

Australian Capital Territory

Electronic Conveyancing National Law (ACT) Participation Rules 2021

Disallowable instrument DI2021–227

made under the

Electronic Conveyancing National Law (ACT), s 23 (Participation rules) and s25(1) (Publication of operating requirements and participation rules)

EXPLANATORY STATEMENT

Overview

The purpose of this explanatory statement is to describe the amendments to the Participation Rules for subscribers to the Electronic Lodgment Network (ELN) in the Australian Capital Territory. The rules have been determined pursuant to section 23 of the *Electronic Conveyancing National Law (ACT)* (ECNL). Commencement complies with section 25(1)(b) of the *ECNL*.

The Participation Rules made by this instrument have adopted the Model Participation Rules Version 6 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.

Human Rights

Section 12 of the *Human Rights Act 2004* (HRA) provides that everyone has the right not to have his or her privacy, family, home or correspondence interfered with

unlawfully or arbitrarily and not to have his or her reputation unlawfully attacked. The proposed disallowable instrument introduces changes to the Participating Rules for subscribers of the ELN in the Australian Capital Territory. As the ELN contains individual's personal information for the purpose of lodging land title registry instruments and other documents, the changes engage the right to privacy under section 12.

The right to privacy under section 12 of the HRA is positively engaged by the proposed changes to the Participation Rules. The changes strengthen privacy and security safeguards to ensure greater protection of personal information. This includes providing the Electronic Lodgement Operator or the Registerer the ability to request evidence from a Subscriber of their compliance with the Eligibility Criteria, specifying cyber security awareness training as a requirement for subscribers and users, and introducing additional requirements for subscribers using Business Names. These changes provide increased integrity and security measures to ensure access to personal information within the ELN is limited to authorised users in accordance with the Participation Rules.

The disallowable instrument also proposes changes to the requirements for “good character”, to confirm a mortgagor is a legal person and verification of identity processes. These changes engage and limit the right to privacy. However, any limitations on the right to privacy resulting from these changes are reasonably justified under section 28 of the HRA as they are consistent with the objective of ensuring the integrity of electronic conveyancing within the Territory and will still be subject to other privacy and security measures that limit access to personal information on the ELN to required users and subscribers with a legitimate business objective.

Detail

This Explanatory Statement deals with the changes in provisions of the Participation Rules in groups rather than Rule-by-Rule. 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. ARNECC will publish updated Guidance Notes on the Participation Rules on the ARNECC website to assist subscribers in understanding what is expected in complying with the rules.

Eligibility Criteria

Participation Rule 4.3

Participation Rule 4.3 expands deeming provisions for good character requirements in relation to eligibility to be a Subscriber to the Electronic Lodgment Network which mirrors the good character requirements for System Security and Integrity (see Participation Rule 7.2).

New Participation Rules introduce the ability for the Electronic Network Lodgment Operator or the Registrar to request a Subscriber for evidence of compliance with the Eligibility Criteria. If the Electronic Network Lodgment Operator or the Registrar request that the Subscriber provide evidence of compliance, the Subscriber must be able to provide evidence that they have taken “reasonable steps” to ensure that their principals, Officers and Subscriber Administrators are not and have not been subject to the particular matter or matters.

Participation Rule 4.5

New Participation Rule 4.5 requires that a Subscriber who wishes to use a Business Name that is the same as its System Name must ensure that the Business Name is registered (unless exempt by law) to the Subscriber, and not in use by another Subscriber.

Client Authorisation

Participation Rule 6.3

Participation Rule 6.3 is amended to confirm that a Client Authorisation that was substantially in the form set out in Schedule 4 at the time of signing is not invalidated by a new version of the form being subsequently released.

Schedule 4

Participation Rule 4 of the Client Authorisation form in Schedule 4 has been amended to make it clearer who has access to a Client’s information, including Personal Information, and for what purposes. The purpose has not been extended beyond that of the relevant conveyancing transaction and any associated compliance examination.

Right to Deal

Participation Rule 6.4

Amendments to right to deal requirements in Participation Rule 6.4 provide that Subscribers need not take reasonable steps to verify that the mortgagor is a legal Person and has the right to enter into the mortgage if the Subscriber is reasonably satisfied that the mortgagee it represents has taken reasonable steps to verify that the mortgagor is a legal Person and has the right to enter into the mortgage.

Verification of Identity

Participation Rule 6.5

Amendment to Participation Rule 6.5.1 setting out the Verification of Identity requirements provides for a transfer of mortgage to align with requirements under each jurisdiction’s legislation.

Amendment to Participation Rule 6.5.4 setting out the Verification of Identity requirements confirms that a Person need not have their identify reverified if they

have been verified in the previous two years, or the Subscriber is acting under a current Client Authorisation where the Client has previously been verified.

System Security and Integrity – Users

Participation Rule 7.2

Amendments to Participation Rule 7.2 expands deeming provisions for good character requirements in relation to system security and integrity to include Users that perform duties in relation to credit activities authorised by an Australian Credit Licence, which mirrors the good character requirements in the Eligibility Criteria (see Participation Rule 4.3).

Amendments to the requirement to conduct a police background check limits the requirement to all Signers prior to their allocation of a digital certificate and all Subscriber Administrators prior to their appointment.

Participation Rule 7.4

The expansion to Participation Rule 7.2 negates the existing requirements on signers in Participation Rule 7.4. As a result, Participation Rule 7.4 has been removed.

System Security and Integrity – Digital Certificates

Participation Rule 7.5

Amendments to the obligation on Subscribers in relation to Digital Certificates in Participation Rule 7.5 includes the application of reasonable steps and amendments to the Signers' obligations to ensure the Digital Certificate is kept within their control, but not necessarily in their possession. This allows a Signer to store a Digital Certificate in safe custody.

Subscriber as Attorney

The Subscriber as Attorney mechanism has been removed from the Rules. As a result, Participation Rules 5.6, 6.3.2, 7.10.2 have been deleted, and amendments made to Participation Rules 5.1, 5.2, 6.4, 6.5, 6.6, 6.13, Schedule 3, Schedule 4, and Schedule 8.

Definitions

Amendments have been made to the definition of Identity Agent to retain the requirement that the appointment must be in writing. This is because Identity Agents applying the Verification of Identity Standard or Subscriber Verification of Identity Standard are deemed to comply with reasonable steps. The Registrars need to be able to easily ascertain what instructions they received.

Other definitions adjusted as appropriate to reflect the amendments.