



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: JD:gl:Property:606390
Direct line: 9926 0375

14 May 2012

Ms Margery Nicoll
Law Council of Australia
DX 5719 CANBERRA

Email: rosemary.budavari@lawcouncil.asn.au

Margery
Dear Ms Nicoll

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

I am writing to you at the request of the Law Society's Property Law Committee ("Committee"). The Committee is pleased to provide comments on the draft Electronic Conveyancing National Law, draft Model Operating Requirements and draft Model Participation Rules in response to a Memorandum dated 4 April 2012 from the National E-Conveyancing Working Group of the Law Council, seeking views from constituent bodies to inform Law Council's response to the Australian Registrars' National Electronic Conveyancing Council ("ARNECC"), which issued this draft documentation.

The Committee's response has focused largely on the Model Participation Rules on the basis that this part of the draft documentation will have the greatest impact upon solicitors.

MODEL PARTICIPATION RULES (MPRs)

Rule 4.1 - Industry qualifications:

The Committee notes that pursuant to Rule 4.1, a Subscriber "must 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 be a Representative."

The Committee's primary position has always been that, in the National Electronic Conveyancing System ("NECS"), every subscriber and certifier (now called a Signer, who is a user authorised to digitally sign documents and to certify) must be a regulated professional (lawyer or conveyancer). In the Committee's view, the MPRs avoid this issue by applying the law in the jurisdiction in which the land is situated. This is going to give the result that this Committee has pressed for in New South Wales, but still raises the spectre of a system that is, in the Committee's view, less secure in other jurisdictions.



The Committee's view for some time now has been that the system should be homogenous and structured so as to give the greatest level of confidence possible to those transacting in it. Other jurisdictions, in particular New Zealand, have recognised this.

In the Committee's view, the jurisdiction-specific eligibility criteria adopted by Rule 4.1 has the potential to create cross-border issues. For example a licensed conveyancer, being a person qualified to act in New South Wales on a Conveyancing Transaction, may wish to act on a transaction where the subject property is situated in Queensland where they are not so qualified so would be unable to act under Rule 4.1 as currently drafted. Border-neutral legal qualifications still lie ahead, and lawyers in NSW also (for example) may want to act on transactions involving land in South Australia for a New South Wales client. In the Committee's view, consideration will need to be given to the resolution of the possible conflict between the entitlement of an entity to undertake Conveyancing Transactions in one State or Territory but not in another.

Rule 4.4 - Character

With respect, in the Committee's view, Rule 4.4(a) as drawn does not seem to make sense. Presumably the criteria set out in subclause (b) should also apply to the Subscriber.

Rule 4.5 - Insurance Rules

In the Committee's view, the aim of the Insurance Rules to not require any additional insurance for regulated conveyancing professionals, such as solicitors in New South Wales, is commendable and essential to the successful operation of NECS.

However, a preliminary review of Schedule 5 (Insurance Rules) by Fidelity Fund officers of the Law Society has raised several issues regarding the manner in which Rule 4 of Schedule 5 seeks to carve out solicitors and conveyancers from complying with the requirements to obtain professional indemnity insurance and fidelity insurance under Rules 1 and 2 of Schedule 5. It is suggested that a simpler and more effective approach to the issue covered by Rule 4 could be to exempt a Subscriber from complying with Rules 1 and 2 where the Subscriber has professional indemnity cover and fidelity insurance cover which satisfies the regulatory requirements of the jurisdiction which has issued the Subscriber's practicing certificate or licence.

By way of general comment, in drafting these Rules, the focus should be on fidelity fund coverage rather than any contribution to the fidelity fund as the entity making the contribution to the fidelity fund may not be the same as the Subscriber entity. Additionally there is a concern that the policies described in Rules 1 and 2, particularly the requirements under subrules (b) and (c) may not be capable of being satisfied.

Rule 6.6 - Supporting Evidence and Document Retention

Rule 6.6 (b) requires the Subscriber to retain "any other documentation created or obtained by a Subscriber in connection with a Conveyancing Transaction, for at least seven years from the date the documentation is created or obtained." This obligation



is in addition to the obligation to retain the client authorisation, revenue documents and identity verification documents. This could be onerous, and sometimes impossible. There should, in the Committee's view, be at least two exceptions. Firstly, where the Subscriber has been obliged, at some time in the prescribed period, by law, to make the documents available to some third party (such as under subpoena or summons), this should displace the obligation of retention in the MPR. Secondly, where the Client has required the delivery up of the client's documentation, (such as upon termination of instructions), the Subscriber should be released from the obligation to retain documentation. Perhaps the MPR should also mandate a Subscriber to enter into a binding agreement with the client (possibly as part of the Client Authorisation) that the client cannot require the delivery up of the originals of the documents in Rule 6.6 (a) (i) – (iii).

In the Committee's view, the best way to deal with the issue of mandatory document retention is to establish an electronic repository into which the documents prescribed for retention could be uploaded. The Committee notes that during previous consultations, there was a suggestion that such a repository would be established. It is a cost-efficient, reliable way to ensure that documents now prescribed to be retained (and others prescribed in the future) are available as proof of compliance with the MPRs into the indefinite future.

Rule 6.12 - No assignment of subscription

The Committee suggests that ARNECC could consider inserting a prohibition on the lending and hiring-out of the subscription, analogously to section 13 of the *Property, Stock and Business Agents Act 2002* (NSW).

Rule 7.3 - Verify identity and integrity of Signers

The Committee notes with concern the absence, in either the ECNL or the MPRs, of an exclusion from all liability of a Subscriber for the incorrect identification of a Client where the Subscriber or the Subscriber's Agent has, in identifying the Client, complied with ECNL and the MPR. The Committee strongly opposes any attribution of liability on the part of a Subscriber where the ECNL and the MPR can be shown to have been complied with and sees no basis upon which the Subscriber's liability should be extended to cover the risk of a skilful identity fraud in electronic conveyancing when no such liability exists within the current paper system.

Consistent with the Committee's view that Signers must be regulated professionals, the Committee suggests the insertion of new sub-rule 7.3(b):

"verify the Signer's eligibility to be a Signer".

(and existing 7.3(b) becomes 7.3(c)).

Section 7.5 - Users

The Committee has no difficulty (having regard to what it has said in the past) with the idea that a User can be anyone nominated by the Subscriber, however the Committee has obvious difficulty with the idea that a Signer is anyone other than a regulated individual.



The Committee's position has consistently been that both representative subscribers and certifiers (now called Signers) in NECS should be regulated professionals.

The New Zealand model mandates verification in electronic conveyancing only by regulated professionals and provides evidence that risk is minimised by the use of regulated professionals. In commenting on the scheme in practice, Robbie Muir NZ Registrar General of Land has said:

"To ensure adequate controls are in place around the use of the system, the ability to certify electronic instruments is restricted to qualified conveyancers, principally lawyers. This reflects the role that lawyers have always played as trusted professionals in the conveyancing process".

Mr Muir also said:

"It is interesting to note that in the paper-based system lawyers were required to certify transactions correct for the purposes of the Land Transfer Act 1952. While this was often seen as a mere formality, case law on these matters indicates that a person making such a certification is in fact providing assurance that the transaction is genuine and legally compliant. The certification regime now in place for e-dealings can therefore be seen as a logical application of the obligations that have always been placed on conveyancers in New Zealand (E-Conveyancing in New Zealand: Progress to Date and Future Developments August 2007)".

This reflects the present legal position in New South Wales and should be maintained in any NECS system.

Schedule 8 – Verification of Identity Rules (Vol Rules) and use of Agents

In the Committee's view, it is quite likely that a formal arrangement will be introduced by which one or more third party agencies (for example, Australia Post) may be allowed to conduct Vol checks even though not a Subscriber. It would be useful to have a paragraph to this effect in Clause 9 of the Vol Rules (Schedule 8), to enable such a process to be introduced with minimum change to the MPR:

"The ELNO may prescribe certain persons as Non Subscriber Agents and the Rules under which such a Non Subscriber Agent may verify the identity of a Client. A Non Subscriber Agent must perform the Client Verification of Identity in accordance with these Verification of Identity Rules and provide certification of identity to a Subscriber who is a Representative in accordance with them."

MODEL OPERATING REQUIREMENTS (MORs)

Rule 19 - Data and Information Obligations

The Committee notes that the effect of Rule 19.3 is to effectively prohibit an Electronic Lodgment Network Operator ("ELNO") from utilising any of the value added services that it might be able to provide. Whether this is motivated by fraud prevention and compliance concerns is unclear. The Committee queries the motivation for this prohibition and whether its inclusion is in the public interest. The Committee notes that the system does contemplate the existence of several ELNOs yet this prohibition has the potential to discourage competition and the growth of several ELNOs.



ELECTRONIC CONVEYANCING NATIONAL LAW (ECNL)

The ECNL matters in which the Committee is interested relate to the Model Operating Rules and the Model Participation Rules.

Given the importance of the issue of eligibility, particularly in respect of Signers, the Committee suggests this matter could be dealt with and enshrined in the legislation.

Further consideration

The Committee is pleased to comment on the draft documentation and would welcome the opportunity for further consultation as this aspect of the development of NECS continues. The Committee also notes there will be a further opportunity for comment on the ECNL once the Regulatory Impact Statement for this draft legislation is released, which is anticipated to occur in May 2012.

Any queries in relation to this matter can be directed in the first instance to Gabrielle Lea, Policy Lawyer for the Property Law Committee on (02) 9926 0375 or by email to gabrielle.lea@lawsociety.com.au.

Yours sincerely


Justin Dowd
President