

4 October 2018

Ms Jean Villani
Chair
Australian Registrars' National Electronic Conveyancing Council
PO Box 2222
Midland
Western Australia 6936

By email: chair@arnecc.gov.au

Dear Ms Villiani

**MODEL PARTICIPATION RULES AND MODEL OPERATING REQUIREMENTS –
CONSULTATION DRAFTS 5.1**

1. Thank you for the opportunity to provide a submission to the Australian Registrars' National Electronic Conveyancing Council (**ARNECC**) regarding Consultation Drafts 5.1 of the *Model Participation Rules and Model Operating Requirements*.
2. The Law Council is grateful for the assistance of its National Electronic Conveyancing System Committee, the Law Society of New South Wales, the Law Society of South Australia and the Law Institute of Victoria (**LIV**) in the preparation of this submission.
3. The Law Council's submission repeats a number of concerns initially raised in the Law Council's 3 May 2018 submission regarding Consultation Drafts 5 of the *Model Participation Rules and Model Operating Requirements (previous submission)*.
4. The LIV was represented by members of its Property Law Committee at the industry forum organised by ARNECC on Wednesday 19 September 2018 in Melbourne. Feedback from the LIV has informed this submission.

Model Participation Rules Version 5.1

The proposed power of attorney model

5. The Law Council notes that there is still some confusion regarding the changes relating to the Attorney regime. The Law Council understands that at the industry forum, ARNECC advised that solicitors will not be required to be appointed Attorneys but will act on valid client authorisations, and Attorneys will need a power and then a client authorisation. Attorneys in this context include lenders which are not Authorised Deposit-taking Institutions (**non-ADI lenders**) joining the workspace as incoming or outgoing mortgagees, who would be required to satisfy the rules of agency.
6. In the previous submission, the Law Council raised concerns in relation the proposed new power of attorney model in Model Participation Rules Version 5 (**MPR5**). In the Law Council's view, those concerns have not been sufficiently addressed in Model

Participation Rules Version 5.1 (**MPR5.1**). The Law Council acknowledges that some suggestions for amendment to MPR5 have been adopted. However, these amendments are largely in relation to minor matters.

7. It appears that the ARNECC will proceed with the new power of attorney model. Therefore, the Law Council repeats its concern in relation to the lack of safeguards applying to that model – in particular that only qualified persons should conduct conveyancing transactions.

Paramourncy of Rule 6.15

8. The material in the feedback table on MPR5 published by ARNECC on 5 September 2018 (**Feedback Table**) appears to indicate that, in ARNECC's view, Rule 6.15 is sufficient to ensure that Subscribers and Signers comply with a jurisdiction's laws in relation to persons authorised to conduct conveyancing transactions. For example, see the responses in the Feedback Table numbered 11 and 19.
9. The Law Council submits that the paramountcy of Rule 6.15 should be made express in the provisions of MPR 5.1. This could easily be achieved by adding to the opening words of Rule 6.15 so that it includes words to the effect of 'Despite any other provision of these Rules, the Subscriber must: ...'.
10. This would appear to be consistent with ARNECC's intention and would provide some protection against potential misuse of the power of attorney model.

Client Authorisation and the power of attorney model

11. The Law Council notes that on 21 September 2018 ARNECC published the presentation materials provided at the industry forum. The Law Council has reviewed the presentation materials and reiterates its concerns about the power of attorney model and the use of a Client Authorisation outside of the representative-client relationship. As noted in paragraph 12 of the Law Council's previous submission, the Law Council does not support the proposed Client Authorisation.

Definition of Power of Attorney

12. The definition of Power of Attorney refers only to a 'written document', which rule 5.6 of the MPR later defines to include one which complies with the laws of the state in which it is made and is valid. The Law Council presumes that this means that the document has been duly signed and not revoked. Clarification in this regard would be appreciated.

Rules 5.6(a)

13. The meaning of new Rule 5.6(a) is unclear. The LIV advises the Law Council that this uncertainty was reflected at the industry forum.
14. In particular, the Law Council queries the reference to 'representative' when 'Representative' is a defined term. In the Law Council's view, this amendment requires further clarification.
15. Rule 5.6(a) also states the Subscriber Attorney cannot also be a representative. The Law Council seeks clarification regarding what the position is for validly appointed Attorneys who are also solicitors and/or Subscribers or professional Attorneys.

Rule 5.6(d)

16. In relation to Rule 5.6(d), the Law Council queries the utility of lodging the power of attorney with the Registrar. The Law Council notes the comment in the Feedback Table that 'the Operator will need to review the registered/lodged Power of Attorney to understand who is the Donor and who is the Attorney and what is authorised'. Under the model proposed by ARNECC, the authority that is to be established is granted by the Client Authorisation and the statutory effect of that document under the Electronic Conveyancing National Law (**ECNL**).
17. The Law Council also suggests that the reference to 'Registrar' in Rule 5.6(d) should be to 'Land Registry'.
18. If the requirement for a Client Authorisation is retained by ARNECC as part of the power of attorney model, the Law Council submits that consideration must be given to the consequences of a conflict between the terms of a power of attorney and the Client Authorisation.

Verification of identity

19. Rule 6.5.1(f) has not been amended in MPR5.1. At paragraph 28 of the Law Council's previous submission it was submitted that the obligation in relation to verification of identity (**VOI**) of the donor should be limited to circumstances where a donor is appointing the Subscriber as Attorney, otherwise the identity of all donors would appear to require verification. As drafted, the additional provision in 6.5.1(f) introduces an obligation for a Representative Subscriber taking instructions from an attorney to identify the donor of the power. However, under Rule 6 of Schedule 8 of the Model Participation Rules (**MPRs**), the Subscriber is only required to verify the identity of the attorney, recognising that in most cases it will be impractical to identify the donor. The Law Council requests that ARNECC reconsider this matter from a practical perspective.

Supporting evidence

20. Rule 6.6(f) of MPR5.1 appears to require the retention by the Subscriber of the original power of attorney as part of the requisite supporting evidence. At paragraph 30 of the Law Council's previous submission, it was suggested that this same requirement in MPR5 should refer to a 'certified copy' of the power of attorney. The Law Council stresses again the need for Rule 6.6(f) to be amended to refer to a certified copy of the power of attorney.
21. In ARNECC's response in the Feedback Table it is proposed that this is not an issue, because originals are returned after registration or production. However, the availability of the original after registration was not the issue. Powers of attorney are documents that are used in many situations and need to be retained and produced by the attorney as their authority to act for the donor in ongoing circumstances.
22. Although it may sometimes be the case, powers of attorney are not usually created for one transaction and then able to be 'archived' in the Subscriber's records. In many cases, it will not be possible for the original power of attorney to be retained at all, or retained in multiple files as supporting evidence. The creation of individual powers of attorney for each transaction is impractical. The Law Council requests that ARNECC reconsider this matter from a practical perspective.

Model Operating Requirements Version 5.1

Electronic Lodgment Network Operator must not be a Subscriber

23. As referred to in paragraph 80 of the Law Council's previous submission, the Law Council strongly suggests the strengthening of Requirement 14.1 0.2, particularly where a Subscriber has a controlling interest in an Electronic Lodgment Network Operator (**ELNO**). The Law Council notes that the Requirement has been amended to refer to the newly defined term 'Subscriber Review Process'. However, the Requirement should be further strengthened. For example, a minimum specified frequency for the Subscriber Review Process for this Subscriber should be added. The Law Council is concerned that potential conflicts of interest are not satisfactorily addressed and reiterates the concerns expressed in paragraph 81 of the previous submission.

Interoperability

24. The Law Council is aware that at the industry forum ARNECC advised that there is no allowance for interoperability in the current regulatory framework, notwithstanding that two other potential ELNOs have satisfied the criteria to be ELNOs and are in the process of negotiating their operating agreements.
25. With the progress of other entities seeking approval to operate as an ELNO, the issue of interoperability is now critical. While the importance of interoperability is generally acknowledged, the Law Council is concerned at the lack of visible progress towards an interoperability framework.
26. At the industry forum, a representative of Sympli advised that ARNECC had not at that point provided a satisfactory answer on the question of interoperability. The LIV has advised the Law Council that were ARNECC able to address these issues, many of the other issues raised in the industry forum would be largely resolved by the emergence of competition within the market (such as in relation to pricing and compliance).
27. From the practitioner perspective, it will be unacceptable if practitioners are required to be Subscribers to multiple ELNOs. If a Subscriber chooses to use multiple ELNOs, it should be possible to use the same digital certificate across multiple ELNOs.
28. True interoperability would mean that a transaction could be conducted with the different parties each using a different ELNO. Without interoperability, it appears that parties to a transaction will all need to use the same ELNO and require practitioners and financial institutions to subscribe to every ELNO. This will be exacerbated if linked or simultaneous settlements will need to be conducted in the same ELNO.
29. The Questions and answers document published by ARNECC on 26 September 2018 states:

20. How will interoperability between ELNOs work? Will practitioners have to subscribe to more than one ELNO?

Interoperability is a difficult issue and a major challenge. It has been raised in the review of the regulatory framework.

There are two prospective ELNOs which have not entered the market yet, and each ELNO will operate independently. Unless there are changes to the current

regulatory framework, it is possible that practitioners will need to subscribe to multiple ELNOs.

ARNECC does not currently consider that there will be any change to the MORs to allow interoperability until the regulatory framework review is complete.

30. In the view of the Law Council, this is unworkable. A lack of interoperability has the potential to negate the efficiencies of electronic conveyancing and to create unacceptable administrative costs for practitioners, financial institutions and clients. Failure to deal with the issue of interoperability has the potential to derail the substantial progress that has been made to date in the implementation of electronic conveyancing. While the Law Council is aware of the substantial obstacles to achieving interoperability, the reality is that these obstacles must be overcome before any other ELNOs commence operations. If ARNECC is not minded to address interoperability issues as a matter of urgency, the Law Council will consider advocating to governments, through the Council of Australian Governments, to address these issues before the system becomes too unworkable and is rejected by practitioners, financial institutions and clients.

Additional concerns arising from the industry forum

Separation

31. The Law Council understands that the present regulatory regime allows for ELNOs to offer upstream and downstream services, including conveyancing services. Further, the Law Council understands that bodies representing conveyancers would like conveyancing services to be specifically excluded from the definition of services an ELNO is permitted to provide.
32. The Law Council notes that, unless ELNOs self-report breaches of the rules of separation they are not likely to be caught. The Law Council has been advised that at the industry forum, concerns were expressed that ELNOs self-certify as compliant within the regulatory regime. However, ARNECC advised that the annual self-reporting requirements were rigorous and there would be 'compliance checking', which was later described as 'responding to complaints'.
33. The Law Council is aware that SAI Global expressed concerns at the industry forum that even if ELNOs are caught in breach of the regulatory regime, the consequences are ineffective, as these are limited to revocation or termination of certification in circumstances where there is currently a sole ELNO and the alternative paper system is being phased out.

Integration

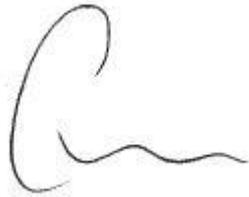
34. The Law Council understands that there will be a standardised setting of terms and conditions for integration, so that each upstream and downstream service provider is treated on an equal basis.
35. The Law Council is aware that at the industry forum, ARNECC advised that, in circumstances where an ELNO did offer upstream and downstream services, changes to integration would ensure the playing field was levelled to prevent the integrated ELNO service provider's business receiving greater favour. ARNECC referred to Telstra as an example, in that Telstra owns the infrastructure for the telephone network, but is prevented from favouring itself when it comes to telephone

and mobile packages/service provision, so that wider participation in the upstream/downstream market is not stifled.

Contact

36. Please contact Mr John Farrell, Policy Lawyer on (02) 62 46 3714 or at john.farrell@lawcouncil.asn.au in the first instance, if you require further information or clarification.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Morry Bailes', with a large initial 'M' and a wavy line extending to the right.

Morry Bailes
President