



Law Council
OF AUSTRALIA

Model Participation Rules & Model Operating Requirements: Consultation Drafts 5

Australian Registrars' National Electronic Conveyancing Council

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council acknowledges the significant contribution made by the Law Society of New South Wales to the drafting of this submission.

The Law Council is also grateful for the assistance of the Law Society of South Australia, the Law Institute of Victoria, the Law Council's National Electronic Conveyancing System Committee and the Property Law Committee of the Law Council's Legal Practice Section in the preparation of this submission.

Introduction

1. The Law Council welcomes the opportunity to provide this submission to the Australian Registrars' National Electronic Conveyancing Council (**ARNECC**) in relation to Model Participation Rules Consultation Draft 5 (**MPR5**) and Model Operating Requirements: Consultation Draft 5 (**MOR5**).
2. The Law Council has provided comments on a number of the changes proposed in MPR5 and MOR5. However, the Law Council is particularly concerned about the changes to Client Authorisation which risk creating a new category of Subscriber with little regulatory control to maintain the current level of expertise, knowledge and competency which the consumer should expect.
3. The Law Council would be grateful for an opportunity to meet with representatives from ARNECC to discuss the issues raised below, particularly those relating to appropriate limits on the Attorney Subscriber model and related entities.
4. The Law Council has had the opportunity to review a letter dated 7 May 2018 from the Electronic Conveyancing Group (**ECG**)¹ to the Chair of ARNECC, Ms Jean Villani, and supports that letter and, in particular, the request that ARNECC provide ECG stakeholders with further explanation of the purpose of the proposed changes outlined in MPR5 and MOR5 through a face-to-face meeting.

Model Participation Rules Version 5

General Comments

5. The Law Council is concerned about a number of fundamental changes proposed by MPR5. We note that the intent of many of the proposed changes, as summarised in the letter from ARNECC dated 16 March 2018 is:

*to allow Subscribers, including ADIs and property developers, to act under power of attorney on behalf of donors in electronic conveyancing transactions, including their wholly-owned subsidiaries.*²
6. The focus of the Law Council in relation to the changes in MPR5 is from the perspective of their impact upon members of the legal profession as Subscribers, and the integrity of electronic conveyancing generally. Apart from the sentence in ARNECC's letter above, the Law Council questions the way in which the proposed model is intended to work and why ARNECC regards the proposed changes as necessary.
7. The Law Council is concerned that the proposed changes in MPR5 appear to be an attempt to allow a new category of Representative Subscribers to act for related parties, but without appropriate limitations in place. While the aim of allowing greater participation and flexibility for some parts of industry has merit, the manner in which this is proposed to be achieved is potentially problematic. The changes proposed might achieve the desired outcome but they are sufficiently broad that they may also

¹ The members of the ECG include the Law Council of Australia, the Australian Institute of Conveyancers and the Australian Bankers' Association. The ECG was formed to provide a collaborative voice for the principal users dealing with the practical and legal issues of electronic conveyancing.

² The Law Society of South Australia notes that the proposal may not be limited to 'electronic transactions', as referred to in the quoted passage. Under the *Real Property Act 1886 (SA)*, Client Authorisations are required for registration of all property dealings, whether electronic or in paper.

undo many of the protections set up to ensure that only qualified practitioners conduct conveyancing transactions. This is important from the perspective of the integrity of the land title registers, the integrity of the electronic conveyancing system generally, and the consumer protection of all parties to a conveyancing transaction.

8. The Law Council opposes the use of powers of attorney in the broad manner proposed. Powers of attorney do have a role to play in electronic conveyancing, but this should generally be limited to the existing role played where a client may use a power of attorney to enter into a Client Authorisation with a practitioner for a transaction. If this role is to be expanded, it should be limited to controlled circumstances that do not allow parties to avoid existing prohibitions on unqualified persons conducting legal work. There is nothing objectionable in the concept of a developer, usually using its in-house legal department to act for subsidiaries, using a power of attorney. In fact, this is often done in the current paper environment. However, a significant issue arises in that the proposed model could be used to facilitate parties acting for others to do legal work for profit, without the required legal qualifications.
9. Accordingly, while the Law Council considers that a limited extension of the role of powers of attorney in electronic conveyancing to allow participation by developers is warranted, the Law Council strongly objects to the extending that use to circumstances where it would amount to conducting legal work in contravention of the relevant prohibitions. If ARNECC is to proceed to implement the use of a power of attorney as proposed, the Law Council suggest that it should only do so if sufficient limitations on that model are also put in place.
10. Detailed comments on MPR5 are set out below.

Definitions

Approved Insurer

11. The Law Council queries the basis for the change in the definition of 'Approved Insurer'. It appears that this change is intended to support other proposed changes, but the Law Council would be grateful for clarification in relation to this.

Client Authorisation – Attorney and Client Authorisation Representative

12. As noted above and addressed in more detail in the Client Authorisations section below, the Law Council opposes the use of a 'Client Authorisation' outside of the 'Representative-Client' relationship. Accordingly, the introduction of a separate definition for an Attorney is both unnecessary and undesirable. The Law Council does not support the proposed Client Authorisation dichotomy and the associated definitions in Rule 2.

Donor Agent

13. If this definition is to be retained, it is suggested that would read better with the insertion of a comma after the words 'means' and after the words 'body corporate'.

Power of Attorney

14. If a definition of Power of Attorney is to be inserted, the Law Council suggests that the reference to '[registered]' should be removed as it is confusing. The Law Council assumes that this reference has been inserted to reflect that registration is necessary

in some jurisdictions, such as New South Wales and the Northern Territory. However, the issue of registration is sufficiently addressed in Rule 5.6(c)(i).

15. It is also submitted that the words 'as agent' should be deleted. The addition of this phrase is unnecessary and arguably not appropriate.

The role of Subscribers

Subscriber's roles

16. The Law Council considers that Rule 5.1.1(c) is not sufficiently limited. It potentially allows non-qualified persons to act for others in electronic conveyancing by procuring a power of attorney. The proposal appears to be creating a new type of Representative Subscriber who can act as a Subscriber because they have been appointed as an Attorney. See above request that ARNECC provide further clarification on the new approach. As currently understood, the Law Council considers that it is essential that sufficient limitations on that model are included in MPR5.

Conduct of conveyancing transactions

17. The relocation of Rule 5.3 to Rule 6.15 could lead to confusion. There appears to be no reason to move it other than to possibly categorise the requirement regarding certain laws as a general obligation on a Subscriber, rather than part of their role in the system. However, it changes the obligation from one applying to Representatives to one applying generally. The Law Council submits that this change is unnecessary and undesirable as Rule 6.7 already contains a general obligation for all Subscribers to comply with laws generally and the proposed change would assist in breaking down the barriers to unqualified representatives carrying out legal work.

Subscriber as an Attorney

18. Rule 5.6(c) requires clarification in a number of respects. The power of attorney is to be 'lodged' with the Registrar in all jurisdictions where registration of the power of attorney is not required. However, it is not sufficiently clear that the proposed requirement to 'lodge' applies only in jurisdictions where registration is not required. Furthermore, it is unclear what is required by the reference to 'lodged'; presumably something less than registration.
19. The Law Society of South Australia has noted that under s 156 of the *Real Property Act 1886* (SA), powers of attorney are 'deposited', not 'registered' or 'lodged'. This adds further to the confusion. Further, under that Act, a power of attorney is only required to be deposited if it is to be used to execute an 'instrument' and the definition of 'instrument' in the Act does not include a Client Authorisation. It is unclear why proposed Rule 5.6(c) requires powers of attorney to be 'registered' or 'lodged'. That process does not prevent use of a forged or fraudulent power of attorney. Also, it does not provide any assurance that the power of attorney has not been revoked.
20. The Law Council also suggests that the words 'in any other case;' be added at the end of Rule 5.6(c)(i).
21. In New South Wales a private company now registers powers of attorney. If, for example, the Victorian and Western Australian Land Registries are privatised, the Law Council queries the benefit of requiring lodgment with the Registrar. This requirement merits further consideration.
22. Rules 5.6(b) and (e) appear to overlap and may lead to confusion.

General obligations

Client Authorisations

23. As noted above, while the Law Council supports a limited provision for a Subscriber, as Attorney, to act for a related entity the proposed use of a Client Authorisation by an Attorney Subscriber is strongly opposed.
24. The proposed changes to Rule 6.3 are not required, and the introduction of a Client Authorisation for an Attorney Subscriber is unnecessary and undesirable. A Client Authorisation acts like a power of attorney to provide the essential link authorising a Subscriber to digitally sign documents on behalf of and legally bind the Client (see section 12 (1)(a) of the Electronic Conveyancing National Law (**ECNL**)). In any instance where a Subscriber acts as Attorney, the authority for that Subscriber to sign documents comes from the grant of the power of attorney itself and a Client Authorisation is superfluous.
25. In the current legal framework for electronic conveyancing, a Client Authorisation is applicable only where a party appoints a Representative to conduct a conveyancing transaction, including signing documents in a workspace, on their behalf. Generally, the conduct of a conveyancing transaction, including signing and certifying the land registry instruments, is considered to be legal work and may only be conducted on behalf of a client by a Representative who is a solicitor or, where applicable in the jurisdiction, a conveyancer. The proposal appears to create a new category of Subscriber who can act for a client based on the power of attorney, rather than in the context of a solicitor/client relationship.

Right to deal

26. In Rule 6.4(c), the word 'remains' should be replaced with the word 'is' to mirror the wording of Rule 6.4(a). If this is a reference to enquiries being made to ensure that the power of attorney has not been revoked, this is already covered in new Rule 7.10.

Verification of identity

27. The amendments to Rule 6.5.1(b) delete a superfluous criterion, as the system does not allow the signing of a mortgage by a Representative acting for a mortgagor, so the mortgagee always has to verify the identity of the mortgagor. These changes are supported.
28. Rule 6.5.1(f) would not be necessary if Attorney Subscribers were limited to related parties (ie subsidiaries). Additionally, this requirement should be limited to circumstances where a donor is appointing the Subscriber as Attorney, otherwise the identity of all donors would appear to require verification.
29. The Law Council suggests that Rule 6.5.4(b) should be clarified to ensure that the Person Being Verified is the same person who was verified in the original process, especially considering the change to the definition of 'Person Being Verified'.

Supporting evidence

30. Rule 6.6(f) requires amplification. The Law Council suggests that it be amended to refer to a certified copy of the power of attorney. This amendment will also be necessary if the proposal to lodge the original power of attorney with the Registrar proceeds in jurisdictions where registration is not required.

Assistance

31. The Law Council suggests that Rule 6.9 be expanded to include assistance in the context of compliance with the Operating Requirements and the Participation Rules as well as the ECNL.

Protection of Information

32. In view of the possibility of there being a new Electronic Lodgment Network Operator (**ELNO**), consideration should be given to amending Rule 6.10 to refer to 'an ELNO' rather than 'the ELNO'. The Rules should be reviewed for similar references that should be amended.

Mortgages

33. The Law Council queries whether Rule 6.13.1 should be modified to only apply the rule to all mortgagees, as the system does not allow for a mortgagor to be represented by a Subscriber in the system, similar to the amendment to Rule 6.5.1(b).

Obligations regarding system security and integrity

Users

34. The Law Council questions the necessity for Rule 7.2.1 to be subject to or qualified by Rule 7.2.2, which can apply generally and alongside Rule 7.2.1.
35. It is also submitted that Rule 7.2.2 is drawn unnecessarily broadly. A Subscriber holding a 'batch' Client Authorisation, and which has in place a process for ensuring that a matter is checked and approved by a User before being placed into a batch for later signing by a Signer, should not be prevented from making use of a batch signing process.

Digital certificate

36. In relation to Rule 7.5.1, the Law Council queries whether the requirement for a Private Key is necessary when ARNECC has only approved a Gatekeeper Public Key Infrastructure signing regime. If ARNECC were to approve a different type of signing technology this would need to be changed to describe both.
37. In the Law Council's view, Rule 7.5.3 should be clearer, stating that a Subscriber must take reasonable steps to ensure that only Signers authorised in respect of a transaction sign electronic 'Documents' in that transaction and that only the person to whom a digital certificate is issued as a Signer uses that certificate to sign and certify electronic 'Documents', to guard against misuse of digital certificates.

Certifications

38. Rule 7.10.2 is necessary to obviate the need for another certification and is supported.
39. The Law Council recommends that Rule 7.10.2 be enhanced by adding that the Certifier has taken reasonable steps to ensure that the power of attorney has been registered where so required by the laws of the jurisdiction in which the land the subject of the conveyancing transaction is situated. Where registration is not required, the power of attorney has been lodged with the land registry in that jurisdiction, if the lodgment requirement is retained.

40. With the addition of Rule 7.10.2 the proposed new certification 7 in Schedule 3 is unnecessary.
41. The Law Council notes that there is a typographical error in the sub-paragraph numbering of Rule 7.10.2.

Schedule 1 – Additional participation rules

42. The Law Society of South Australia queries the meaning and intended effect of 'Schedule 1 - Additional Participation Rules'. This Schedule lists a number of Rules and says they 'can only apply in South Australia to a prescribed Person under section 273 of the *Real Property Act 1886 (SA)*'. The definition of 'prescribed person' under that section includes a legal practitioner, a registered conveyancer and an unrepresented party. There is no indication which of the persons referred to in the specified Rules must be a 'prescribed person'. Is it the 'Subscriber'? The 'Donor'? The 'Attorney'? For example, Rule 6.5.1(f) refers only to 'Donors' and 'Donor Agents' - must Donors or Donor Agents be legal practitioners, conveyancers or unrepresented parties? If so, why, and why only in South Australia?
43. If ARNECC is now amenable to including a jurisdiction specific requirement, the Law Society of New South Wales requests an additional rule excluding Certification 6 from operation in New South Wales.

Schedule 3 – Certification rules

44. In New South Wales, a guardian does not have authority to sign documents relating to the disposition of property. The Law Council suggests that Guardians should be excluded and if this is a necessary inclusion for Victoria, an appropriate additional participation rule could be added in a provision in Schedule 1. If there is any reason to include a general guardian term (meaning guardian of a minor), then the Law Society of New South Wales advises that the term must to be defined so as to exclude a guardian for the purposes of the *Guardianship Act 1987 (NSW)*.
45. As a practical matter, the Law Council suggests the inclusion of a note either after Certification Rule 1 or at the end of the Schedule clarifying that it is only necessary to include the applicable role of the person identified and not all of the possibilities for the transaction.
46. New Certification Rule 7 is unnecessary in view of the new Rule 7.10.2 and would potentially be difficult to implement, requiring either manual inclusion by a 'tick-the-box' or creation of a new Subscriber Role in the system.

Schedule 4 – Client Authorisation

47. The inclusion of a separate Client Authorisation form to authorise an Attorney Subscriber to sign documents on behalf of the donor of the power of attorney is unnecessary, undesirable and confusing. The authority for a Subscriber who is an Attorney to sign documents comes from the grant of the power of attorney itself.
48. A Client Authorisation is only necessary for a Representative as they do not already have that authority arising out of the Solicitor Conveyancer/Client relationship in cases where the transaction disposes of property or creates a binding right (as in a restrictive covenant) affecting the client. A Client Authorisation is not required for an employee of a Principal Subscriber, as they are authorised by their employer as part of their employment - an Attorney should be no different. A Client Authorisation should only

be applicable where there is a Client relationship, in order to authorise digital signing by a Representative.

49. As noted above, the new dichotomy proposed by MPR5 for a 'Client Authorisation – Attorney' and a 'Client Authorisation – Representative' is of concern. The Law Council reiterates its request (and the request of the ECG) that ARNECC provide an explanation as to why it regards this change as necessary.

Meaning of words used in this Client Authorisation

50. The Law Council questions why many of the definitions are being deleted from the Client Authorisation. Even though the definitions are already in the Participation Rules, we understand that the Client Authorisation is intended to be self-sufficient, and not require a Client to refer back to the Rules for the definition of a term used in the Client Authorisation. There appears to be no rationale for instances where a definition is deleted and where a definition is expanded so as not to rely on the ECNL.
51. It appears that by removing the capitalisation of a term such as 'person' in the Client Authorisation form (e.g. in the definition of Client) and also 'document', it is being suggested that these terms have a different meaning to 'Person' or 'Document' as defined in Rule 2.1.2, noting that the preamble to that Rule states that the definitions apply to the capitalised term. The same issue applies in relation to removing the capitalisation of 'Australian legal practitioner' in the definition of 'Representative' and possibly elsewhere. The Law Council submits that removing such capitalization could have unintentional and undesirable consequences.
52. The Law Council strongly prefers the retention of definitions in the Client Authorisation and capitalisation to remain as per the current version of the Model Participation Rules.
53. In relation to the new definition of Registrar, we query whether there are any instances where the reference to Registrar should be to the Land Registry in jurisdictions where these organisations are now separate private entities.

Schedule 5 – Compliance examination procedure

Power to request information and Documents

54. In relation to Rule 1.2, the Law Council suggests that, where a notice is issued by the Registrar's Delegate, the notice be required to cite the delegation.

Costs

55. With regard to Rule 5.1, the Law Council suggests that consideration be given to better limiting the imposition or recovery of fees from the Subscriber. Additionally, there should be a right of review.

Schedule 6 – Insurance Rules

Self-insuring Subscribers and Identity Agents

56. The Law Council suggests that Rule 3(c) should be expanded to include other transactions such as lodging a caveat or a priority notice. In due course when the residual document strategy is implemented, releasing or varying a restrictive covenant or providing consent to a release or variation should also be included.

Schedule 8 – Verification of Identity Standard

Definitions

57. The definition of ‘relative’ includes ‘domestic partner’. The meaning of ‘domestic partner’ is unclear and should be removed from the definition of ‘relative’.

The Identifier Declaration

58. The phrase ‘has or is entering’ is sufficient for Rule 4.4(d).

Model Operating Requirements Version 5

General Comments

59. The focus of the Law Council in relation to the changes in the MOR5 is primarily from the perspective of their impact upon members of the legal profession as Subscribers. As with the changes proposed in MPR5, the Law Council is unsure of the intent or rationale for making a number of the changes proposed in MOR5. The Law Council would be grateful to receive some general information in relation to the purpose of the proposed changes to the Model Operating Requirements.

60. With the emergence of other entities seeking approval to operate an ELNO, the issue of interoperability will become crucial in the practical operation of the electronic conveyancing system. From the practitioner perspective, it will be highly undesirable if practitioners will need to be Subscribers to multiple ELNOs. Will a transaction need to be completed with all parties to the transaction using the same ELNO? If so, how will that ELNO be determined? There are many substantial questions in relation to interoperability and the Law Council would be pleased to be involved in discussions on this issue.

61. Detailed comments on MOR5 are set out below.

Take effect date

62. The Law Council considers that an effective date 20 business days from publication of MOR5 is insufficient. Consideration must be given to staged implementation as well as the time of year of release. For example, where PEXA is required to have a changed plan or document, a transitional period for compliance should be provided. Also, it is unclear how the annual independent expert certification process will be affected by MOR5. The impact upon parties that have already substantially completed the application process to become an ELNO under the existing Requirements is also unclear.

Operating requirements

63. There are a number of changes that appear to be stylistic, such as capitalisation changes which are confusing and potentially incorrect. The Law Council notes that other provisions are reordered but otherwise apparently unchanged, which could cause confusion, for example the rewording in Requirement 15.8.

Definitions

Downstream Service

64. The Law Council recommends that suggests that an improved definition of 'Downstream Service' or some notes or examples be included in Requirement 2. As currently drafted, it is unclear what is meant by this term but it plays an important role in the changes made in MOR5.

Subscriber Review Process

65. The Law Council questions how this definition and concept in Requirement 2 fits with ARNECC's Subscriber compliance audits.

Operation of ELN (Electronic Lodgment Network)

National system and minimum Document capability

66. In relation to Requirement 5, 'Document' is a defined term and should be capitalised in the heading of Requirement 5.2.
67. The Law Council queries whether new documents are to be added to Requirement 5.2(b) as they come online. This could be important with regard to the definition of exceptions to mandated electronic lodgment in some jurisdictions, especially if there are any new ELNOs with differences in the 'optional' document scope.

General obligations

68. The Law Council notes that Requirement 5.3(e)(ii) means that these Requirements must be in force prior to 1 July 2018.

Integration

69. The aims of Requirement 5.5 are unclear.
70. The Law Council suggests that a definition is necessary for the term 'integration' and queries the extent to which Requirement 5.5 requires disclosure of the potential integration partner. Furthermore, transitional arrangements in relation to Requirement 5.5 should be included.
71. The Law Council notes that from the definition of 'Person Wishing to Integrate', Requirement 5.5.6(b) relates only to Downstream Services.

Separation

72. With regard to Requirement 5.6.2, the Law Council queries whether the ELNO is able to consult, advise or enter a joint venture for payment if the downstream service provider is not related.

Obligations regarding system security and integrity

Access to an ELN

73. In the Law Council's view, Requirement 7.2.2 appears to be misplaced in the Model Operating Requirements and it repeats a new provision being inserted in MPR5. If the change is made in MPR5 then it is automatically required to be monitored by the ELNO with respect to Subscriber compliance.

Data Breach Notification

74. The Law Council suggest that the obligations imposed on an ELNO in Requirement 7.11 should also be reflected in the mandatory provisions for the agreement between the ELNO and the Cloud Service Provider set out in Requirement 7.12.2(g) as a means of ensuring those same obligations are imposed on Cloud Service Providers.

75. The Law Council questions whether the new requirements at Requirement 7.11.3 and Requirement 7.11.4 are more appropriately included as a part of the Information Security Management System ('ISMS') under Requirement 7.1 and reviewed annually as fit for purpose by an independent expert.

76. If these matters are not part of the ISMS, consideration should be given to a separate requirement to undertake vulnerability testing in Category 2 of Schedule 3 as a requirement prior to commencing operation, similar to the addition of a specific reference in Category 3 of Schedule 3 as an annual requirement.

77. Correspondingly, with respect to the required vulnerability assessment and penetration testing, the Law Council questions how is compliance to be established.

Cloud Service

The Law Council recommends that a provision expressly excluding the acquisition by the Cloud Service Provider of any property in or other rights over stored Land Information be added to Requirement 7.12.2(g).

The Law Council questions whether compliance with Requirement 7.11 should be expressly required of a Cloud Service Provider through the agreement.

Subscribers

Review of Subscribers and suspension or termination

78. In relation to Requirement 14.7, the Law Council questions how an ELNO can effectively review a Subscriber if it is owned and/or controlled by that Subscriber.

79. Given the change to 'review' rather than 'monitoring' in Requirement 14.7(b), which implies a periodic rather than an ongoing requirement, the Law Council questions how often an ELNO must review a Subscriber.

ELNO must not be a Subscriber

80. The Law Council submits that Requirement 14.10.2 should be strengthened, particularly where a Subscriber has a controlling interest in an ELNO. Consideration could also be given to requiring the independent expert's assessment annually.

81. Further, what if the ELNO is owned or controlled by a Subscriber? What about a Subscriber to another ELNO? Where a Subscriber owns or controls an ELN, it should be required to provide access to that ELN to all Subscribers on an equal basis. For example, see Requirement 5.5.5.

Compliance monitoring and reporting

When to demonstrate compliance

82. The Law Council questions the meaning of the exception in Requirement 15.4(b)(ii). In the Law Council's view this exception seems odd when each category separately lists the requirements applying at that time (including matters that were required in a different category).
83. Additionally, if a matter is required at each annual review, there appears to be no reason to exclude the requirement on reapplying. It could instead be excluded from the annual review and included at the reapplying stage.

Schedule 2 – Performance levels

84. The Law Council submits that the word 'assessed' in the first paragraph under the heading Service Availability should be replaced with the word 'programmed' another word of similar effect.

Schedule 3 – Reporting requirements

85. In relation to Requirement 5.6.4 regarding a Separation Plan, the Schedule should indicate that, unlike other requirements, a Separation Plan is conditional and is included only where it is required by Requirement 5.6.4.

Schedule 8 – ELNO service fees

86. The Law Council notes that the apparent cross subsidisation of mortgage fees by service fees applicable to practitioners is one of the most often queried aspects of the PEXA fees structure. The Law Council queries whether ARNECC has considered whether this is an area that should be regulated?

ELNO Service Fees from 1 July 2023

87. The Law Council queries what a 'reasonable rate' in clause 3.1(b) of Schedule 8 means.
88. Clause 3.2 does not appear to take into account any capital investment in continuing improvement in the platform and services. Presumably the platform is not expected to be fully developed and would likely require ongoing releases and improved functionality, including improvements to accommodate changes in legislation or regulations.
89. With regard to clause 3.7, the Law Council questions the reason for adjusting based on differences in the March quarter only.

Pricing tables

90. The Law Council queries whether other changes should be included in clause 4.1(b), for example land registry system/software changes or changes to update/replace underlying system software at the ELNO.
91. The Law Council also questions the meaning of the phrase 'to reflect the increase or decrease' in clause 4.2 and whether it adequately accounts for the fact that PEXA, for example, averages the fees across jurisdictions. If only one jurisdiction increases fees, can the ELNO still average the fees, or is it required to have a fee structure that reflects the change?