



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Prop:RHgl1982121

28 October 2020

Mr Michael Tidball
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: john.farrell@lawcouncil.asn.au

Dear Michael,

Model Participation Rules and Model Operating Requirements – version 6.1

The Law Society of NSW appreciates the opportunity to provide comments for a Law Council submission to the Australian Registrars' National Electronic Conveyancing Council ("ARNECC") in relation to the consultation drafts, version 6.1 of the Model Participation Rules ("MPR") and the Model Operating Requirements ("MOR"). The Law Society's Property Law Committee has contributed to this submission.

The Law Society understands that ARNECC accidentally overlooked the Law Council's prior submission dated 2 March 2020 on the earlier draft version 6 of the MPR and MOR ("prior submission"). We understand that ARNECC has apologised and will consider the prior submission, together with additional feedback from the Law Council on version 6.1 of the MPR and MOR. We understand that the Law Council will likely request a meeting with ARNECC, which we strongly support. Other stakeholders have had the benefit of receiving ARNECC's responses in the helpful feedback tables published by ARNECC. A meeting would be an opportunity for us similarly to receive feedback from ARNECC. Such a meeting should take place once ARNECC has considered the Law Council's prior submission and additional feedback and should be scheduled well prior to the finalisation of the next version of MPR and MOR.

In relation to version 6.1 of the MPR, we welcome ARNECC's position that the proposed amendment to the verification of identity ("VOI") regime requiring Subscribers to first apply the VOI standard prior to utilising reasonable steps will not form part of MPR Version 6.¹ However, we are concerned that ARNECC may still consider such changes in the future. The COVID-19 pandemic acutely illustrates the need for flexibility in legal and business practices. In our view, the VOI standard of the MPR should never be amended to require that Subscribers first seek to apply a VOI standard requiring a face-to-face interaction prior to utilising reasonable steps, and to that end we reiterate the comments made about that proposal in the prior submission.

We note that several issues raised in the prior submission have been raised by other stakeholders and addressed in version 6.1. On that basis, ARNECC need not consider the

¹ Notice to Stakeholders (20 May 2020) MOR and MPR version 6
https://www.arnecc.gov.au/_data/assets/pdf_file/0009/1482165/arnecc-notice-stakeholders-may-2020.pdf.

following matters raised in the prior submission, using the paragraph numbering of that submission:

- paragraph 26, in relation to MPR 4.3.1(c);
- paragraphs 38 and 39, in relation to MPR 7.5; and
- paragraph 42, in relation to MPR Schedule 3 – Certification Rules.

We now set out our comments on version 6.1 of the MPR and MOR.

Model Participation Rules (“MPR”)

1. MPR 2.1 Definitions

Subscriber’s Systems: We note that concerns were raised by another stakeholder (and in the prior submission) about the breadth of this definition. We suggest that words such as “used to access or linked to the ELN” be added at the end of the definition. As currently drafted, the definition could include information technology systems that are irrelevant for the operation of eConveyancing, such as a firm’s payroll system.

Publish: We suggest the following alternative definition of publish:

Publish means, for any information, to make publicly available on a website and, in addition, in any other manner the Registrar considers appropriate.

2. MPR 7.2 Users

We note the revised approach in new MPR 7.2.3(b), which limits the obligation to obtain a police check to prior to the initial allocation of a Digital Certificate to a Signer or prior to the appointment of a Subscriber Administrator. We submit that where the Signer or Subscriber Administrator is an Australian legal practitioner, this obligation should not apply. The deeming provision set out in MPR 7.2.4, applicable to MPR 7.2.3(a), should similarly apply in relation to MPR 7.2.3(b).

Several stakeholders raised issues about what kind of police check should be required (State or Federal) and the period of the check. We note that the feedback table provides that further guidance may issue. However, we suggest that this should be addressed in the MPR itself, possibly by inserting a definition of a police check. If a new requirement is being introduced, there should be no ambiguity about exactly what Subscribers must do to comply.

Model Operating Requirements (“MOR”)

3. General comment

We note that ARNECC will review the comments made on version 6 in the prior submission. We highlight the issue raised in the prior submission regarding draft MOR 14.1.2(b), which in our view may be read as meaning that every partner in a law firm (the “Potential Subscriber”) will need to have their identity verified at the initial registration to use the ELNO, rather than just the partner who will be signing the Participation Agreement to register the firm as a Subscriber. Please see paragraphs 56-59 of the prior submission.

We also suggest that MOR 3(a) should be reviewed with the introduction of a distinction between an ELNO and a Potential ELNO in version 6. As drafted, MOR 3(a) applies to an ELNO or a Potential ELNO but applies only “at the time the ELNO or Potential ELNO applies for Approval”. We submit that at the time of application, the applicant can only be a Potential ELNO. The requirement would apply to both an ELNO and Potential ELNO if it were extended to apply to an application for renewal of an Approval.

Additional matters

4. e-settlement Subscribers

We note that at item 60 in the MPR feedback table, a stakeholder has raised concerns with the compliance of e-settlement Subscribers with the regulatory framework, particularly in relation to the conduct of the VOI and completion of the client authorisation. We welcome the publication of *Guidance Query #7 – Guidance to e-settlement subscribers and their instructing practitioners*. However, we suggest that consideration should be given to incorporating the clarifications provided in the Guidance Query into the MPR.

We suggest that, in keeping with the statutory relationship created by sections 10 and 11 of the *Electronic Conveyancing National Law* between the client and the Subscriber, the MPR make it clear that in preparing, signing and lodging electronic documents and authorising settlement of a transaction, an e-settlement Subscriber is acting for the client and not the conveyancing practitioner that engaged them.

5. Client authorisations, caveats and priority notices

We suggest that consideration be given to removing the current exemption from obtaining a client authorisation for a caveat or priority notice. We understand that originally the exemption was provided on the basis that a practitioner may need to lodge a caveat urgently and, as such, it was appropriate to carve out caveats from the obligation to obtain a client authorisation. Given that there is now no doubt that a client authorisation can be prepared and signed electronically, the carve out may no longer be appropriate.

As a priority notice contemplates another dealing to “complete” or “perfect” the conveyancing transaction, for which a client authorisation will be required, we query whether the exemption for priority notices (and withdrawals or extensions) should be retained. In any event, priority notices will not tend to be used in urgent circumstances, as distinct from caveats.

There is also an inconsistency between the optional requirement of a client authorisation for a caveat or priority notice, and certification 2 of MPR Schedule 3 that a Subscriber holds a properly completed client authorisation. Currently, this inconsistency is remedied by Guidance Note #3: Certifications, which specifies that a client authorisation is not required for a caveat, priority notice, or an extension or withdrawal of a priority notice. We submit that removing the current exemptions for caveats and priority notices would provide simplicity and consistency in the regulatory framework. Certification 2 in MPR Schedule 3 would then, on its face, more accurately reflect the true position, without further recourse to a separate Guidance Note.

The important responsibilities of a Subscriber when instructed by a client to lodge a caveat electronically were discussed in the NSW case of *Guirgis v JEA Developments Pty Limited* [2019] NSWSC 164. Bearing in mind the significant responsibility that the Court found rests upon the Signer, obtaining a client authorisation would appear to be a pertinent step in the process the Signer engages in when forming their opinion as to the existence of a caveatable interest.

If you have any further questions in relation to this submission, please contact Gabrielle Lea, Policy Lawyer on (02) 9926 0375 or email: gabrielle.lea@lawsociety.com.au.

Yours sincerely,



Richard Harvey
President