

2020

AUSTRALIAN CAPITAL TERRITORY

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

DI2020–110

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.

National Electronic Conveyancing in Australia is being delivered through an online business platform called an Electronic Lodgement Network. An Electronic Lodgement Network will essentially be a web-based "hub" for parties to a conveyancing transaction to electronically prepare and settle the transaction and to electronically lodge the documents for registration at the appropriate Land Registry. It is a gateway or channel for documents to be presented for lodgement with the existing Land Registries.

In addition to providing a gateway for lodgement of documents with the Land Registries, the Electronic Lodgement Network provides a mechanism for the settlement of the financial aspects of a conveyancing transaction.

Because of security requirements, only registered "subscribers" (generally lawyers and lenders) will be entitled to use the system on behalf of their clients or on their own behalf. It is not intended that the electronic conveyancing system be available for use by members of the general public unless they are represented by a subscriber.

A subscriber representing a client will enter into a Client Authorisation agreement authorising the subscriber to act for the client in an electronic transaction. Before entering into the Client Authorisation agreement, the subscriber must verify the identity of the client in accordance with Verification of Identity Rules.

A subscriber will create electronic documents (eg registry instruments and instructions, settlement schedules) in an electronic workspace shared with other subscribers acting in relation to, or involved in, a conveyancing transaction. Various data and lodgement verification checks will occur before settlement. The electronic documents will be signed by the subscriber affixing a digital signature to the documents.

If the conveyancing transaction is complete and ready to settle on the nominated settlement date, financial settlement will occur automatically by electronic funds transfer. Once settlement has occurred the Land registry instruments will be electronically lodged with the appropriate Land Registry.

The current manual paper-based conveyancing system will remain as an alternative to electronic conveyancing, at least for the foreseeable future.

The Electronic Conveyancing National Law sets the framework for electronic conveyancing. Amongst other things it:

- 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 for their jurisdiction;
- empowers the Registrar to set conditions for access to and use of an Electronic Lodgement Network;
- empowers the Registrar, or his or her delegate, to conduct an examination of compliance with any conditions for access to and use of an Electronic Lodgement Network;
- 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 determine requirements relating to the operation of an Electronic Lodgement Network (known as operating requirements) and to require that an Electronic Lodgement Network Operator comply with the operating requirements.

The Operating Requirements are intended to provide:

- a trusted environment for Subscribers, Users and the community to have confidence in electronic conveyancing
- a suitable environment for producing lodgements that adhere to the Data Standard specified and which can be readily examined and registered electronically
- an accessible environment for industry participants
- a safe and secure environment for completion of transactions electronically
- a responsive environment capable of adapting to market changes and government policy developments, and
- an efficient environment that encourages widespread adoption of electronic conveyancing.

The operating requirements cover topics such as:

- the financial standing of an Electronic Lodgement Network Operator
- operational and technical standards
- insurance cover to be held by an Electronic Lodgement Network Operator
- suspension or revocation of an Electronic Lodgement Network Operator's approval, and
- directions to an Electronic Lodgement Network Operator to restrict, suspend or terminate a subscriber's use of an Electronic Lodgement Network.

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

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 Operating Requirements in groups rather than solely clause-by-clause. The Operating Requirements are largely self-explanatory and will be well understood by Electronic Lodgement Network Operators and 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 Operating Requirements

This is a compliance clause requiring a number of conditions to be met by an Electronic Lodgement Network Operator.

The compliance conditions go to the Operator's ability to meet the Operating Requirements before, during and after any time that they are an Electronic Lodgement Network Operator. The Operator must also be able to comply with any conditions attached to their approval as an Electronic Lodgement Network Operator.

Compliance with individual rules by the Electronic Network Lodgement Operator may be waived at the discretion of the Registrar-General.

Clauses 4.1 to 4.7

These are clauses that go to:

- eligibility to be an Electronic Lodgement Network Operator
- the role of an Electronic Lodgement Network Operator, and
- general obligations of Electronic Lodgement Network Operators.

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

Under subclause 4.1 an Electronic Lodgement Network Operator 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 an Electronic Lodgement Network Operator must be a corporation registered under the *Corporations Act 2001* (Cth). If the Operator is a foreign body corporate then it must both be registered under the Corporations Act and obtain. The constituting documents of the corporation must also allow for the corporation's compliance with these Operating Requirements.

Subclause 4.3 provides a character and reputation test for corporations seeking to become a Electronic Lodgement Network Operator. The purpose of this is to ensure that reliance may be placed on the activities or services provided by the Operator. Being able to rely on an Electronic Lodgement Network Operator 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 4.3.2 provides that an Electronic Lodgement Network Operator must maintain contemporary best practice governance arrangements that are regularly reviewed

Subclauses 4.4 to 4.6 require an Electronic Lodgement Network Operator to demonstrate sufficient:

- financial
- technical, and
- organisational

resources to meet its obligations under these Operating Requirements.

Subclause 4.7 requires an Electronic Lodgement Network Operator to obtain insurances satisfactory to the Registrar-General covering the following:

- professional indemnity
- fidelity
- public and product liability, and
- asset insurance.

Subclauses 4.7.3 to 4.7.5 go to the quality of the insurances, who provides them and what and who they must cover.

Subclause 4.7.6 requires that the Electronic Lodgement Network Operator must, as soon as practicable, inform the Registrar-General in writing of the occurrence of an event that may give rise to a claim under these insurances and must keep the Registrar-General fully informed of subsequent action and developments concerning the claim.

Clause 5 – Operation of ELN

Clause 5 sets out the role and obligations of Electronic Lodgement Network Operators. The establishment of a successful and stable electronic lodgement network to provide electronic conveyancing services across Australia has required, and will continue to require, significant investment and risk management. This is reflected in the obligations of Operators.

Subclause 5.1 requires that the Electronic Lodgement Network Operator encourage the use of the Electronic Lodgement Network and have a business plan reflecting this. Operators are also required to have their business plan cover proposed service delivery model and timings for commencement of operations.

Subclause 5.2 requires that the Electronic Lodgement Network Operator provide a system available to all Land Registries in Australia, as well as open to subscribers from all States and Territories. The subclause also lists the documents that should be available for lodgement through the Electronic Lodgement Network.

Subclause 5.3 provides general obligations that the Electronic Lodgement Network Operator must comply with. The obligations are directed at ensuring that the Operator provides a successful and stable Electronic Lodgement Network, and that high standards of professionalism, skill, training and care are maintained.

The general obligations also go to ensuring compliance with relevant laws, notifying the Registrar-General of events that pose a risk and cooperation with investigations.

Each of these obligations represent good business practice and are unlikely to be onerous on Electronic Lodgement Network Operators.

Subclause 5.4 provides for transparency in the way Electronic Lodgement Network Operators set and change their service fees. The objective is to instil confidence in industry, users and the community generally that service fees are determined equitably and transparently.

Transparency is achieved by requiring the Operator to publish its service fees in a Pricing Table. Subclause 5.4.6 adds to this by requiring publication of any changes in service fees at least 20 business days before they take effect.

Under subclause 5.4.3 the Operator may increase these service fees on an annual basis, but by no more than the percentage increase in the Consumer Price Index as published by the Australian Bureau of Statistics from time to time. Variations to this may be sought from the Registrar-General in accordance with subclause 5.4.4.

Subclause 5.5 is intended to ensure that integration into Electronic Lodgement Network systems is both possible and practical. Publication of integration terms and conditions by the Electronic Lodgement Network Operator will assist potential subscribers in accessing the network.

The integration terms and conditions should cover matters such as;

- technical requirements for integration
- systems testing
- system security
- interface mechanisms
- service levels
- integration timeframes, and
- change management processes.

Subclause 5.6 is intended to ensure that Electronic Lodgement Network Operators separate 'downstream' or 'upstream' services provided by a subscriber from its own operations, structurally or functionally. The objective is to prevent, or at least limit, opportunities for unfair commercial advantage.

Examples of downstream or upstream services include practice management software, legal services management software and real estate software.

Clauses 6 to 9

These clauses are about ensuring that Electronic Lodgement Networks are tested, secure and independently verified, and that risks are appropriately managed.

The objective is to ensure that Electronic Lodgement Network Operators provide an environment that operates correctly, satisfies the need for integrity and security of data, and ensures that subscribers, Land Titles offices and the public may have confidence in the system and in land titles. The intention is that there should be no greater risk of fraud or error in completing transactions compared to the paper-based manual system.

Under the provisions of these clauses Electronic Lodgement Network Operators are expected to, amongst other things:

- have test plans with detailed functionality specifications and comprehensive user documentation
- execute those test plans thoroughly and vigorously under tightly controlled conditions
- record, evaluate, report on and share test results
- obtain independent certification of test results
- maintain a comprehensive Information Management Security System, including user accreditation and compliance monitoring
- protect systems from viruses, trojans and other kinds of malware
- provide for data recovery in the event of data loss or corruption
- have incident management protocols and provide relevant training, and
- ensure generally that the system is ‘fit for purpose’ and that user accreditation and authentication is secure.

It is intended that Electronic Lodgement Networks should comply with Australian Standard AS ISO/IEC 27001-2015 which specifies the requirements for establishing, implementing, maintaining and continually improving an information security management system.

Electronic Lodgement Network Operators are also obliged to have complete risk management arrangements in place for the identification and mitigation of risks. Amongst other things these risk management arrangements must address:

- business continuity and sustainability
- service availability and performance
- system malfunction
- employee error, fraud or sabotage
- user error, fraud or sabotage, and
- external intrusion into the system.

Clauses 10 to 13 - System Requirements

These clauses deal with the minimum requirements for electronic systems operated by Electronic Lodgement Network Operators. The objective is to ensure that the Electronic Lodgement Network:

- offers at least a minimum level of service to subscribers, users and Land Titles offices

- provides an environment that operates correctly, satisfies the need for integrity and security of data, and ensures that subscribers, Land Titles offices and the public may have confidence in the system and in land titles, and
- ensures that subscribers and Land Titles offices can meet their legal obligations.

Subclause 10.2 has been omitted from the ARNECC model rules, and so is marked as deleted here.

Clause 14 - Subscribers

This clause deals with regulation of access to the Electronic Lodgement Network system. The purpose of the requirements in this clause are to ensure that:

- only eligible persons are registered and remain registered as subscribers
- only subscribers legally entitled to carry out conveyancing work represent clients in using the system
- treating subscribers fairly and transparently in access and use of the system
- a register is maintained of all subscribers and users of the system
- relevant training in use of the system is available
- user compliance with the terms and conditions of access to the system is monitored
- subscribers may have access and use of the system suspended or terminated, including at the direction of the Registrar-General
- documentation is available to the Registrar-General validating compliance with these requirements.

Clause 15 to 16 – Compliance and certification

These clauses are about monitoring compliance with these Operating Requirements. The purpose of these provisions is to ensure confidence in both the Electronic Lodgement Network and the Electronic Lodgement Network Operator. The objective is to ensure that any failure to demonstrate compliance is remedied without delay

Electronic Lodgement Network Operators are required to have processes in place to continually monitor compliance with these Operating Requirements. This can be demonstrated by:

- producing specified documents, including an Annual Report to the Registrar-General
- publishing Monthly Reports
- providing Self-Certifications, including No-Change Certifications
- obtaining and supplying Independent Certifications, including Independent Expert review reports and recommendations, and
- supplying any other information requested by the Registrar-General.

An independent certifier or an Independent Expert must be competent, qualified and insured (and approved by the Registrar-General) and must not be related to the Electronic Lodgement Network Operator in any way. The Operator must provide reasonable assistance to the certifier or expert in discharging their duties.

Clause 17 – Compliance Examination

This clause is about ensuring compliance with these Operating Requirements. The purpose of these provisions is to ensure confidence in both the Electronic Lodgement Network and the Electronic Lodgement Network Operator. To do so it is necessary for the Registrar-General to have the ability to check compliance with these Operating Requirements and participation

rules, either on a random compliance assurance basis or as part of an investigation into alleged or suspected misconduct.

Under the Electronic Conveyancing National Law compliance examinations may be made by attendance at the party's premises, after reasonable notice, or by requiring documents to be produced to the Registrar-General within a specified period, or as otherwise required by the Registrar-General.

These reviews may not necessarily be conducted in person by the Registrar-General and it may also be the case that such reviews may be included in, or conducted in tandem with, other professional compliance inspections by or on behalf of regulatory bodies such as conveyancing or legal practice regulators or revenue offices. Accordingly, the Registrar-General can delegate the compliance examination function to an appropriate officer or appoint an agent.

Under the Electronic Conveyancing National Law an Electronic Lodgement Network Operator or a subscriber must cooperate with any compliance investigation in that they must comply with any reasonable request by the person conducting the compliance examination:

- to furnish specified information or to produce specified documents; or
- to take specified action for the purposes of the compliance examination.

Instead of conducting a compliance examination in relation to a matter, or at any time during a compliance examination or after the completion of a compliance examination in relation to a matter, the Registrar-General may refer the matter to an appropriate authority.

An appropriate authority includes a law enforcement agency, and a regulatory or disciplinary body for persons engaged in any profession, occupation, calling or business.

The Registrar-General is not obliged to conduct any compliance examination or monitor activities in an Electronic Lodgement Network.

Clause 18 – Reports

This clause deals with the reporting obligations of Electronic Lodgement Network Operators.

The objective is to ensure confidence in the Operator, the Electronic Lodgement Network itself by requiring regular demonstrations of the Operator's:

- compliance (and non-compliance) with these and other legal requirements
- activities, and
- complaints handling.

Clause 19 – Data and Information Obligations

This clause deals with the data and information obligations of Electronic Lodgement Network Operators.

The objective of the provisions in this clause is to ensure confidence in the Operator's ability to:

- indefinitely store, maintain and retrieve information
- provide information to the Registrar-General as and when required
- pass information to subscribers, and
- respect intellectual property rights.

Clause 20 – Registrar-General’s Powers

This clause deals with the Registrar-General’s powers to suspend or revoke approval of an Electronic Lodgement Network Operator.

The Registrar-General may act on a number of grounds, including:

- material breach of these Operating Requirements
- provision of false, misleading, deceptive, incomplete or inaccurate information by an Operator
- insolvency
- failure to remove a director, secretary or officer following their conviction for a criminal offence
- cessation of operating the Electronic Lodgement Network, or
- failure to commence operating the Electronic Lodgement Network.

Clause 21 – Business and services transition

This clause deals with arrangements in the event of an Electronic Lodgement Network Operator ceasing to provide and operate an Electronic Lodgement Network or any of its service.

The objective of the provisions is to ensure that:

- the Operator can disengage from the business in an orderly manner with the least possible disruption to affected parties including the Registrar-General, and
- where appropriate, continued operation of the Electronic Lodgement Network by the Registrar-General or a third party identified by the Registrar-General is facilitated.

Subclause 21.3 has been omitted from the ARNECC model rules, and so is marked as deleted here.

Clauses 22 to 23

These clauses deal with ensuring that these Operating Requirements can be:

- kept up to date, and
- added to as required.

Schedules

Schedule 1 sets out the level of insurances required pursuant to Clause 4 of these Operating Requirements.

Schedule 2 sets out performance levels for the Electronic Lodgement Network.

Schedule 3 is a reference table of reporting requirements for Electronic Lodgement Network Operators.

Schedule 4 has no content.