

Electronic Conveyancing National Law (ACT) Operating Requirements 2021

Disallowable instrument DI2021–226

made under the

Electronic Conveyancing National Law (ACT), s 22 (Operating Requirements for ELNOs) and s25 (Publication of operating requirements and participation rules)

EXPLANATORY STATEMENT

Overview

The purpose of this explanatory statement is to describe the changes to the Operating Requirements relating to operation of an Electronic Lodgment Network (ELN) by Electronic Lodgment Network Operators (ELNOs). The rules have been determined pursuant to section 22 of the *Electronic Conveyancing National Law (ACT)* (ECNL). Commencement complies with section 25(1)(b) of *ECNL*.

The Operating Requirements made by this instrument have adopted in full the Model Operating Requirements Version 6 developed and approved by the Australian Registrars' National Electronic Conveyancing Council (ARNECC). The Model Operating Requirements have been determined by ARNECC for promulgation by each Registrar before coming into effect in that jurisdiction as Operating Requirements.

The operating requirements cover topics such as:

- the financial standing of an ELNO
- operational and technical standards
- insurance cover to be held by an ELNO
- suspension or revocation of an ELNOs approval, and
- directions to an ELNO to restrict, suspend or terminate a subscriber's use of an ELN.

Pursuant to section 36(1)(g) of the *Legislation Act 2001* a regulatory impact statement is not required for these Participation Rules as they are part of a nationally uniform scheme of legislation.

Human Rights

Section 12 of the *Human Rights Act 2004* (HRA) provides that everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily and not to have his or her reputation unlawfully attacked. The proposed disallowable instrument introduces changes to the Operating Requirements of the ELN by ELNOs. As the ELN contains individual's personal information for the purpose of lodging land title registry instruments and other documents, the changes engage the right to privacy under section 12.

The right to privacy under section 12 of the *HRA* is positively engaged by the proposed changes to the Operating Requirements because the changes strengthen privacy and security safeguards to ensure greater protection of personal information. This includes greater testing requirements to ensure protection for integrated systems and new security and cyber security training obligations. These provide additional privacy and security safeguards as a measure to prevent unauthorised access to the ELN.

Detail

This Explanatory Statement deals with the provisions of the Operating Requirements in groups rather than solely by Requirement-by-Requirement. The Operating Requirements are largely self-explanatory and will be well understood by ELNOs and subscribers, particularly those who are already involved in electronic conveyancing in other jurisdictions. ARNECC will publish Guidance Notes on the Operating Requirements on the ARNECC website to assist ELNOs understanding what is expected in complying with the requirements.

Eligibility

Operating Requirement 4.3

Amendments to the character requirements in Operating Requirement 4.3 reflect that a disciplinary action must be determined and have the possibility of impacting conveyancing transactions before it affects eligibility.

Amendments to the defined Suspension Events and Termination Events that affect good character by limiting them to specific events set out in the Participation Rules, such as material breach, fraud or negligence. The amendments ensure that Suspension and Termination for minor events such as non-payment of fees for example, will not impact future good character requirements.

Amendments to the character requirements in relation to principals and Officers limit the requirements to those who have access to the ELN or control over Persons who have access to the ELN. This ensures that large organisations, such as international

organisations that are Subscribers, are not required to confirm the good character of every one of their principals and Officers even those that have no access or influence over the ELN.

Amendments to the good character requirements clarify that principals, Officers and Subscriber Administrators that did not materially contribute to prior refusal, Suspension or Termination events are not captured. This ensures, for example, that an Officer that did not contribute to a Termination event at a firm is not prevented from seeking employment as an Officer of another firm.

Operation of ELN

Operating Requirements 5.2, 13.3, 20.1

Operating Requirements 5.2(c) and 5.2 (d) are included to ensure Potential ELNOs and ELNOs are aware that they are required to deliver more than the minimum set of documents specified in Operating Requirement 5.2(b).

New Operating Requirement 13.3 provides for a staggered roll out to be negotiated between the ELNO and the Registrar.

Operating Requirement 20.1 has been changed to permit suspension or termination either within five years from the date the ELNO commences operating, or two years from the date a jurisdiction becomes operational in light of feedback if an ELNO fails, without reasonable excuse, to enable the electronic Registry Instruments and other electronic Documents set out in Operating Requirement 5.2(b)

Operating Requirement 5.5

Amendments to Integration requirements provide for ELNOs to keep records of requests to facilitate Integration.

Amendments also require ELNOs to keep records of any requests made for a copy of an ELNOs Integration terms and conditions and/or principles and, where it is not possible for a set of Integration terms and conditions to be developed, ELNOs may instead develop a set of principles upon which those terms and conditions will be negotiated.

Testing

Operating Requirement 6.2

Operating Requirement 6.2 introduces a new requirement that ELNOs must not implement certain new functionality without first undertaking testing.

Obligations Regarding System Security and Integrity

Operating Requirements 7.1, 14.6

Operating Requirements 7.1 and 14.6 introduce new obligations for ELNOs around training Subscribers and Users on cyber security, security policies, and their obligations in relation to the security of the ELN.

Operating Requirement 7.6

Operating Requirement 7.6 includes a new Digital Certificate security requirement that prevents ELNOs Systems from including any functionality which enables Subscribers or Users to breach Participation Rule 7.5.5.

ELNOs must ensure Subscribers can use open Digital Certificates, subject to any reasonable requirements in the ELNOs Subscriber security policy.

Operating Requirement 7.13

New Operating Requirement 7.13 introduces a requirement that an ELNO undertakes a vulnerability assessment and penetration testing by an appropriate qualified independent security professional of its ELNO System and any other systems and networks that store or process Land Information and implements recommendations from the independent security professional are implemented promptly.

Change Management

Operating Requirement 13.3

New Operating Requirement 13.3 introduces a requirement for ELNOs to provide the Registrar with an implementation plan covering a minimum two-year period.

Reporting Requirements

Schedule 3

Category One, Two, Three and Four of the Reporting Requirements in Schedule 3 are adjusted as appropriate to reflect the amendments.

Definitions

The definition of Business Plan is amended to include the requirement for an ELNO to assess the likely costs for development and ongoing expansion of a fully functional system.

The definition of Insolvency Event is amended to exclude temporary arrangements to postpone a debt.

Amendments are included to the definition of User to allow a person appointed as the manager of the business of a Law Practice or conveyancing practice to access the Electronic Lodgment Network for the purpose of finalising a transaction. This could occur due to the death or incapacity of a sole principal.

Inclusion of potential ELNO which means a Person who has applied for Approval pursuant to section 15 of the *ECNL* to provide and operate an Electronic Lodgment Network.

Other definitions have been amended and added as appropriate to reflect the amendments.