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# Electronic Conveyancing National Law, Model Participation Rules and Model Operating Rules

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## **Australian Registrars' National Electronic Conveyancing Council**

**7 February 2014**

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## Acknowledgment

The Law Council acknowledges the assistance of its National Electronic Conveyancing System Committee, the Law Society of New South Wales and the Law Institute of Victoria in the preparation of this submission.

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## Introduction

1. The Law Council is pleased to provide a submission to the Australian Registrars' National Electronic Conveyancing Council (ARNECC) regarding version 2 of the draft Model Participation Rules (MPRs) and version 2 of the draft Model Operating Rules (MORs) released by ARNECC for electronic conveyancing.<sup>1</sup>
2. ARNECC has been established pursuant to an Intergovernmental Agreement for an Electronic Conveyancing National Law (the IGA), which provides for participating States and Territories to cooperate in the implementation of a national electronic conveyancing system.<sup>2</sup> ARNECC has been responsible for facilitating the drafting of the Electronic Conveyancing National Law (the National Law) and its passage in participating jurisdictions.
3. The National Law provides for State and Territory Land Titles Registrars (the Registrars) to determine MORs and MPRs in each jurisdiction. In determining these requirements, the Registrars are to have regard to the MORs and MPRs as agreed by ARNECC.
4. The MORs regulate the relationship between an Electronic Lodgement Network Operator (the Operator) and the relevant Registrar. The MPRs regulate the relationship between an Operator and a subscriber. Legal practitioners who wish to participate in electronic settlement of conveyancing transactions and electronic lodgement of relevant Land Titles Registry instruments (registry instruments) will be subscribers. Other subscribers are anticipated to be licensed conveyancers and financial institutions. Some subscribers, such as legal practitioners and licenced conveyancers, will be representative subscribers who act on behalf of clients.
5. The Law Council notes that the draft National Law, MORs and MPRs were first released for public comment on 30 March 2012. The Law Council made a submission in response to this consultation on 25 May 2012.<sup>3</sup> The Law Council also notes that a Consultation Regulation Impact Statement regarding the National Law was released on 5 July 2012. The Law Council made a submission in response to this consultation on 3 August 2012.<sup>4</sup>
6. The Law Council also participated in a consultation with ARNECC on 6 August 2012 and provided comments to ARNECC on the draft National Law on 10 September 2012.<sup>5</sup>
7. The Law Council notes that a number of changes have been made to the MPRs as a result of these consultations by ARNECC.
8. The Law Council also notes that these consultations led to the formation of a joint stakeholder/ARNECC Working Party to review the Client Authorisation Form. The Working Party held a meeting on 20 November 2012, which was attended by Law Council representatives, Murray McCutcheon and Michael James. As a result of this meeting, the Client Authorisation Form was redrafted. The Law Council provided a

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<sup>1</sup> See <http://www.arnecc.gov.au>

<sup>2</sup> See Intergovernmental Agreement for an Electronic Conveyancing National Law, available at [http://www.arnecc.gov.au/\\_data/assets/pdf\\_file/0009/173907/IGA\\_for\\_an\\_Electronic\\_Conveyancing\\_National\\_Law.pdf](http://www.arnecc.gov.au/_data/assets/pdf_file/0009/173907/IGA_for_an_Electronic_Conveyancing_National_Law.pdf)

<sup>3</sup> See <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/ElectronicConveyancingNationalLaw,ModelOperatingRequirementsandModelParticipationRules.pdf>

<sup>4</sup> See <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2615%20-%20Introduction%20of%20the%20Electronic%20Conveyancing%20National%20Law%20-%20Consultation%20Regulation%20Impact%20Statement.pdf>

<sup>5</sup> See Law Council of Australia letter to ARNECC, 10 September 2012.

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submission in response to the redrafted Client Authorisation Form on 14 February 2013.<sup>6</sup>

9. In July 2013, the Law Council agreed to participate in the Electronic Conveyancing Group (ECG), which involves the Law Council, the Australian Bankers' Association and the Australian Institute of Conveyancers. It aims to work collaboratively to contribute to the efficiency of the e-conveyancing system and to develop effective relationships with ARNECC and National E-Conveyancing Development Ltd (NECDL).
10. On 17 September 2013, members of the ECG met with Mr Brenton Pike, Chair of ARNECC to discuss a number of outstanding issues, including a number of suggested amendments to the MPRs.
11. The Law Council notes that the electronic settlement model to be used in the Electronic Lodgment Network (ELN) is currently being developed and although the Law Council has been provided with some details, the model has not been finalised at the date of this submission. The Law Council may wish to make further comments once these details are finalised.

## Draft Version 2 MPRs

12. The Law Council notes that a number of the proposed changes to draft version 2 of MPRs are not substantive changes but rather drafting improvements. The Law Council supports the resulting improvement in clarity.

## Digitally Sign and Digital Signature

13. The Law Council has previously made a number of comments regarding definitions relating to the process of digitally signing registry instruments and documents.<sup>7</sup> Some of these definitions have been amended during the consultation processes. However, the Law Council considers that there is still a need for clarification of these definitions in the MPRs. The relevant definitions are outlined below.

14. In the MPRs, 'digitally sign' has the meaning given to it in the National Law:

*digitally sign* in relation to an electronic communication or a document, means to create a digital signature for the communication or document.

15. In the MPRs, 'digital signature' has the meaning given to it in the National Law:

*digital signature* means encrypted electronic data intended for the exclusive use of a particular person as a means of identifying that person as the sender of an electronic communication or the signer of a document.

16. In the MPRs:

Digital Certificate means an electronic certificate Digitally Signed by the Certification Authority which:

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<sup>6</sup> See <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2699%20-%20Electronic%20Conveyancing%20National%20Law%20-%20Client%20Authorisation%20Form.pdf>

<sup>7</sup> See <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2682%20-%20Electronic%20Conveyancing%20-%20Model%20Participation%20Rules.pdf>

See also letter to ARNECC, 10 September 2012.

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- a. identifies either a Key Holder and/or the business entity that he/she represents; or a device or application owned, operated or controlled by the business entity; and
  - b. binds the Key Holder to a Key Pair by specifying the Public Key of that Key Pair; and
  - c. contains the specification of the fields to be included in a Digital Certificate and the contents of each.
17. Digitally signing a document or an email involves encrypting the file using a cypher that is unique to the individual such that successful decryption requires the use of a key that, in the case of asymmetric cryptography, is the public key that corresponds to the private key used for the encryption (or vice versa in some cases) and, in the case of symmetric cryptography, requires the encryption key to be known.
  18. The “cypher” is a unique set of numbers generated for an individual to use when digitally signing; the actual process is a mathematical operation that results in a value that can be quickly calculated. The cypher is comprised in a person’s digital [signing] certificate.
  19. NECDL has chosen asymmetric cryptography, so that the signer is issued with a public key/private key pair. The private key is used to sign email or documents or the workspace and everyone else can use the signer’s public key (which NECDL will hold) to verify the identity of the signer. While it is not impossible, it is regarded as “computationally non-feasible” to forge someone’s key thus providing a very high degree of assurance as to the identity of the person who used it (provided the digital certificate is kept secure and the identity was verified at the point of certificate issue).
  20. The Law Council submits that the definition of digital signature the National Law is a conflation of language apt to describe the digital certificate and language apt to describe the product of its use. The definition of ‘digitally sign’ exacerbates the problem.
  21. The Law Council is of the strong view that the two definitions (and associated definitions) need revision if they are to be workable. The Law Council recommends that at least the following two definitions be redrafted as follows:

*digitally sign* means, in relation to an electronic communication or a document, the use of a particular person’s digital certificate to sign the communication or document.

The word “sign” should be left to its ordinary common law meaning, which takes account of context and intent.

*digital signature* means the product of the use of a particular person’s digital certificate so as to identify that person as the sender of an electronic communication or the signer of a document.
  22. The Law Council understands that ARNECC believes that digital signature has been defined in such a way as to allow for future improvements in technology. The Law Council remains of the view that the drafter has mistakenly conflated the role of the digital certificate with the product of its use.
  23. Superimposed on the problems with the definitions is the way the regime of subscribers, users and the issuing of a digital certificate is proposed to operate. The Law Council understands that the process envisaged by NECDL is that the corporate holder of a digital [signing] certificate can issue child certificates so that the use of a child certificate binds the corporate user. This additional sophistication needs to be understood in relation to the attribution rule in section 12 of the National Law which

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refers to a 'subscriber's digital signature' being 'created' for a registry document. Given the language of the current definitions and the definition of 'subscriber', it is clear that a subscriber's digital signature is not the product of digitally signing by a 'user' or 'individual' (except in the case of a sole practitioner who will be a subscriber in his or her own capacity).

24. As presently advised the Law Council's view is that the definitions remain defective and that those defects will preclude section 12 from having the intended effect. Given the pivotal importance of these definitions to the entire national electronic conveyancing system, the Law Council formally requests a meeting with ARNECC and/or its technical and legal advisors so that a more accurate definitional suite across the ECNL, MORs and MPRs can be agreed. The Law Council submits that the full suite of definitions including 'digitally sign', 'digital signature', 'digital certificate', 'user', 'signer' and 'key holder' need to be conformed to the Subscriber-primacy paradigm that the national electronic conveyancing system is implementing. This is achievable without sacrificing technological neutrality.
25. The Law Council was pleased to be informed that ARNECC had received the independent advice it was seeking regarding these matters, but was disappointed that insufficient details of that advice were provided to permit any appreciation of how it led to the conclusion that no change to the definitions was required.

## Subscriber who acts as Representative

26. A subscriber acts as an agent for a client in digitally signing documents on behalf of the client. A subscriber who acts on behalf of clients is defined as a 'representative'.
27. Clause 5.3 of the MPRs provides that a representative must:
  - a. comply with the laws of the Jurisdiction in which the land the subject of the Conveyancing Transaction is situated regarding who can conduct a Conveyancing Transaction; and
  - b. take reasonable steps to ensure that a Signer complies with the laws of the Jurisdiction in which the land the subject of the Conveyancing Transaction is situated regarding who can conduct a Conveyancing Transaction and Digitally Sign Registry Instruments.
28. In its submission of 25 May 2012 in relation to the MPRs, the Law Council recommended that the definition of 'signer' be amended to clarify that a signer should be a legal practitioner or licensed conveyancer, having regard to the operational roles and level of responsibility of a signer.
29. The Law Council understands that ARNECC declined to make this amendment on the basis that inserting new clause 5.3 as above was sufficient to ensure that only appropriately qualified persons become representatives and signers.
30. In its submission of 14 December 2012 on the MPRs, the Law Council submitted that it should be an absolute requirement for a representative to ensure that a signer complies with the laws of the jurisdiction in which the land the subject of the conveyancing transaction is situated regarding who can conduct a conveyancing transaction and digitally sign, rather than merely take 'reasonable steps'.
31. The Law Council understands that at a meeting between the ECG and ARNECC on 17 September 2013, the Chair of ARNECC advised that a change to the MPRs would be requested to make it an absolute requirement that a representative must ensure that a signer is a legal practitioner or licensed conveyancer.

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32. The Law Council would be pleased to be provided with the rationale for this requested change not being made in the draft MPRs. The Law Council notes that the Law Society of New South Wales is satisfied with the obligation in clause 5.3 being a requirement to take reasonable steps rather than an absolute requirement.

## Responsible Subscribers

33. Clause 5.4.2 of the MPRs provides that a responsible subscriber must:

take reasonable steps to ensure that it does not pass on information to the Registrar obtained from another Participating Subscriber that it knows or suspects is incorrect, incomplete, false or misleading.

34. The Law Council has previously requested the deletion of this subclause on the basis that the provision goes further than the current role of a lodging party and that it is unclear how a responsible subscriber could take on the obligation for the accuracy of information entered by other subscribers.
35. The Law Council understands that a further paper is likely to be provided from ARNECC to the ECG in relation to this matter. The Law Council defers further comment on this subclause until the paper has been provided and considered.

## Subscriber Agents

36. The Law Council notes that a subscriber's ability to have a subscriber agent perform the necessary verification of identity is an integral element of the MPRs and essential for rural or remote practitioners.
37. The Law Council further notes that pursuant to clause 6.5.2 of the MPRs, compliance with the Verification of Identity Standard set out in Schedule 8 of the MPRs is deemed to constitute taking reasonable steps for the purposes of verifying identity in clause 6.5.1 of the MPRs.
38. For the sake of clarity, the Law Council requests that clause 6.5.2 be amended by inserting the words 'by the Subscriber or the Subscriber Agent' after the words 'Verification of Identity Standard'.

## Subscriber Agents and Insurance

39. The Law Council notes the insertion of new clause 9(b) in schedule 8 Verification of Identity Standard which requires that a subscriber engaging a subscriber agent to verify identity must:

"ensure that the Subscriber Agent does not limit its liability for negligence to less than the amount specified in paragraph 1.2(b) of the Insurance Rules or for fraud to less than the amount specified in paragraph 2.2(b) of the Insurance Rules..."

40. The Law Council is concerned that that these insurance requirements for an insured amount of at least \$1.5 million per claim in relation to negligence and fraud may not be able to be met by subscriber agents. As mentioned, a subscriber's ability to have a subscriber agent perform the necessary verification of identity is an integral element of the system and one of the main potential benefits of the system, particularly for rural and remote practitioners.

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41. The Law Council is aware of a number of existing and new entities entering the market as possible subscriber agents for the verification of identity. It would be disappointing if a number of these entities were effectively prohibited from providing their services because they were unable to obtain the requisite insurance at a commercially acceptable level.
  42. Without a sufficient number of subscriber agents in the market, the verification of identity required by the MPRs may become a significant disincentive to practitioners to use electronic conveyancing.
  43. The Law Council also recommends that face to face identification be dispensed with as an essential feature. There are a number of document-based federated identity verification services available which in the Law Council's view provide a greater identity assurance than a mere reasonable likeness test that a face to face presentation with unverified documents can produce. The Federal Government's revived Document Verification Service should also be available to Participants in the national electronic conveyancing system.

## Protection Measures

44. The Law Council was provided with NECDL's draft Subscriber Security Policy on 4 February 2014.
45. The Law Council defers further comment on provisions which relate to the security policy, such as clause 7.1, until it has had the opportunity to review the policy.

## Jurisdiction specific additional participation rules

46. The Law Council is pleased to note that to date there are no additional MPRs (Schedule 1) which will apply in certain jurisdictions only. The Law Council notes and supports the efforts ARNECC is making to avoid or limit jurisdiction-specific additional MPRs.

## Client Authorisation

47. The Law Council wishes to acknowledge the work done by the joint stakeholder/ ARNECC Working Party established to review the Client Authorisation Form.
48. The Law Council is pleased to see that a number of improvements have been made to the Client Authorisation Form, including:
  - a. replacement of the word 'client party' with 'client';
  - b. consistent use of the word 'authorisation' replacing prior references to 'agreement';
  - c. deletion of unnecessary terms on the second page of the Client Authorisation Form; and
  - d. that the Client Authorisation Form is no longer required to be signed in the presence of the subscriber or subscriber agent.
49. The Law Council notes that the Client Authorisation Form contains two important authorisations on the front page and in clause 1 as follows:

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The Client authorises the Subscriber to.....

- c. authorise any financial settlement involved in the Conveyancing Transaction(s); and
- d. do anything else necessary to complete the Conveyancing Transaction(s).

Once the financial settlement model is finalised by NECDL, the Law Council may wish to comment further on the wording of these authorisations, particularly in relation to the debiting of trust accounts.

50. The Law Council also notes that a number of suggestions have been made by stakeholders to assist practitioners and the ease with which they are able to complete the Client Authorisation Form. These suggestions include the development of a smart form, integration of the form with other systems allowing for the pre-population of data and the ability to complete and sign the Client Authorisation Form electronically. The Law Council reiterates the importance of pursuing these initiatives in improving the efficiency of the overall system.

## Conclusion

51. The Law Council is pleased with the number of amendments made to previous drafts of the MPRs and the Client Authorisation Form.
52. The Law Council anticipates that it may wish to provide further comments in relation to the operation of the MPRs once the financial settlement model is finalised.
53. The Law Council looks forward to working with ARNECC in finalising the legislative framework for electronic conveyancing.

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## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12-month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2014 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.