

**2020**

**AUSTRALIAN CAPITAL TERRITORY**

**ELECTRONIC CONVEYANCING NATIONAL LAW (ACT) PARTICIPATION  
RULES 2020**

**DI2020–109**

**MADE UNDER THE**

***ELECTRONIC CONVEYANCING NATIONAL LAW (ACT) ACT 2020***

**EXPLANATORY STATEMENT**

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Registrar-General**

## Background

In July 2008 the Council of Australian Governments agreed pursuant to the *Seamless National Economy National Partnership Agreement* that there should be a new electronic conveyancing system for the settling of real property transactions in all Australian States and Territories.

The *Intergovernmental Agreement for an Electronic Conveyancing National Law* (IGA) came into operation on 21 November 2011. The Electronic Conveyancing National Law makes possible the implementation of a national electronic conveyancing system in Australia and has the object of promoting efficiency throughout Australia in property conveyancing.

Electronic conveyancing in other Australian jurisdictions has proven to be an efficient, accurate and secure way of conducting the settlement and lodgement stages of a conveyancing transaction. It replaces many of the paper and manual processes traditionally involved in property transactions.

Electronic conveyancing allows lawyers and financial institutions to interact and transact together online. Within the digital environment, information can automatically feed in from the original source and populate all documentation while the system cross-checks that information. Documents are created, signed and lodged within the online environment, and parties also complete all necessary steps to settle the transaction within that online environment.

In particular, the national electronic conveyancing system enables legal practitioners and financial institutions to:

- use electronic online processes to prepare electronic instruments that create, transfer and remove estates and interests in land,
- settle financial transactions such as payment of disbursements including lodging fees and duties, and
- electronically lodge instruments with relevant State or Territory Land Registries.

The Electronic Conveyancing National Law:

- authorises the Registrar of Titles in each jurisdiction (the Registrar) to
  - receive electronic registry instruments and other electronic documents by electronic lodgement; and
  - register electronic registry instruments, with the same effect as receiving and registering paper instruments under the jurisdiction's Torrens legislation;
- empowers the Registrar to operate or to authorise one or more persons to operate an Electronic Lodgement Network (ELN) for their jurisdiction;
- empowers the Registrar to set conditions for access to and use of an ELN;
- empowers the Registrar, or his or her delegate, to conduct an examination of compliance with any conditions for access to and use of an ELN;
- provides that by entering into an approved form of Client Authorisation, a transacting party may authorise a Subscriber to:
  - digitally sign electronic registry instruments and other electronic documents on that transacting party's behalf;

- lodge electronic registry instruments and other electronic documents with the relevant Land Registry;
- authorise any financial settlement involved in the transaction; and
- do anything else necessary to complete the transaction electronically.

The Electronic Conveyancing National Law is set out in the Appendix to the *Electronic Conveyancing (Adoption of National Law) Act 2012* (New South Wales).

In the ACT the Electronic Conveyancing National Law is adopted by operation of the *Electronic Conveyancing (National Law) Act 2020*.

## **Outline**

The purpose of this disallowable instrument is to provide Participation Rules for subscribers to the Electronic Lodgement Network in the Australian Capital Territory. The rules have been determined pursuant to section 23 of the Electronic Conveyancing National Law (ACT).

The Participation Rules made by this instrument have adopted the Model Participation Rules Version 5 developed and approved by the Australian Registrars' National Electronic Conveyancing Council (ARNECC) in full. The Model Participation Rules have been determined by ARNECC for promulgation by each Registrar before coming into effect in that jurisdiction as Participation Rules.

The Participation Rules covers topics such as the eligibility criteria for subscribers, representations or warranties to be given by subscribers, suspension or termination of a subscriber's access, client authorisations, obligations of subscribers to verify the identity of their client, certification of registry instruments, digital signatures and the retention of documents.

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.

## **Detail**

This Explanatory Statement deals with the provisions of the Participation Rules in groups rather than clause-by-clause. The Participation Rules are largely self-explanatory and will be well understood by subscribers, particularly those who are already involved in electronic conveyancing in other jurisdictions.

### *Clauses 1 to 2.2*

These clauses provide definitions and guidance on interpretation.

### *Clause 3 – Compliance with Participation Rules*

This is a compliance clause requiring a number of conditions to be met by a Subscriber to an Electronic Lodgement Network (ELN). ‘Subscriber’ is defined in the Electronic Lodgement National Law as a corporation or other body corporate, partnership, government agency or natural person registered to use an ELN to complete conveyancing transactions electronically, as or on behalf of a transacting party.

The compliance conditions go to the Subscribers ability to meet the Participation Rules at the time of application, as well as over the period that they remain a Subscriber. The Subscriber must also be able to comply with certain rules after ceasing to be a Subscriber.

Compliance with individual rules by the Subscriber may be waived at the discretion of the Registrar-General.

### *Clauses 4 to 7*

These are clauses that go to:

- eligibility to be a subscriber
- the role of a subscriber, and
- general obligations of subscribers.

These clauses are identical to those found in each other jurisdiction that has implemented electronic conveyancing.

Under subclause 4.1 subscriber is required to hold an ABN. An ABN is an Australian Business Number issued by the Australian Government’s Australian Business Register. It consists of a unique 11 digit number that identifies a business or organisation to the government and community.

Under subclause 4.2 a subscriber must be a person or partnership. If the person is a corporation then it must be a creation of relevant law, with the constituting documents allowing for compliance with these Participation Rules.

Subclause 4.3 provides a character and reputation test for persons or partnerships seeking to become a subscriber. The purpose of this is to ensure that reliance may be placed on the activities or documents provided by a subscriber. Being able to rely on actions and documents provided by subscribers promotes efficiency throughout Australia in property conveyancing by providing a sound framework for documents in electronic form to be lodged and dealt with under the land titles legislation of each jurisdiction.

Subclause 4.4 requires a subscriber to comply with the Insurance Rules.

Clause 5 sets out the role of subscribers when using an Electronic Lodgement Network. Subscribers may act on their own behalf, or on behalf of a client or donor. A donor is a person giving another a power under a Power of Attorney.

Subclause 5.2 provides that subscribers incur rights and obligations as a principal, despite any terms that may be found in a client authorisation, Power of Attorney or similar arrangement.

Subclause 5.3 has been omitted from the ARNECC model rules, and so is marked as deleted here.

Subclause 5.4 ensures that a responsible subscriber may always be found, even where the subscriber is a partnership or corporate entity.

Subclause 5.5 ensures that trustees and partnerships are bound by these rules, including where membership of a partnership changes.

Subclause 5.6 deals with subscribers as attorney under a Power of Attorney. It provides that:

- the subscriber must not be a representative (the definition of representative may be found in subclause 2.1 of these Rules)
- the donor must have appointed the attorney under a Power of Attorney
- the Power of Attorney must comply with the law in the jurisdiction it is made
- the Power of Attorney must be registered with the Registrar in the jurisdiction where the land that is subject to a conveyancing action is found, and be legally valid in that jurisdiction, and
- the Power of Attorney must authorise the attorney to act and sign on documents on the donor's behalf in conveyancing transactions.

Clause 6 lists general obligations on subscribers, including:

- subclause 6.1 – subscribers must ensure users are aware of these Rules, and
- subclause 6.2 – subscribers must keep system details complete and up to date.

Subclause 6.3 specifies obligations going to the use of client authorisations, including acting within the terms of an authorisation and verifying of the authority of the person giving an authorisation. A client authorisation is in standard form by which a party to a conveyancing transaction authorises a subscriber to act on their behalf to do things such as digitally sign electronic documents and lodge electronic documents via an Electronic Lodgement Network.

The subclause reflects 'best practice', contains rules that are similar to those already followed within the industry, and are not considered onerous.

Subclause 6.4 provides rules for a subscriber to validate that their client is a real person and has a right to deal with a property. The obligations reflect ‘best practice’, are similar to those already followed within the industry, and are not considered onerous.

Subclause 6.5 specifies the obligations of subscribers to verify the identity of their clients. This subclause sets out rules that require a subscriber to take reasonable steps to verify the identity of a client or other entity involved in a conveyancing transaction. The requirements reflect ‘best practice’, are similar to those already followed within the industry, and are not considered onerous.

Subclause 6.6 requires a subscriber to retain evidence supporting a conveyancing transaction. The rule includes the types of documents that subscribers need to retain for a period of seven years. The requirements reflect ‘best practice’, are similar to those already followed within the industry, and are not considered onerous.

Subclauses 6.7 to 6.12 require a subscriber to comply with ‘best practice’ procedures in its dealings with clients, Registrar-Generals and information, including the protection of information. The requirements reflect ‘best practice’, are similar to those already followed within the industry, and are not considered onerous.

Subclause 6.13 provides requirements for mortgagees, and are to be followed where a mortgagor is not a subscriber or represented by a subscriber. These requirements reflect ‘best practice’, are similar to those already followed within the industry, and are not considered onerous.

Subclause 6.14 has been omitted from the ARNECC model rules, and so is marked as deleted here.

Subclause 6.15 provides requirements around the conduct of transactions by subscribers, including the requirement to comply with the laws of the Jurisdiction in which the land the subject of the Conveyancing Transaction. This requirement ensures that ACT-specific Prescribed Requirements are not compromised.

#### *Clause 7 Obligations regarding system security and integrity*

The provisions of this clause provide rules for subscribers about managing system security and integrity. The purpose of this is to ensure that systems provided by Electronic Lodgement Network Operators are properly accessed by subscribers and users.

The Electronic Conveyancing National Law allows for the lawful collection of personal information through the establishment of an Electronic Lodgment Network – an electronic system that enables the lodging of registry instruments and other documents in electronic form for the purpose of the land titles legislation.

Personal information, such as name and address, is included as part of these instruments, just as it is under the current paper-based system. Collection of this data under E-Conveyancing is necessary to ensure accurate and legal transfer of title or registration of other dealings relating to land.

Electronic Lodgement Network Operators and subscribers must maintain confidentiality of all information provided which the provider of the information would reasonably expect confidentiality to be maintained. They must comply with all applicable privacy laws and laws relating to document and information collection, storage and retention.

Similarly, subscribers must take reasonable steps to ensure that information provided to the Subscriber by any other Subscriber, any Client, the Registrar-General or the Electronic Lodgement Network Operator is protected from unauthorised use, reproduction or disclosure.

The content of the clause is identical to those found in each other jurisdiction that has implemented electronic conveyancing. The obligations reflect ‘best practice, will be well known to prospective subscribers and users from other jurisdictions and will already have been built into systems designs. They are not considered onerous.

#### *Clauses 8 to 12*

These clauses are identical to those found in each other jurisdiction that has implemented electronic conveyancing. The compliance criteria relating to subscribers will be well known to prospective subscribers from other jurisdictions.

Subclause 8 requires a subscriber to comply with any changes made to these Rules by the Registrar-General.

Subclause 9.1 requires subscribers to comply with directions from the Registrar-General (or from an Electronic Lodgement Network Operator at the direction of the Registrar-General) restricting access to or use of an Electronic Lodgement Network.

Subclause 9.2 allows suspension of a subscriber from the Electronic Lodgement Network at any time if a suspension event occurs. A suspension event is defined in clause 2 and means any ground pursuant to which a Subscriber may be suspended as set out in Schedule 7 (as amended from time to time).

Subclause 9.3 allows termination of a subscriber from the Electronic Lodgement Network at any time if a termination event occurs. A termination event is defined in clause 2 and means any ground pursuant to which a Subscriber may be terminated as set out in Schedule 7 (as amended from time to time).

Subclause 9.4 preserves any rights and liabilities of parties in the event of subscriber suspension, termination or resignation.

Subclause 9.5 provides obligations for the finalisation of conveyancing transactions in the event of subscriber restriction, suspension, termination or resignation. These are already ‘best practice’ obligations in the industry and are not considered onerous.

Clause 10 includes provisions:

- requiring subscribers to comply with section 34 of the Electronic Conveyancing National Law and any compliance examination procedure. A compliance examination procedure may be undertaken by the Registrar-General for the purpose of determining whether or not these Participation Rules are being complied with, or to investigate suspected or alleged misconduct with respect to the subscriber's use of an Electronic Lodgement Network
- requiring an Electronic Lodgement Network Operator or a subscriber to cooperate with any compliance investigation
- allowing the Registrar-General to refer a matter to an appropriate authority instead of conducting a compliance examination, or during or after a compliance examination
- providing that the Registrar-General is not obliged to monitor activities in an ELN or conduct any compliance examination, and is not liable for any compensation for any loss or damage arising out of anything done or omitted in good faith in connection with the monitoring of activities in an ELN or the conduct of a compliance examination.
- Requiring subscribers to give notice of, and remedy, any breach of or non-compliance with these Rules, and
- Requiring subscribers to take action to avoid a breach of these Rules.

Clause 11 prohibits subscribers from:

- Tampering with, or allowing modification or alteration of, registry information or title check data
- Using registry information or title check data for purposes other than a conveyancing transaction or where use is required by law
- Using the Electronic Lodgement Network other than in accordance with these Rules
- Using, producing or disclosing information from the Electronic Lodgement Network other than information the subscriber has entered, or information where action is required by law.

Clause 12 requires subscribers to comply with the Additional Participation Rules, if any.

### *Schedules 1 to 7*

These Schedules and the forms contained in Schedule 4 are identical to those found in each other jurisdiction that has implemented electronic conveyancing.

Schedule 1 provides a list of certain rules that do not apply in South Australia.

Schedule 2 provides procedures for amending these Participation Rules. The procedures provide separately for amendment with prior consultation with a representative group of subscribers, and for amendment without consultation.

Schedule 3 provides rules for certification by subscribers going to:

- Identity of the client, and his her or its administrator or attorney (if any) by both the subscriber and where appropriate a mortgagor
- Holding of a properly completed Client Authorisation (see Schedule 4 for the Client Authorisation form)
- Retention of supporting evidence for registry instruments or documents
- Receipt and destruction of original and duplicate certificates of title (although this is not something that would normally happen in the ACT), and
- Ensuring that the signing of registry instruments or documents is done within the power of the signatory.

These requirements serve a legitimate objective, that is, the protection of individual land ownership from fraudulent behaviour.

Where people are unable to establish their identity through official documents, it is possible for a subscriber to verify the identity of a person in some other way that constitutes the taking of reasonable steps. For example, it may be possible to obtain other documents which support identity or to make inquiries with the client or a third party such as a doctor, nurse or government officer.

Schedule 4 provides Client Authorisation forms for both the client and an attorney for the client to authorise a subscriber to act on their behalf to a conveyancing transaction. Each form includes an explanation of the terms of the client authorisation.

Schedule 5 provides a Compliance Examination Procedure.

Under section 34 of the Electronic Conveyancing National Law a compliance examination procedure may be undertaken by the Registrar-General for the purpose of determining whether or not the operating requirements and these Participation Rules are being complied with, or investigating any misconduct relating to an Electronic Lodgement Network.

Subitem 1.1 in this Schedule provides that:

- the Registrar-General must provide notice to a subscriber stating the time in which information or a document must be produced and how that information or document must be furnished, and
- the subscriber must comply with the requirements set out in the notice within the time specified.

Subitem 1.5 has been omitted from the ARNECC model rules, and so is marked as deleted here.

Item 2 provides power for the Registrar-General or delegate to inspect, copy make extracts from a document produced under the notice referred to above. If requested by a subscriber, the Registrar-General must issue a receipt for the document.

Item 3 provides for the return of documents where the Registrar-General or delegate is satisfied that retention is no longer necessary. The document does not need to be returned if has been passed on to a police authority or anyone else entitled to the document.

Item 4 provides that a document supplied pursuant to the notice referred to above may be inspected, copied or have extracts made from it by any person entitled to the document. This does not require the Registrar-General or delegate to give access if it is impractical to do so, or if it is reasonable not to do so.

Item 5 provides for subscribers to pay, if required by the Registrar-General, reasonable fees and costs directly attributable to a compliance examination. This applies only if the subscriber has been found to be in material breach of the Participation Rules

Schedule 6 provides rules around subscriber and agent's insurance. These go to:

- maintaining professional indemnity insurance, and
- maintaining fidelity insurance

Item 3 provides that certain subscribers and agents may self-insure. These include government agencies and statutory bodies.

Item 4 provides for certain classes of subscriber and agent to be deemed to be insured for the purposes of the Participation Rules. These include lawyers, law practices and professional conveyancers with professional indemnity insurance that has nominated characteristics.

Similarly, a mortgage broker may be deemed to be insured if they hold professional indemnity and fidelity insurance with nominated characteristics.

Item 5 provides that subscribers must comply with any requirements set out by their insurer.

Item 6 provides that subscribers must provide proof of insurance if requested by an Electronic Lodgement Network Operator.

Schedule 7 sets out what suspension and termination events are, as well as providing procedures for suspension and termination.

Item 1 sets out what the various suspension events are.

Item 2 sets out what the various termination events are.

Item 3 sets out the suspension and termination procedure.

The procedure requires the Registrar-General to send a ‘show cause’ notice to a subscriber suspected of non-compliance with the Participation Rules, giving reasons for issuing the request and inviting the subscriber to show cause why they should not be suspended or terminated within 15 business days.

After receipt of the show cause response, or in any event after 15 business days have elapsed, the Registrar-General may determine whether to suspend or terminate (or direct an Electronic Lodgement Network Operator to suspend or terminate) the subscriber.

Subitem 3.2 provides that the Registrar-General may move to immediately suspend or terminate the subscriber, without notice, if urgent action is necessary to protect the operation, security, integrity or stability of an Electronic Lodgement Network.

Subitem 3.2 also provides a procedure for the Registrar-General to issue a ‘show cause’ notice to the suspended or terminated subscriber, and if satisfied with the response (or in any event after 15 business days) may decide whether to reinstate the subscriber.

Subitem 3.3 provides that the Registrar-General must notify the subscriber promptly of any final determination made under the previous subitems. The notification must include reasons for the determination, as well as the time and date a suspension or termination took place.

Subitem 3.4 provides that a Registrar-General may reinstate a subscriber, or have an Electronic Lodgement Network Operator reinstate a subscriber, at any time if the Registrar-General is satisfied the subscriber does not represent a threat to the operation, security, integrity or stability of an Electronic Lodgement Network.

Subitem 3.5 provides that any determination made by the Registrar-General in relation to suspension or termination, does not affect any other determination that may have been made, or may yet be made, by the Registrar-General.

#### *Schedule 8 – Verification of Identity Standard*

Establishing confidence in a person’s identity is a critical starting point for delivering a range of government services and benefits, as it is for many transactions conducted by the private sector and other non-government organisations.

The Verification of Identity Standards in these Rules are those found in the Model Operating Requirements and Model Participation Rules produced by the Australian Registrars National E-Conveyancing Council. They reflect the Commonwealth’s *National Identity Proofing Guidelines* which are part of the *National Identity Security Strategy* administered by the Commonwealth Department of Home Affairs. They are intended to provide a high to very high level of assurance of identity (Level 3 to Level 4 from the guidelines).

The Verification of Identity Standards have already been adopted by most other Australian jurisdictions and processes for establishing identity (as set out in Access Canberra’s *Land Titles Practice Manual* and elsewhere) should be familiar to conveyancing practitioners, financial institutions, real estate agents and other interested parties in the ACT.

Clause 1 provides definitions of terms used in the Verification of Identity Standards.

Clause 2 is an integrity measure requiring that verification of identity must be done in a ‘face to face’ interview and that any photographic evidence of identity must be examined to ensure there is a reasonable likeness between the person and photograph.

Clause 3 provides categories of identity documentation and rules around retention of evidence. The categories of documentation and the minimum documentation requirements table reflect the *National Identity Proofing Guidelines* and widely used material from other areas of practice and in other jurisdictions.

Clause 4 provides rules around identity declarations and the role of identity verifiers. These also reflect the *National Identity Proofing Guidelines* and widely used material from other areas of practice and in other jurisdictions.

Clause 5 deals with confirming the legal existence of a body corporate and establishing the authority and identity of persons claim to be able to act on behalf of the body.

Clauses 6 and 7 deal with establishing the identity of a person or body corporate claiming authority to act under a Power of Attorney, including confirming that the attorney powers extend to conveyancing matters.

Clauses 8 and 9 have been omitted from the ARNECC model rules, and so are marked as deleted here.

Clause 10 requires identity verifiers to take further steps to verify identities where some doubts arise about either documents or photographic likenesses, or where it is otherwise reasonable to do so.

#### *Schedule 9 – Identity agent certification*

This schedule provides a form for use by persons undertaking verification of identity pursuant to these Rules. The form includes provision for recording identity documents produced and endorsed during the process.