

23 March 2016

Mr Mark Briffa

Manager, Electronic Subdivisions Unit
Land Victoria
570 Bourke Street
Melbourne VIC 3000

By email only: mark.briffa@delwp.com.au

Dear Mr Briffa

SPEAR Electronic Lodgment Network Participation Rules and Subscriber Application Form

The Law Institute of Victoria (LIV) appreciates the opportunity to provide feedback to Land Victoria on the following documents:

- SPEAR Electronic Lodgment Network (ELN) Participation Rules Consultation Draft 2 (SPEAR Rules Draft 2); and
- SPEAR ELN Subscriber Application Form.

Previous consultation

In 2014, Land Victoria released SPEAR Electronic Lodgment Network Participation Rules Consultation Draft 1, draft SPEAR Common Rules and draft SPEAR ELN Subscriber Application Form for comment. In September 2014, the LIV made the attached submission providing feedback in relation to these three documents.

Current consultation

The LIV notes that the previous proposed SPEAR Common Rules have been consolidated into the current proposed SPEAR Rules Draft 2, and that SPEAR Rules Draft 2 also incorporates changes that were introduced in Version 3 of the Model Participation Rules for electronic conveyancing.

Despite these changes to the SPEAR Rules Draft 2, many of the LIV's comments in its September 2014 submission remain relevant. In particular, the LIV reiterates its concerns identified in item 1 of that submission under the heading 'General Comments'. The LIV also notes that a number of its specific comments about various clauses in the previous consultation documents have either not been addressed or no clarification has been offered by Land Victoria.

SPEAR Rules Draft 2

The LIV also makes the following comments regarding SPEAR Rules Draft 2:

- References to mortgages and mortgagees have been deleted. The LIV queries the reason for this on the basis that mortgagees might wish to be Subscribers to SPEAR in some instances;

- References to 'ELNO' (Electronic Lodgment Network Operator) have been removed and replaced with references to SPEAR Electronic Lodgment Network. The LIV presumes that these changes were made as Property Exchange Australia (PEXA) is not involved in SPEAR, but seeks clarification in this regard;
- **Rule 7.1 and schedules 10 & 11**

The LIV notes that this rule and schedules 10 and 11 relate to the security of computer systems using SPEAR and the obligations of Subscribers regarding these matters. The LIV proposes to discuss these obligations with the Legal Practitioners' Liability Committee and will revert to you with any feedback;
- **Rule 9.1.1**

Rule 9.1.1 provides that 'a Subscriber may resign as a Subscriber by giving not less than 6 calendar months' notice to the Registrar'. The LIV queries the purpose of the notice period requirement, and is concerned about any consequences in the event of a practice being sold. In its earlier submission the LIV expressed concern that 6 months was too long a notice period and was unreasonable in the circumstances;
- **Rule 9.4**

The LIV queries whether rules 9.4(a) and 9.4(b) should be separated by 'or' rather than 'and'. This is because schedule 7 suggests that a Termination Event could take place after the Registrar gives 15 business days' notice to a Subscriber;
- **Rule 13.3**

This rule provides that 'the Subscriber agrees that, each time it digitally signs an electronic Document, the Subscriber is taken to represent and warrant to the Registrar that all information, statements and certifications in the electronic Document are correct, complete and not false or misleading'. Leaving aside the difficulties caused by any "deemed" representation and warranty, the LIV considers that this clause is excessively onerous, and casts an unfair burden on the Subscriber. Additionally, we query whether this rule will apply, for instance to such cases as where there is an inadvertent or typographical error (for example, in a volume or folio number or the misspelling of a name). The LIV proposes to discuss this rule with the Legal Practitioners' Liability Committee, and will revert to you with any feedback;
- **Rule 15.2**

The LIV notes that the period of data retention by Land Victoria at rule 15.2 is for 7 years from the date of lodgment. The LIV queries whether this should be from the date of registration (as a plan of subdivision is normally registered after lodgment). Feedback from LIV members indicates that the law practice's file would never be closed until either registration or withdrawal of dealing, so the 7 year period required of a law practice would end later than Land Victoria's timeframe. The LIV also queries whether there may be other circumstances which warrant, or where it would be prudent to have, data retention for a period longer than 7 years, and would welcome the opportunity to further explore this with you;
- **Rule 16.5**

The LIV proposes to discuss the release in rule 16.5 with the Legal Practitioners' Liability Committee, and will revert to you with any feedback;

- **Rule 22.4(a)**
On 1 January 2016, Australia Post introduced changes to its letter service which mean that it can now take up to six business days, rather than two business days, for delivery of regular mail. The LIV therefore suggests that rule 22.4(a) should refer to 'six business days' rather than 'three days';
- **Rule 22.4(c)**
Rule 22.4(c) provides that notices sent by email are taken to be received when the sender receives an automated message confirming delivery or four hours after the time sent. The LIV is concerned that four hours is too short a timeframe if the person dealing with a matter is on leave or out of the office for other reasons;
- **Rule 23**
The LIV agrees that there is merit in requiring mediation in the event of a dispute as specified in rules 23.3, 23.4 and 23.5. However, the LIV considers that the rules regarding expert determination should be removed so that the parties can resort to litigation and not be bound by the determination of a nominated expert. This is especially the case because the parties share the expert's costs equally no matter who was at fault;
- **Client Authorisation Form**
The definition of 'Transfer' provides that it 'includes the preparation of all documents required to effect a purchase or sale of land...' The previous definition referred to the preparation of documents required to effect 'any other transfer of land', but these words have been deleted. The LIV queries the deletion of the words, as not all transfers relate to a purchase or sale of land.

SPEAR ELN Subscriber Application Form

The LIV makes the following comments regarding the SPEAR ELN Subscriber Application Form:

- The explanatory note on page four of the form refers to one to eight execution blocks but there are actually nine execution blocks. The LIV suggests that the explanatory note should be amended to refer to all nine execution blocks;
- The LIV submits that the 'type' of power of attorney should be disclosed and refers to its comments at item 2.2(c) of its September 2014 submission.

If you would like to discuss any of the above comments in further detail, please contact Karen Cheng, Rebekah Farrell or Barton Wu, LIV Property & Environmental Section, at kcheng@liv.asn.au, rfarrell@liv.asn.au or bwu@liv.asn.au.

Yours sincerely



Steven Sapountsis
President
Law Institute of Victoria

8 September 2014

Mr Chris Lester

Manager, Electronic Subdivisions Unit
Land Victoria
Department of Transport, Planning and Local Infrastructure
Level 23, 570 Bourke Street
Melbourne 3000 VIC

Also by email: Chris.Lester@dtpli.vic.gov.au

Dear Chris,

Thank you for providing the Law Institute of Victoria (LIV) with the draft:

- SPEAR ELN Participation Rules
- SPEAR Common Rules; and
- Subscriber Application Form.

The LIV welcomes the opportunity to provide its comments and feedback to the above.

1. General comments

Members of the LIV's Property Law Committee have provided you with feedback in relation to all of the above documents. For completeness, this feedback is repeated below. However, as a preliminary issue, it is the LIV's view that the proposed Participation Rules are overly legalistic and complex and create red tape which is not necessary in the context of applications to register plans of subdivision.

The LIV notes that the proposal to allow electronic lodgment of applications to register plans of subdivision in SPEAR has presumably been made with a view to ensuring that, in the near future, all such applications will be made electronically. With this in mind, the LIV is concerned that the proposed system is unlikely to be taken up by all of its members, particularly those in small firms or sole practice, for the following reasons:

- 1.1. Subscribers to SPEAR will be required to have a digital certificate. Such certificates are expensive and of limited duration. The LIV understands that, although large firms of surveyors have joined SPEAR because they can justify the costs of digital certificates, smaller surveying firms still use the paper system because, to them, such costs are not justified. The LIV queries whether it is actually necessary to have a system using digital certificates for the reasons explained below.
- 1.2. The LIV is of the view that any proposed system should not impose more obligations on legal practitioners than currently exist in the paper system. At present, in order to lodge an application for a plan of subdivision, no agreement has to be entered into with Land Victoria. Instead, the relevant application form is signed by an Australian Legal Practitioner and accompanied by all documents that are not already lodged in SPEAR. The LIV queries why its members would wish to enter into a 59 page document which contains onerous obligations.

- 1.3. Although the LIV can understand why participation rules and client authorisations are required where legal practitioners will be digitally signing documents such as a transfer of land on behalf of clients, the LIV submits that an application to register a plan of subdivision is inherently different. Such an application is merely subdividing land without necessarily resulting in a change of ownership. Even if boundaries of land are changed (as is the case in a not in common ownership subdivision), the actual change of ownership is not effected unless an appropriate transfer of land is executed. The LIV queries whether there have been any instances of fraud in relation to applications to register plans of subdivision that would justify the requirement for stringent participation rules. If not, the LIV submits that the proposed SPEAR ELN Participation Rules are unnecessary. Instead, the relevant paperwork could be a modified version of the subscriber application form supported by SPEAR Common Rules. The SPEAR Common Rules should be limited only to matters which are absolutely necessary to ensure that the electronic lodgment of applications for plans of subdivision works and should not impose any additional burdens on subscribers that do not exist in the paper environment.
- 1.4. The LIV understands that land surveyors are not required to enter into any agreements which would be the equivalent of the proposed Participation Rules and are only required to have digital certificates in order to ensure that only authorised surveyors digitally sign documents in SPEAR. The LIV submits that, in the case of legal practitioners (who can be readily identified) a simplified system such as the following which does not require digital certificates could be used to encourage greater take up of electronic lodgment of applications by legal practitioners in SPEAR:
 - a. The subscriber application form would identify an existing Landata user or VOTS customer. The LIV assumes that this would be a law firm in the case of legal practitioners. As Land Victoria has existing business relationships with such subscribers, the LIV sees no need for any additional identification requirements.
 - b. Each subscriber would be required to provide Land Victoria with a list of the Australian Legal Practitioners employed by that firm that it has authorised to digitally sign applications to register plans of subdivision. Each such legal practitioner would be given a user name and a password. Arrangements such as this work well with Apple and most other providers of electronic services, for example those making online sales.
 - c. The authorised legal practitioner could electronically sign an application to register a plan of subdivision by completing that practitioner's user name and password. If there were to be any issues subsequently regarding the application, it would be easy to identify the legal practitioner on the basis of the unique user name and password. The subscriber would be required in a simplified subscriber agreement to accept responsibility for that legal practitioner on the basis that each subscriber is responsible for the users it authorises to digitally sign applications to register plans of subdivision and carry out any other necessary administrative functions within SPEAR.
- 1.5. The LIV submits that a system such as the one proposed above is likely to lead to a far greater take up by legal practitioners of the proposed SPEAR system to enable applications to register plans of subdivision to be made electronically.
- 1.6. On the basis of the above comments, the LIV would be happy to consider revised drafts of the Subscriber Application Form and SPEAR Common Rules. However, if for some reason this is not acceptable to Land Victoria, the LIV's view is that it would be preferable to have only one set of participation rules for both PEXA and SPEAR. The LIV appreciates that, in reality, it will be necessary for SPEAR to have 'SPEAR specific' rules. Nonetheless, the LIV is concerned that having two different sets of participation rules for PEXA and SPEAR will lead to confusion (particularly when operating requirements, common rules and participation agreements also need to be dealt with). This is another reason why the LIV would prefer the SPEAR documentation to eliminate the proposed Participation Rules altogether.

2. Specific comments

The LIV otherwise makes the following comments in relation to the above draft documents that were sent by email on 28 July 2014.

2.1. SPEAR Participation Rules

- a. It is submitted that inconsistencies exist between the definition of 'Participation Rules' at page 7 and the definition of 'these Participation Rules' in clause 2.2.
- b. At clauses 6.12 and 9.1.1, is at least 6 calendar months' notice required before a Subscriber may resign? The LIV queries the purpose of the notice period requirement and is concerned about any consequences in the event of a practice being sold.
- c. At clause 6.15.2(c), Subscribers may need to fund clients substantial amounts of money if the Subscribers do not have a trust account. The LIV queries whether it would be possible for Subscribers to obtain bank cheques from clients to pay lodging fees or if clients could make payments directly into a designated Land Victoria account by way of an electronic funds transfer.
- d. At clause 11(b), it is queried whether the prohibition will prevent Subscribers from obtaining a 'progress check' to provide to another party, or will Subscribers need to obtain the progress check elsewhere?
- e. At clause 11(f), it is queried whether a conveyancing transaction would be considered 'ancillary'.
- f. At clause 15.2, the LIV is concerned (and has concerns generally) about Subscribers bearing all of the risk.

2.2. Subscriber Application Form

- a. The LIV queries the necessity of the Registrar seeking a credit report for the purposes of SPEAR as this is not a requirement for Customers who make lodgments in paper.
- b. The Application Form contains references to 'Subscriber Administrator' and also 'SPEAR ELN Administrator'. However, it is not clear that these are intended to be different entities. It is submitted that this may be resolved by defining the 'SPEAR ELN Administrator' in the Participation Rules or in the Application Form itself.
- c. It is submitted that the 'type' of power of attorney should also be disclosed where the 'date of power of attorney' is required. The LIV notes that, in Victoria, powers of attorney are not yet required to be registered and queries if a certified true copy of the power must be provided if attorneys execute the Application Form. It is suggested that, if this is required, a note to this effect should be included in the Application Form.

2.3. SPEAR Common Rules

- a. At clause 2.1, the LIV queries why Land Victoria is unable to guarantee that the SPEAR system is free from viruses. The LIV is concerned that Subscribers will bear all the risks associated with SPEAR containing viruses.
- b. At clause 2.3, the LIV queries what 'reasonable cause' could result in Land Victoria altering, suspending or withdrawing the availability of SPEAR. It is submitted that the operation of the 'withdraw from use' notice requires clarification and that, irrespective of the cause, notice should be given to Customers and Users.

- c. At clause 2.4, it should say “accept” (“s” is deleted), and the comma before “delays” should also be deleted.
- d. At clause 2.7, the LIV requests more details about Land Victoria’s ‘disaster recovery strategy’.
- e. At clause 3.2, the LIV submits that it is not acceptable for Users to be expected to use a system that may not comply with ‘Statutory Provisions’.
- f. At clause 5.3, please note that a full stop is missing.

The LIV otherwise submits that this clause is too onerous. For example, there could be a typographical error in the communication which would result in a breach of warranty. Furthermore, certain Customers, such as legal practitioners, act on a client’s instructions and may not know if they are correct. It is suggested that this clause be deleted as it has no equivalent in the paper environment.

- g. At clause 5.4, the LIV submits that records maintained by Land Victoria should not be conclusive evidence. It is suggested that the clause should be reworded so that records may be conclusive evidence unless evidence satisfactory to a Court of competent jurisdiction is produced to the contrary.
- h. At clauses 7 and 8, it is submitted that Customers should be able to rely on information in SPEAR because integrity and faith in the system is paramount to Customers and Users, especially legal practitioners.

It is further submitted that information in SPEAR, such as current status of an application to register a plan of subdivision, should be correct and be able to be relied upon. Also, if Councils negligently provide information, they must be capable of being sued for their negligence.

- i. At clauses 10 and 11, the LIV submits that Land Victoria should take responsibility for its system (namely SPEAR). If Land Victoria wishes to encourage take up of SPEAR, Customers and Users should be able to rely upon it to a reasonable extent as is currently the case in the paper environment. The risk should not be carried by Customers (who would include legal practitioners).

Furthermore, it is submitted that the second sentence in clause 10.1 should be deleted as neither Councils nor Land Victoria should be able to disclaim liability if their negligent acts have caused loss or damage. The common law should apply. If this sentence is retained, the LIV submits that it will need to alert its members to this issue, particularly if this will have an adverse impact on their professional indemnity insurance.

- j. At clause 12.2(3), please note that the year of the Planning and Environment Act is not 1978, and that the correct year is 1987.
- k. At clause 12.4, it is queried whether “and PDF” should in fact be “any PDF”.
- l. At clause 14, it is suggested that “All Customers agree” should be changed to “All Customers acknowledge”.
- m. At clause 15, the LIV queries whether it is Land Victoria’s intention that statements of compliance will not be required by SPEAR. Presently, in accordance with Land Victoria policy, a plan of subdivision cannot be lodged unless the statement of compliance has issued. The LIV requests clarification on this issue.

Furthermore, it is noted that this clause refers to both 'Applicant' and 'Relevant Applicant'. Whilst the latter is defined, the former does not appear to be, and the LIV queries the difference between the two.

- n. At clause 16, it is submitted that objections in SPEAR should be able to be relied upon. The LIV queries the purpose of recording objections on SPEAR if Users are required to revert to the 'relevant Responsible Authority' in order to rely on the objections.
- o. At clause 17, the LIV notes that the document is described as an 'Agreement', but at clause 18 it is called a 'Deed'. It is submitted that this terminology should be consistent.
- p. At clause 18, in relation to the definition of 'Loss', it is queried as to what foreseeable taxes could be paid on 'this Deed'.

If you would like to discuss any of the above matters, please do not hesitate to contact Karen Cheng, LIV Property and Environmental Law Section Lawyer, on 9607 9522 or kcheng@liv.asn.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Geoff Bowyer', with a period at the end.

Geoff Bowyer
President
Law Institute of Victoria