions. While noting ARNECC's view that ELNOs should be able to stage the implementation of interoperability in accordance with their business plans, we consider establishing an implementation timeline within the regulatory framework would provide greater certainty. | None | Feedback noted. ARNECC considers that some flexibility is required in dealing with the implementation of Interoperability, given the many variables at play.<br>See row 5 above. |
| 9. | 5.4 | Note and support the decision that there will be no Interoperability Fee. | Change to MOR and future review | See row 2 above. |
| 10. | 5.4 | Welcome and fully support the prohibition on Interoperability Service Fees for both ELNOs and Subscribers.<br>As noted previously, the application of Interoperability Service Fees is likely to significantly affect and discourage new entrants to the market. | Change to MOR and | See row 2 above. |

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| | | | future review | |
| 11. | 5.4 | It is noted that the current version of the MORs both defines and prevents ELNOs from charging 'Interoperability Service Fees'. It is also noted that the CPI cap on the access fees charged to Subscribers by ELNOs ('ELNO Service Fees') has been extended to 30 June 2023. Interoperability fees have the potential to significantly affect the dynamics of the ELNO market. Any pricing determinations should be made with reference to a clear set of regulatory principles and broader market objectives. The relevance of other fees and charges enabled by the regulatory framework (such as ELNO Service Fees) should also be considered.<br>While PEXA retains a large market share, the structure of fees (and in particular the absence of a fee) would impact PEXA, particularly if it bears asymmetric costs. Whilst it is recognised that initially this could act to level the playing field between the incumbent and new entrants, it is considered that the fee structure should create good incentives and promote competition in the long term.<br>It is considered that stakeholder confidence in, and certainty around, the proposed (or any) approach to interoperability fees is best supported by appropriate consultation and the clear communication of the principles or reasoning behind any pricing determinations.<br>Notwithstanding the above, it is acknowledged that establishing a framework for price determinations can be time-consuming and resource intensive. It is therefore appreciated that there may be tensions between rolling out the reforms and establishing the detailed regulatory arrangements. It is important that ARNECC balance the challenge of progressing reform in a timely manner, with the need to ensure transparency, certainty, and stakeholder confidence in the regime. Given that the Direct Connection model is a pragmatic interim solution to interoperability, stakeholder confidence in the proposed approach to interoperability fees (as well as the basis on which future pricing will be determined) has the potential to influence market outcomes both now and in the future.<br>Further certainty around pricing in the market could be established through the establishment of upfront consultation, supported by subsequent timely reviews. It may be there is scope for certain fees to be determined by way of the negotiate arbitrate arrangements, subject to adhering to articulated pricing principles. | Change to MOR and future review | See row 2 above.<br>Note, the CPI cap has since been further extended to 30 June 2025 in MOR Consultation Draft 7.2. |
| 12. | 5.4 | A previous submission set out a framework for an Interoperability Service Fee to be levied in limited circumstances, such as where a switching of the Responsible ELNO is required. It is considered that this principle will continue to be applicable in the event that there is a fee contemplated to be payable to a Responsible ELNO. This principle, where an Interoperability Service Fee is only levied in the circumstance that a switch of the Responsible ELNO occurs, aligns with the principle put forward by IPART and the ACCC that any transfer price should be cost reflective and allocated appropriately between ELNOs in order to drive efficiencies.<br>From a drafting perspective, it is noted that (f)(i) of the definition of Equivalent Basis includes a reference to pricing. It is assumed that this is inserted to cater for a later version of the Model Operating Requirements which may allow for Interoperability Service Fees to be charged, however we note it may be clearer to remove this from MOR v7.1 for consistency given the prohibition of Interoperability Service Fees. | Change to MOR and future review | See row 2 above. |
| 13. | 5.4.3 | Supportive of the increased the duration of the limitation of increasing ELNO Service Fees to CPI from 30 June 2022 to 30 June 2023. However it is also proposed that ARNECC should be provided with further flexibility to be able to using pricing controls to provide incentive for meeting the goals of Interoperability. For example, a pricing freeze at current levels, or a price reduction, until an ELNO is capable of Lodging Interoperable Lodgment Cases in the relevant jurisdiction would be supported.<br>This would provide further incentive to ELNOs to ensure the mandated timetable is met, and supplement any enforcement powers that will be implemented through the ECNL. Further pricing controls could be implemented in the event an ELNO does not meet the 30 June 2023 Interoperability timeline. | Change to MOR and future review | See row 2 above. ARNECC does not consider the use of price freezes or price reductions an appropriate enforcement measure. |
| 14. | 5.4.7 | It is strongly recommended that MOR 5.4.7 be deleted and the wording previously proposed in MOR consultation draft version 7.0 be reinserted.<br>There are grave concerns about the impact of MOR 5.4.7 would have on the vitality and sustainability of e-conveyancing, due to the chilling effect it would have on continued investment by existing and potential future ELNOs and the perverse impacts it would have on ELNO market and servicing strategies.<br>It is also disappointing that this provision was proposed publicly in MOR 7.1 without any explanation of the objectives it seeks to secure or any assessment of its potential consequences. | Change to MOR | See row 2 above. |
| 15. | 5.4.7 | Concerns with MOR 5.4.7 can be categorised under three issues:<br>1. It is fundamentally not appropriate for ARNECC or its members to seek to regulate pricing in e-conveyancing.<br>2. A prohibition on Interoperability Service Fees risks derailing the development of a sustainable model for interoperability.<br>3. A prohibition on Interoperability Service Fees is economically unsound and risks distorting the efficient operation of e-conveyancing as well as deter future entry and innovation.<br>For these reasons, it is essential for proposed MOR 5.4.7 to be removed. | Change to MOR and future review | See row 2 above. |
| **MOR 5 – Operation of an ELN – Separation** | | | | |
| 16. | 5.6 | Notwithstanding there are no proposed changes to the previous MOR Version 6, we must again table our concerns and note the critical importance that the emergence of vertical integration by an ELNO must be effectively managed as part of the regulatory reform framework for competition and interoperability. | Future review | ARNECC has agreed to undertake a review of the separation framework by engaging an external expert. This feedback will be provided to the external expert. |

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| | | Concerns have been consistently tabled as to the lack of rigour in the proposed legislation to prevent an ELNO, or a related party to participate in downstream services to the detriment of the conveyancing profession. Consistent tabling of this view does not support the MOR's Separation "purpose" stated in Version 6 of the MORGN as it has **not Instilled confidence in industry**. | | |
| 17. | 5.6 | Interoperability and its reform should not be viewed as having a singular outcome for delivering competition in the ELNO market segment. We should not lose sight that we are attempting to deliver competition benefits for consumers and not to create an ELNO dominated marketplace. ARNECC must address vertical integration by amending existing rules and legislation, specifically, the Model Operating Rules (MOR) and the ECNL. Without it interoperability may in fact lessen competition and choice for the consumer and has the potential to eradicate many SMEs across our national conveyancing profession. | Future review | See row 16 above. |
| 18. | 5.6 | Some stakeholders have expressed concerns around the risks of ELNOs with significant market power being allowed to vertically integrate (or to enter into close commercial relationships with other firms) in markets related to e-conveyancing. There is a clear need for the regulatory framework to include appropriate behavioural obligations to address the potential for discrimination by ELNOs in favour of related entities. It is not clear that the current separation requirements are sufficiently robust, particularly in circumstances where regulatory decisions in one part of the market, such as price controls, could potentially be offset by a vertically-integrated ELNO's decisions in related markets. Similarly an ELNO with close relationships in related markets may be able to frustrate the entry of future competitors using a range of levers from across its broader operations.<br>It is also noted that good faith obligations are unlikely to be sufficient in vertically-integrated contexts. Non-discrimination obligations may also be needed to ensure all access seekers are treated equally by service providers. The presence of robust non-discrimination obligations supported by an effective enforcement regime is particularly important in circumstances where third parties are in competition with the related entity of a vertically-integrated service provider with significant market power.<br>Given the developing nature of the market and relevant technologies, suitable and clear expectations and obligations on the extent to which ELNOs may expand their operations into related markets (and how they must interact with other parties in these markets) must be established as soon as possible. | Future review | See row 16 above. |
| **MOR 5 – Operation of an ELN – Interoperability framework** | | | | |
| 19. | 5.7 | The content of Interoperability Agreements between ELNOs should be minimised and, wherever possible, provisions should be located in the MORs, providing transparency and confidence for all stakeholders, and benefit to any potential entrant to the ELNO market. Some operational matters may need to be included in Interoperability Agreements but matters impacting upon Subscribers and their Clients should not be left to negotiation between the ELNOs.<br>The relegation of Claims Management to be dealt with in the Interoperability Agreement is still opposed. Provisions regarding Claims Management should be located in the MORs rather than in bilateral agreement(s) between the ELNOs. Subscribers, Clients and other third parties, such as financial institutions, will be impacted by the Claims Management process, yet they will not be a party to enforce that process if it is articulated in an Interoperability Agreement.<br>For the limited matters that are appropriate to include in an Interoperability Agreement, standard provisions should be adopted where possible. It is recommended that the MORs should mandate the language of standard provisions.<br>In addition to the above, for transparency, Interoperability Agreements should be publicly available. The new MOR 5.7.3(a) which requires an ELNO to promptly publish on its website a copy of the Interoperability Agreement, with any agreed 'commercially sensitive information redacted' is supported. ARNECC should play a supervisory role to ensure that publication is prompt and the level of redaction appropriate. | None | Feedback noted but not adopted. MOR 5.7.3(a) requires that Interoperability Agreements be published. The claims management process agreed upon between ELNOs will therefore be visible to Subscribers (save for any commercially sensitive information).<br>The direct relationship between Subscribers and ELNOs is managed via the Participation Agreement. |
| 20. | 5.7.1 | Pleased to see that further detail has subsequently been included in the MORs defining what a request to interoperate meant in relation to an ELNO's ability to utilise the dispute resolution process hinging on an ELNO 'receiving a request'. | None | Feedback noted. |
| 21. | 5.7.2 | a. A new ELNO's integration of its ELN with all of the external agencies in all jurisdictions will be delayed as resources are diverted to deal with any interoperability request by an existing ELNO or other Potential Interoperable ELNO. This eventuality will disrupt the new ELNO's business plan and inevitably delay its achieving operating status in all jurisdictions and therefore compliance with its obligation of widespread use of its ELN. Inevitably also in such a situation, the investment required by a new ELNO to achieve full operating status and become income generating will be increased without necessarily providing any immediate competition benefits to consumers.<br>b. Under the proposed arrangements it will become possible for an existing ELNO or Potential Interoperable ELNO to frustrate the entry of a new ELNO (or all new ELNOs) into the market by requesting they participate in interoperability from the time they (the new ELNO or ELNOs) become operational in a first jurisdiction. While such an action by an existing ELNO may not have been contemplated in the design of the proposed arrangements, and may not be contemplated by any of the existing ELNOs, it is a possibility and will become an unnecessary deterrent to market entry. There is no reason for this possibility to be left unattended.<br>To deal with these implications, it is suggested that permanent relief be provided in the MOR to all new market entrants from having to participate in interoperability until say, six months after they have become operational in all jurisdictions. This is preferred to each prospective new entrant having to apply for a waiver under the s.18A(2) provision to be inserted in the ECNL and to await the outcome of that application before making application to become an ELNO.<br>This remedy could be readily achieved by inserting a new requirement in the MOR, at say, 5.7.8, along the lines of:<br>*5.7.8 "A Potential Interoperable ELNO may decline any request from an ELNO or other Potential Interoperable ELNO until such time as it has been operating for six months in all available jurisdictions."* | None | Feedback noted but not adopted. It is ARNECC's intention that new ELNOs will commence operation with Interoperability in place, noting that implementation may be staged in accordance with the ELNO's Business Plan. |

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| | | Such a requirement does not prevent a new entrant from choosing to participate in interoperability at the earliest possible opportunity if it believes such participation to be in its best interests and it can properly resource the work involved in conjunction with all of its other implementation obligations. | | |
| 22. | 5.7.2(a) | Pleased to see that obligations in relation to the sharing of information between ELNOs when negotiating an Interoperability Agreement (MOR 5.7.2(b)) and a publication obligation (subject to confidentiality concerns) (MOR 5.7.3(a)) have been introduced into the MORs. The extension of the good faith obligation to both ELNOs is also supported. | None | Feedback noted. |
| 23. | 5.7.3(a) | The proposed requirement that ELNOs must promptly publish executed (or determined) Interoperability Agreements on their websites, with agreed commercially sensitive material redacted is welcomed. While acknowledging the potential for commercial sensitivities, it is important that the Interoperability Agreements between ELNOs be made public to the fullest extent possible.<br>Transparency around these agreements will ensure industry and ARNECC understand the roles and responsibilities of ELNOs in the context of interoperability. This is particularly the case in the event that the contractual agreements between ELNOs are not limited to matters specific to the ELNOs' interaction with another. While ARNECC is considering providing more information on the roles of Participating and Responsible ELNOs in the MOR Guidance Notes, and the National Electronic Conveyancing Interoperability Data Standards also set out the roles and functions of each ELNO in an Interoperable Electronic Workspace, the importance of transparency of roles and responsibilities is reiterated. | None | Feedback noted. |
| 24. | 5.7.4 | The inclusion of arbitration, with clear timetables, as a crucial step to ensure that Interoperability Agreements are negotiated efficiently, and are in place prior to the implementation of full interoperability is supported. The principles that have been included to be considered by the arbitrator in determining an outcome are also supported. | None | Feedback noted. |
| 25. | 5.7.4 | It is not believed that including mediation in this process will lead to better outcomes for dispute resolution. Given the range of governance forums and working groups between ELNOs, as well as engagement at a senior representative level, it is unlikely that mediation will serve to resolve issues that are unable to be properly resolved through these other avenues. As such, the requirement for mediation will serve as a delay and extend the negotiation process of the Interoperability Agreement.<br>It is proposed that the requirement for mediation be removed from MOR 5.7.4, with the existing process for arbitration to be the sole dispute resolution mechanism in the event ELNOs are unable to reach an agreement between themselves. | None | Feedback noted but not adopted. ARNECC considers mediation a valuable part of the dispute resolution process. It is common for regulatory regimes to provide for mediation prior to arbitration.<br><br>Note that MOR 5.7.5 contemplates ELNOs agreeing to a binding dispute resolution process that could bypass mediation if agreed. |
| 26. | 5.7.5 | It is noted that the threshold for proceeding to mediation remains tied to an 'unable to agree' requirement, rather than a defined timeframe within which negotiations must be completed. The 'unable to agree' threshold risks delays in settling Interoperability Agreements (as one party can insist that negotiations are ongoing despite the other party's notice). It would therefore be preferable if the MORs established a defined timeframe (and appropriate notification requirements). It is also noted that the MORs still do not require ELNOs to notify ARNECC in the event of a dispute. | None | Feedback noted but not adopted. The timeframe commences once either party unilaterally determines that the parties have been unable to agree and issues a notice pursuant to MOR 5.7.5(a). The process is therefore tied to a timeframe as soon as either party desires it. |
| 27. | 5.7.5 | Given the complexity and commercial significance of the issues that may be required to be resolved under the mediation process in MOR 5.7.5, it is considered that parties to a mediation should be explicitly afforded the opportunity to submit a written submission explaining their position for consideration, as part of the process. They should also have the ability to engage an expert, where required.<br>The following additions to MOR 5.7.5 are therefore recommended:<br>*(f) each ELNO or Potential Interoperable ELNO shall have the opportunity to submit a written position paper to the opposing party, the mediator and any expert according to rules and procedures determined by the mediator.*<br>*(g) each ELNO or Potential Interoperable ELNO shall have the opportunity to engage an expert according to rules and procedures determined by the mediator.*<br>It should be made clear that the dispute resolution process between ELNOs does not restrict an ELNO, before or during or after the dispute resolution process, from:<br>a. seeking injunctive relief in relation to any matter in or related to the dispute<br>b. appealing a decision under the ECNL<br>c. seeking merits review or judicial review of a decision made by a Registrar<br>even if these proceedings are in relation to any matter in or related to a dispute which is or may or has been the subject of the dispute resolution process. | None | Feedback noted but not adopted. MOR 5.7.5(d) requires the parties to comply with the process determined by the mediator. ARNECC does not think it is necessary to further specify in the MOR the procedure that should be followed.<br><br>The MOR does not prevent an ELNO from seeking injunctive relief. A decision made by the Registrar, under the ECNL or otherwise, is not relevant to the process of ELNOs agreeing between themselves the terms of an Interoperability Agreement. |
| 28. | 5.7.6 | Pleased to see that an arbitration provision has been added to the MORs to apply to disputes which are not resolved via mediation within 20 business days, unless extended by agreement. Certainty around timing, roles, and responsibilities at each stage of a dispute resolution process is important. The introduction of clear timeframes (such as the newly-introduced 20 business day limit to the mediation phase) in the dispute resolution process will limit the ability of parties to engage in delaying tactics when negotiating Interoperability Agreements. | None | Feedback noted. |
| 29. | 5.7.6 | The proposed introduction of commercial arbitration will likely support the Interoperability Agreement negotiation process, and that the list of matters which the arbitrator would be required to take into account (MOR 5.7.6 (c)) appears appropriate. That said, the importance of arbitration decisions not raising barriers to entry for new entrant ELNOs is significant. As such, these decisions should take into account their potential impact on new | None | Feedback noted but not adopted. MOR 5.7.6(c) already requires the arbitrator to take into account the requirements of the MORs and the legitimate business |

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| | | entrants. As the MORs require all Interoperability Agreements to be entered into on an 'equivalent basis,' the agreement between the two current ELNOs will effectively function as a default standard agreement. If this agreement establishes onerous standards it may lock future entrants out of the market. It may therefore be appropriate for an arbitrator to also have regard to competition and the public interest when considering a dispute. | | interests of each ELNO and Potential Interoperable ELNO. ARNECC considers the existing content of MOR 5.7.6(c) is sufficient. |
| 30. | 5.7.6 | In light of the recommendation for MOR 5.7.5, that parties to a mediation be able to submit a position paper and engage an expert, it is considered that extra time be provided to reach a resolution under the mediation process before it is submitted to arbitration.<br>It is therefore recommended the following amendment to the opening sentence of MOR 5.7.6:<br>*5.7.6 If a dispute or difference arising under Operating Requirement 5.7.5 is not settled within ~~20~~40 Business Days of referral to mediation (unless such period is extended by agreement of the parties), then…* | None | Feedback noted but not adopted. ARNECC considers that the current timeframe is appropriate and notes that it may be extended by agreement between the parties in accordance with MOR 5.7.6. |
| **MOR 5 – Operation of an ELN – Interoperability roles** | | | | |
| 31. | 5.8.1 | It is suggested that MOR 5.8.1, which describes the role of the Responsible ELNO, should be expanded to specifically include the completion of any Associated Financial Transaction, consistent with the (revised) definition of 'Responsible ELNO', and fundamental to the concept of the Responsible ELNO. | None | Feedback noted but not adopted. ARNECC considers the description in the definition of Responsible ELNO is sufficient. |
| 32. | 5.8.1 | Under the MOR as it currently stands, where the ELNO relies on Back End Infrastructure Connections, it is not responsible for the performance of, or services provided by, those third party Back End Infrastructure Providers (whether registry, revenue office or financial settlement services).<br>The proposed definition of Responsible ELNO purports to make the ELNO responsible for completing an Associated Financial Transaction i.e. it assumes bundled responsibility.<br>An ELNO that elects to participate in financial settlement, whether directly or through a financial settlement services provider can be responsible for sending messages in respect of those functions (as contemplated in MOR 5.8.1 (a)). However, it cannot be responsible for completion of functions which occur in third party systems.<br>ARNECC should remove the word "completion" from the definition of Responsible ELNO. | Change to MOR | The definition of Responsible ELNO has been amended to clarify that the Responsible ELNO must *facilitate* completion of the Associated Financial Transaction, rather than be wholly responsible for completion.<br><br>The definition of Responsible ELNO has also been amended to clarify that the Responsible ELNO is responsible for *presentation* for lodgment of the Interoperable Lodgment Case, for consistency with the rest of the MOR. |
| **MOR 7 – Obligations regarding System Security and Integrity – ISMS** | | | | |
| 33. | 7.1(b) | It is recommended that MOR 7.1(b) be amended to specify that an ELNO's ISMS include controls for 7 key categories. Categories A-F describe cyber security activities that are common across critical infrastructure sectors and recognised in existing standards and frameworks. Category G, Subscriber Management, is unique to e-conveyancing and refers to the risks involved with an ELNO's relationship with its Subscribers (e.g. identity and credential management).<br>The addition of an additional subclause to 7.1(b) is recommended as follows:<br>*(iv) includes formalised controls and defined metrics for*<br>*mitigating risks relating to:*<br>*A. Identity Management & Access Control*<br>*B. Data Security*<br>*C. Security Continuous Monitoring*<br>*D. Recovery Planning*<br>*E. Resilience*<br>*F. External Dependencies*<br>*G. Subscriber Management*<br>The phrase 'formalised controls and defined metrics used in the suggested clause is adapted from an existing standard, Capability Maturity Model Integration, to reflect a maturity level of 'Defined' (1. Initial, 2. Managed, 3. Defined, 4. Enhanced, 5. Optimising) | Future review | ARNECC will review this feedback for Version 8 of the MORs. |
| **MOR 7 – Obligations regarding System Security and Integrity – Security of ELN** | | | | |
| 34. | 7.3.2 | ARNECC's acceptance of the suggested feedback to allow ELNOs to obtain reports other than SOC 2 Type 2 in order to meet their obligation under MOR 7.3.2.<br>For consistency with similar Operating Requirements that relate to requests for Registrar approval, it is recommended MOR 7.3.2 be amended to require that such approval should not be unreasonably withheld. | Change to MOR | MOR 7.3.2(a) has been amended to require that the Registrar may not unreasonably withhold approval. |
| **MOR 7 – Obligations regarding System Security and Integrity – Data** | | | | |
| 35. | 7.4.2 | ARNECC's feedback that our previous submission in relation to use of data is broader than interoperability alone is noted. The review of this issue at a later date is supported. | None | Feedback noted. |

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| 36. | 7.4.2 | It is submitted that there is no case made for adding MOR 7.4.2 as additional regulation by Registrars of information received from another ELNO in an Interoperable Electronic Workspace. This is because:<br>a. Handling of Land information is already regulated by MOR 19.3 and handling of Personal Information is already regulated by the direct application of the federal Privacy Act 1988 to ELNOs as organisations and by the requirement on ELNOs to comply with State Information Privacy Acts through the conditions on the approval to operate (NSW and SA) or through the Operating Agreement with the jurisdiction (Victoria and Queensland);<br>b. Information relating to associated financial transactions which is Personal Information (e.g. a client's bank account number) is already regulated by Privacy Laws<br>c. There is no case for regulating information relating to associated financial transactions which is NOT Personal Information i.e. it does not identify any individual and the identity of any individual cannot be reasonably ascertained from it (e.g. settlement dates, the number of settlements and aggregate amount of funds transfers in settlements made on a particular day).<br>▪ No risk of misuse of such information has ever been articulated by Registrars justifying regulation.<br>▪ Such information is not received by Registrars and has never been regulated by Registrars in electronic conveyancing or paper conveyancing.<br>▪ There is no attempt in the MOR to regulate such financial settlement information if it has not come from another ELNO, so what is the rationale for regulating such financial settlement information when it does come from another ELNO?<br>▪ If ELNOs had any concerns about the other ELNO using de-identified settlement information, it could be covered in the interoperability agreement and doesn't need Registrar regulation.<br>▪ Registrars have no experience or expertise in regulating the handling of associated financial transaction information<br>▪ It is doubtful that there is power under the proposed ECNL changes for Registrars to regulate the handling of associated financial transaction information or apply proposed MOR 7.4.2 to associated financial transaction information. The definition of interoperability in the proposed ECNL amendments refers to the completion of *electronic conveyancing transactions*, not *associated financial transactions*. No paragraph in proposed subs 22(2) regarding OR making powers covers regulation of the handling of data concerning associated financial transactions (such regulation is not about the technical and operational requirements of an ELN under s 22(2)(c)). Given the refusal of Registrars to be responsible for regulating associated financial transactions as stated in s 40(2), it is surprising that Registrars would propose regulatory powers over associated financial transaction data in the MOR.<br>d. After excluding categories (a), (b) and (c) the only other information received from another ELNO in an Interoperable Electronic Workspace is generic data or metadata which is not Personal Information e.g. message headers, timestamps, results of online certificate status checks. There is no risk of misuse of such information justifying regulation.<br>In summary, no case has been made for regulating the handling of any information received from another ELNO in an Interoperable Electronic Workspace which is not already subject to regulation as Land Information or Personal Information (e.g. a real risk of misuse of such information which needs regulation to prevent it). Registrars need to either make that case or withdraw proposed MOR 7.4.2.<br>Industry feedback suggesting 'De-Identified Data', that may be used for an ELNO's reporting or governance activities should also be excluded from the restrictions relating to disclosure, storage and use is noted.<br>The proposal expressed by industry to introduce a definition for ***De-Identified Data*** in respect of all existing regulation of information under the MOR is supported. | Change to MOR | A small edit has been made to subparagraph (b) to clarify that the purpose of MOR 7.4.2 is to regulate rather than restrict the use of data. Data use is regulated by other provisions of the MOR such as MOR 19.3.<br><br>MOR 7.4.2 is intended to cover data in addition to Land Information and Personal Information. For example, the name of a Subscriber who is not an individual would fall into neither category.<br><br>ARNECC may review the issue of data use more broadly at a later date. |
| **MOR 7 – Obligations regarding System Security and Integrity – Digital Certificate regime** | | | | |
| 37. | 7.6 | ARNECC's feedback to our previous submission that they do not consider it necessary for further regulatory intervention into digital certificates at this time is noted. We have heard feedback from industry that the issue of customer switching costs and complexities that will make switching ELNs more difficult continue to be items of concern. It is considered that addressing these issues are necessary to achieve the goal of interoperability, being a truly competitive eConveyancing market. By resolving these impediments now, a clear signal will be sent to industry that practitioner concerns are being addressed, and interoperability is being developed with their concerns in mind.<br>It is understood that they are likely to be changes required to current digital certificate policies in order to be compatible with interoperability. There may also be technical changes required to allow other ELNOs to validate digital signatures that have occurred on other platforms, particularly in relation to Associated Financial Transactions, as these digital signatures are not validated by any other party other than the ELNO (as opposed to digital signatures on Registry Instruments, which can be validated at the land registry level). Given these changes, It is considered appropriate and efficient to implement further regulatory intervention now in order to take advantage of the change processes that are currently being undertaken.<br>Feedback received from Subscribers, as has been raised in various industry forums, that Subscribers do not want to, and are unlikely to be willing to, obtain a new digital certificate in order to use another platform. This demonstrates a significant barrier to customer choice, and will result in fewer Subscribers willing to engage with another ELNO. Open digital certificates that can be used across all ELNs does not solve the issue of current Subscribers who have paid for a 3 year digital certificate and will not consider purchasing a new digital certificate until their current certificate expires.<br>The ability for Subscribers to be able to use their ELNO issued digital certificates, which they have already paid for, across all ELNs, is supported in line with our previous submission on this issue. | None | Feedback noted but not adopted. ARNECC reiterates that ELNOs are currently required to permit Subscribers to use open Digital Certificates, subject to any reasonable requirements in the ELNOs' Subscriber security policies. This requirement enables Subscribers to use a single Digital Certificate across multiple ELNs if they wish to do so. |

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| | | In addition to resolving the issue of competition and customer choice, this change would also ensure that the resilience that interoperability brings reaches its full potential. | | |
| 38. | 7.6 | It is noted that stakeholders have raised concerns about the use of digital certificates across different ELNOs. It is also noted that under the MORs ELNOs are required to permit Subscribers to use open Digital Certificates (subject to reasonable security related requirements). It is important that the costs or complexity associated with obtaining and maintaining Digital Certificates do not result in unnecessary barriers to competition (i.e. by making it difficult or costly for Subscribers to switch between ELNOs). It is also considered that issues around the recognition and/or transferability of Digital Certificates are likely to increase if other ELNOs enter the market. Any solution should be conscious of supporting competition between the current ELNOs and not hindering future entry. | None | Feedback noted. |
| 39. | 7.6.3 | As previously noted, we firmly note as an objective of Interoperability for conveyancing practitioners is a system that is 100% secure, reliable, and simple to use with no additional cost to the conveyancer or consumer. Accordingly, we support any Digital Certificate technology solution that simplifies the electronic signing process without additional cost or compliance responsibilities for subscribers. | None | Feedback noted. |
| 40. | 7.11.2(a) | ARNECC's feedback on our previous submission is noted, however given the broad definition of a Data Breach that is contained in MOR v7, it is considered that the amendments made to MOR 7.11.2(a) that requires each ELNO to notify all other ELNOs it Interoperates with of a Data Breach is too broad. It is again proposed that this requirement to notify should be limited to where a Data Breach occurs in respect of an Interoperable Conveyancing Transaction, or where the Data Breach is relevant to Interoperability.<br>In the alternative, if ARNECC is of the view that the breadth of this provision is appropriate, it is proposed that there is a requirement for ELNOs to keep the notification of a Data Breach confidential, unless notification to Subscribers or other third parties is required by law or under the Model Operating Requirements. This confidentiality requirement is essential to ensure that confidence in the Titles Register is maintained. | None | Feedback noted but not adopted. The definition of Data Breach is already restricted to the ELN. ELNOs may negotiate confidentiality obligations in their Interoperability Agreements. |
| **MOR 9 – Risk Management – No increased risk of fraud or error** | | | | |
| 41. | 9.2(b) | An ELNO cannot be responsible for the design of interoperability.<br>The words "the design and" must be deleted from MOR 9.2(b). | Change to MOR | MOR 9.2(b) has been amended to clarify that the overall framework of Interoperability is a result of consultation with industry generally and not just ELNOs. An ELNO is responsible for its own implementation of Interoperability. |
| **MOR 10 – Minimum System Requirements – Data standards** | | | | |
| 42. | 10.3.2 Note | It is queried how the Registrar cannot be responsible for the regulation of Associated Financial Transactions if the Registrar can mandate data standards for such transactions.<br>The definition of interoperability in the proposed ECNL amendments refers to the completion of electronic conveyancing transactions, not associated financial transactions.<br>Given Registrars do not wish to be responsible for regulating associated financial transactions as stated in proposed s 40(2) of the ECNL, it is surprising that Registrars would propose regulatory powers over associated financial transaction data standards in the MOR. | None | The note reflects that the ECNL has given the Registrar power to specify data standards related to Interoperability which cover any Associated Financial Transactions. However, this does not mean that Registrars are responsible for the overall regulation of Associated Financial Transactions. |
| 43. | 13.3.1 | The insertion of Interoperability as a requirement to be included in the implementation plan provided to ARNECC is supported. This will ensure that ARNECC has appropriate visibility of each ELNO's development towards Interoperability, and track progress towards 30 June 2023. | None | Feedback noted. |
| **MOR 13 – Change Management – Release Management** | | | | |
| 44. | 13.4 | It is acknowledged that with NECDS Limited taking control over the data standards and the release management protocols associated with it, there is a need for Registrars to have broader oversight of an ELNO's release management. However, there is concern that this new provision may have broad reaching implications to an ELNO's internal release management schedule. Given the lack of detail set out in MOR v7.1, further detail should be set out in the guidance notes that sets out the extent of what a Registrar is able to determine.<br>Further, it is proposed that further detail be added to MOR v7.1 to specify in what circumstances a Registrar is able to create release management requirements. Alternatively, release management could be handled similarly to the Test Plan requirements, where a plan is agreed between an ELNO and the Registrar. This would provide assurance to the Registrars that an ELNO is sufficiently handling release management, whilst allowing the ELNO to work within their internal release management requirements and ways of working. | Change to MOR | MOR 13.4 has been amended to specify that the Registrar must undertake reasonable consultation with ELNOs prior to specifying any release management requirements.<br>ARNECC's intention in adding MOR 13.4 was to ensure that the Registrar has the power to step in where there is a risk of an ELNO's release affecting, for example, Interoperability, Land Registry Systems or Duty Authority systems. It may not be necessary for the Registrar to exercise this power.<br>Note also that the change management topic in Schedule 8 of the MOR obliges ELNOs to communicate with each other in respect of releases that impact Interoperability. |
| 45. | 13.4 | It is noted that ARNECC has included this new Requirement as a means toward addressing feedback that implementation planning is not an activity that an ELNO can undertake on a unilateral basis. | Change to MOR | See row 44 above. |

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| | | The proposed drafting of 13.4, however, affords significant powers to the Registrar that, if not carefully considered, could be exercised with adverse impacts to the ELNO or econveyancing network.<br>We recommend that any release management requirements to be specified by the Registrar must be made in line with agreed release management principles. Further, to satisfy the requirement of reasonableness, the Registrar must consult with the affected parties, taking their consideration into account, before making an order. | | |
| **MOR 14 – Subscribers - Review of Subscribers and suspension or termination** | | | | |
| 46. | 14.7 | As it currently stands an ELNO has the unfettered power to restrict, suspend or terminate a Subscriber's access of the ELN if, on review, it considers there has been a breach of the PRs. No guidance is given as to what that review process involves and, as such, there is no transparency. Whilst 14.7(d) requires the ELNO to immediately notify the Registrar of the action taken, this is only after the action has been taken. The impact of an improper exercise of the power under 14.7 could be substantial and result in the inability of a Subscriber to conduct its business, leading to a loss of income. Checks and balances are needed such that an ELNO does not have unfettered power without the independent overarching power of the Registrar for transparency in any action taken to limit, suspend and terminate a Subscriber's access to the ELN. The MOR needs to be amended such that it dovetails with the MPR and the procedure set out in Schedule 7 to avoid any abuse of power by an ELNO. | None | ARNECC will consider this issue when preparing Version 8 of the MOR. Any changes will be subject to stakeholder consultation. |
| **MOR Schedule 3 – Reporting Requirements** | | | | |
| 47. | | It is not considered that the requirement that ELNOs supply their business plans to Registrars as part of annual reporting provides sufficient transparency and certainty to ensure continued progress. | None | Feedback noted but not adopted. ARNECC is satisfied with the existing reporting requirements. |
| 48. | | ARNECC should give further consideration to how ELNO performance will be monitored and reported on in the context of an interoperable market. Information about the performance of the market, particularly a developing market, can be extremely valuable to regulators and industry participants. Future policy decisions (and monitoring activities) will benefit from this information, while Subscribers will be better placed to decide whether to switch ELNOs or to negotiate fees with their current ELNO. Further, obligations on ELNOs to report on their performance could be established via amendments to Schedule 3 of the MORs. | None | See row 47 above. |
| **MOR Schedule 8 – Interoperability Agreement Matters** | | | | |
| 49. | | The feedback provided by ARNECC in our previous submission on Interoperability Agreement Matters is acknowledged. However, it is further noted that there still remains a number of Interoperability Agreement Matters that prescribe provisions to be included that serve a public policy purpose. These items are:<br>i. Claims management;<br>ii. Privacy;<br>iii. Root cause analysis;<br>iv. Security;<br>v. Service Levels; and<br>vi. Testing.<br>It is crucial that these issues are addressed to ensure both public confidence in Interoperability and integrity in the Titles Register. As noted by various stakeholders in previous consultation meetings, without appropriate regulation in place on these items in the current market structure, it is unlikely that these matters would be properly dealt with.<br>Whilst it is agreed that these matters can be included in the Interoperability Agreement, we note that if these requirements only exist within the Interoperability Agreement, the sole method of enforcement of these public policy issues are through bilateral action between ELNOs. Given the impact on Subscribers that would likely result from a failure by an ELNO to comply with these obligations, it is proposed that Registrars should have the ability to take action against an ELNO for a breach of these items. To enable this method of enforcement, ARNECC could:<br>i. include these requirements in the body of MOR v7.1; and/or<br>ii. insert a provision in MOR v7.1 that states an ELNO must comply with the Interoperability Agreement Matters in the Interoperability Agreement. | None | Feedback noted but not adopted. ARNECC does not consider it is appropriate for Registrars to enforce a breach of a bilateral agreement. ARNECC is satisfied that the existing regulatory regime requiring that these matters be dealt with between ELNOs is sufficient. |
| 50. | Dispute Resolution | Appreciate and support the inclusion of arbitration as a required dispute resolution method. It is noted that there will be a range of governance forums as part of ongoing processes between ELNOs, and as such do not believe that mediation should be a mandated step of the dispute resolution process.<br>In the event that ELNOs are unable to resolve a dispute through the various governance forums, it is unlikely that mediation will result in a different outcome. The requirement to engage in mediation will therefore serve only to delay the time taken to resolve disputes, which is detrimental both to ELNOs and Subscribers.<br>It is proposed to remove the requirement for mediation within the Interoperability Agreement. | None | Feedback noted but not adopted. ARNECC considers mediation a valuable part of the dispute resolution process. It is common for regulatory regimes to provide for mediation prior to arbitration. |

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| 51. | Service Levels | It is noted that this has been included as a new Interoperability Agreement Matter. Whilst it is noted that there will be likely performance requirements needed between ELNOs in relation to operational processes included in the Interoperability Agreement, technical performance requirements will be captured through the NECIDS.<br>It is believed that the NECIDS will cover the necessary technical performance levels, and as such is not required to be a mandated Interoperability Agreement Matter. | Change to MOR | Schedule 8 of the MOR has been amended so that ELNOs are required to agree on terms relating to service performance levels and response times for matters not already covered by the NECIDS. |
| 52. | Testing | In feedback provided to ARNECC on its proposed drafting of this Requirement, attention was called to the fact that ELNOs are head-to-head competitors and that a general obligation for ELNOs to keep each other informed of systems changes or enhancements would risk disclosure of sensitive intellectual property.<br>It is noted that forums have already been established for the development of a data standard for interoperability and these recognise the sensitivity of communicating proprietary system information to competitors. Terms of reference confirm that an ELNO's products, features and pricing are out of scope.<br>Paragraph (b) should be modified to confirm that the notification of changes is required only to the extent required to facilitate testing.<br>In practice it is imagined (and this will be resolved in the agreement) that an ELNO will be required to develop any necessary test cases in respect of the changes outlined in paragraph (b) and to coordinate a mutually acceptable testing schedule with other ELNOs.<br>It is important that paragraph (b) not be read as a blanket obligation to notify other ELNOs of the nature of system changes, but rather to consider the impact of changes on any testing arrangements.<br>It is noted that where system changes may impact interoperability, an ELNO may also elect to raise a change request with the curator of the NECIDS, if appropriate. | Change to MOR | Schedule 8 of the MOR has been amended to clarify that the obligations in paragraphs (a) and (b) apply only to the extent that they enable each ELNO to comply with its testing obligations. |
| 53. | Training resources and information | Revised Schedule 8, which prescribes the matters to be included in an Interoperability Agreement, includes the new topic: Training resources and information.<br>The provision of this information to Subscribers is welcomed, but it is queried whether this information should be included in the Interoperability Agreement. | None | Feedback noted but not adopted. The process by which the information is provided to Subscribers is to be in the Interoperability Agreement, but the information itself will be provided in the manner agreed between the ELNOs. |
| **Additional Comments** | | | | |
| 54. | General | Some of the amendments made in this revised version of the MORs adopt a restricted concept of interoperability, limited to the titling and registration aspects of the conveyancing process. For interoperability to be appropriately regulated, it is submitted that this narrow focus is not appropriate. The regulatory framework should effectively provide for the completion of the whole of a conveyancing transaction, including 'associated financial transactions', by interoperable Electronic Lodgment Network Operators (ELNOs). | None | Feedback noted. |
| 55. | General | It is considered the ECNL should specify the key steps and milestones needed to ensure interoperability is delivered in the specified timeframe. If milestones are not established in the ECNL, they should be set out in the MORs to promote accountability and ensure continued progress towards a competitive interoperable market. It is also considered that the regulatory framework should include mechanisms to review the implementation of reform measures and identify any outstanding matters (including related fee arrangements). This is particularly important given that the current approach to interoperability (Direct Connection) is expected to be an interim step in the transition to a more competitive ELNO market. Ideally, scheduled reviews should be established via the ECNL, with further detail set out in the MORs. | None | Feedback noted but not adopted with respect to reviews.<br>The ECNL provides the legislative basis to allow the MORs to set a timeframe for implementation. Refer to row 5 above.<br>Placing the timeframe in the MORs rather than the ECNL gives the Registrars the flexibility to undertake consultation and ensure the timeframe is achievable and up to date. |
| 56. | Compliance and Enforcement | It is considered critical that the regulatory framework for e-conveyancing establishes robust and credible enforcement measures (and appropriate penalties for breaches) as soon as possible. Such measures will promote compliance with a number of key obligations including timeframes for the introduction of interoperability, and with general obligations set out in the MORs. The credible threat of enforcement action has a broad range of potential benefits, including deterring delays in the negotiation of Interoperability Agreements, reducing the potential for disputes during the term of Interoperability Agreements, and supporting the entry of new participants into the market (i.e. providing new entrants with confidence that they will be able to compete on merit).<br>It is understood that ARNECC remains committed to an enforcement regime but has made a pragmatic decision to delay this work due to the difficulties associated with developing a multi-jurisdiction regime. While acknowledging that this is a complex area of reform, the establishment of an enforcement regime is critical to the market reform that will provide industry with certainty to meaningfully participate in an interoperative market. It is recommended that the timeline for developing the enforcement regime should be set out in the ECNL. Absent the presence (or clear prospect) of an enforcement regime, it is not clear that Subscribers (or future ELNOs) can reasonably be expected to engage in an interoperable market. | None | Feedback noted but not adopted. . ARNECC continues to develop an expanded national enforcement regime under the ECNL. |
| 57. | Financial Settlement | Under the amended draft of the ECNL, an ELNO's operating requirements (i.e. the MORs) may require it to participate in an industry code relating to associated financial transactions. The current version of the MORs does not contain any provision in relation to participation in the industry code. It is understood that this reflects that the code is yet to be developed by the industry steering committee. As such, we query whether further detail about this obligation will be set out in the MORs, including interaction with the enforcement measures that will underpin this obligation. | None | Feedback noted. Once the code has been developed, ARNECC will consider whether any further amendments to the MORs are required. |
| 58. | Financial settlement | There are two aspects of financial settlement that require further attention in relation to the regulatory framework for interoperability. | None | Feedback noted but not adopted. |

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| | | First, the MORs should include obligations for the digital signing of financial line items. Currently, MOR 7.6.2(a) relates only to the use of Digital Certificates in the ELN which, by definition in section 13 of the Electronic Conveyancing National Law (ECNL), excludes the part of the ELNO System used to conduct Associated Financial Transactions. In the absence of specific obligations, the digital signing of financial line items emerged in the current single ELNO environment as a practical solution to the parties' need for a means of reliance in a 'closed loop' system, but in an interoperable environment, this should be regulated. This 'gap' in the expanded reliance regime under section 12 of the ECNL must be addressed in a multi ELNO environment. Of course, the absence of a signed line item relating to financial settlement makes the changes to section 12 of the ECNL to include financial settlement in the reliance regime irrelevant – there will be no signature to rely upon.<br>Secondly, the various trust accounting requirements of solicitors and conveyancers across participating jurisdictions need to be further examined in relation to the information that solicitors and conveyancers will need in an interoperable transaction to satisfy the record keeping requirements for a trust account. In the single ELNO environment, the particulars of the clearing accounts for each financial institution at which a law practice operates a trust account are published, enabling compliance with trust account record requirements. However, in an interoperable environment, questions arise as to how the relevant information will be ascertained and whether a more rigorous approach is needed in a multi-ELNO environment. For example, should each ELNO be compelled to publish the particulars for all its clearing accounts to assist compliance with trust account regulation? Further discussion of these issues is welcomed. Certainly there must not be any risk that practitioner subscribers will be non-complaint with their trust account obligations by participating in an interoperable transaction. | | As previously advised, ARNECC will not introduce an obligation for financial line items to be digitally signed. If industry participants determine that financial line items should be digitally signed within the meaning of the ECNL, then the reliance regime in section 12 comes into play.<br><br>Practitioners should raise any further concerns with the trust account regulators and ELNOs directly. |
| 59. | Potential Competition Concerns | It is considered important that ARNECC (and ELNOs) are mindful that certain matters set out in Interoperability Agreements have the potential to raise competition concerns in relation to the Competition and Consumer Act 2010 (CCA). For example, the CCA prohibits contracts, arrangements, understandings or concerted practices that have the purpose, effect or likely effect of substantially lessening competition in a market. Where businesses are concerned that their proposed conduct may give rise to a breach of the competition provisions of the CCA, they can seek authorisation from the ACCC. Broadly, the ACCC may grant authorisation if it is satisfied that the likely public benefit from the conduct would outweigh the likely public detriment. The authorisation process is public and transparent and the ACCC generally must make a decision within 6 months of receiving the application. Some Commonwealth, state and territory Acts may also specifically permit conduct that would normally contravene the CCA. | None | Feedback noted. |