
Model Participation Rules Version 3F

**Australian Registrars' National Electronic
Conveyancing Council**

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Acknowledgment

The Law Council acknowledges the assistance of its National Electronic Conveyancing System Committee and the Law Society of New South Wales Property Law Committee in the preparation of this submission.

Introduction

1. The Law Council is pleased to provide a submission to the Australian Registrars' National Electronic Conveyancing Council (ARNECC) regarding version 3F of the Model Participation Rules (MPR3F), which issued on 10 June 2015.
2. Representatives from the Law Council's National Electronic Conveyancing System Committee were grateful for the opportunity to attend a Forum for stakeholders hosted by ARNECC MPRs on 15 June 2015.
3. This submission elaborates on the main concerns expressed by representatives at the Forum, and raises several other requests for clarification or suggestions for drafting improvements.

MPR Version 3F

4. The Law Council acknowledges that a number of amendments have been made to previous versions of the MPRs that reflect amendments it previously requested. In particular, the Law Council was pleased to see that the prior requirement for the witnessing of the signing of a Client Authorisation, Registry Instrument or other Document in the same interview as part of the Verification of Identity Standard has been deleted.

Common law principles of agency and safe harbour

5. The Law Council welcomes the deletion of former Rule 6.5.4(c) and notes that ARNECC has expressed the intent that the common law principles of agency are to apply to the attribution of liability as between a Subscriber and its appointed Identity Agent. However, the Law Council is concerned that this intent is not reflected in MPR3F.

The requirement to appoint an Identity Agent whom the Subscriber reasonably believes is reputable, competent and holds the required insurances is now included in the definition of Identity Agent. The requirement to direct the Identity Agent to apply the Verification of Identity Standard is also mandated. The Law Council is pleased that ARNECC has affirmed its willingness to reconsider the proposition ventilated at the 15 June meeting that, as long as a Subscriber has appointed and directed an Identity Agent as defined, and has no reason to believe that the Identity Agent has not complied with the VoI Standard, then the provision of a Schedule 9 certificate by that Identity Agent to the Subscriber should confer 'safe harbour' on the Subscriber.

To implement this principle, Rules 6.5.2 to 6.5.5 need to be modified. As currently worded, any failure by the Identity Agent to implement the VoI Standard, no matter how trivial the departure, and no matter that the non-compliance could not have been ascertained by the Subscriber by the application of reasonable diligence, will result in the Subscriber being deprived of safe harbour and, critically, will never discover that unless and until the Identity Agent's failure comes to light some time after settlement.

6. If 100% compliance with the Standard by an Identity Agent is required, then the safe harbour any recipient of a Schedule 9 certificate believes they have is illusory. Unless remedied this circumstance would also have substantial PI Insurance consequences.

Eligibility Criteria and Character

7. The Law Council originally had concerns in relation to the breadth of new Rule 4.3.2(f) and new 4.3.3(f) in respect of deemed good character for a Subscriber who holds an Australian Credit Licence, and an officer who is a fit and proper person performing duties in relation to credit activities authorised by an Australian Credit Licence. The Law Council now understands that this provision in relation to deemed good character is

limited in its application and not intended to be a de-facto way to open up eligibility for entities to act as Subscribers more generally.

8. The Law Council also queries the rationale for the references in 4.3.2(e) and 4.3.3(f) to a Public Servant being a Subscriber in his/her own right and the Crown being a principal, director, etc. of a Subscriber.

Verification of Identity Standard

9. The Law Council supports the reworking of the Verification of Identity Standard such that it is limited to describing the process itself, with the substantive provisions in relation to the operation and application of the Verification of Identity Standard being located in the body of the MPRs.
10. The Law Council acknowledges that the Verification of Identity Standard as previously drafted for verifications overseas by consular officials was not workable, in that consular officials were unable to comply with the requirements, in particular the required certification could not be provided. It is therefore appropriate that these provisions have been removed. However it is disappointing that, given the time that has elapsed since the publication of the first version of the MPRs, this aspect is unresolved. Interim guidance as to what ARNECC would consider as taking reasonable steps in identifying persons overseas is needed and the Law Council notes that this is likely to be dealt with by way of Guidance Note. The Law Council asks to be included in discussions on how this aspect is likely to be resolved.
11. The Law Council is pleased that ARNECC is seeking to provide further clarification in relation to the two year exemption for re-verification under the Verification of Identity Standard. However the revised drafting still does not achieve the intent as advised by ARNECC. There are several aspects to this issue:
12. Placing the exemption for re-verification in the Verification of Identity Standard itself is problematic, as the Verification of Identity Standard describes the steps to be followed by the Identity Verifier. This redrafting unintentionally limits the operation of the exemption to the very narrow case of a re-identification by that particular Identity Verifier. The re-identification exemption should be moved to the end of principal clause 6.5 in the body of the MPRs, as a further extension of having taken reasonable steps for safe harbour.
13. Moving the exemption to the body of the MPRs would also enable the clause to be redrafted in line with the Law Council's understanding of ARNECC's intent, being that if the Subscriber itself or through an Identity Agent has verified the client's identity under the Standard within the last two years, and reasonable steps have been taken to ensure it is the same person engaging the Subscriber, then the client need not be re-identified.
14. Moving the exemption to the body of the MPRs would also be consistent with ARNECC's approach that the Verification of Identity Standard comprise of the prescribed process, and the substantive provisions in relation to the operation of the Verification of Identity Standard be placed in the body of the MPRs.
15. The Law Council notes that some changes and improvements have been made to Rule 6.5.1. However, the subclauses remain difficult to follow, particularly 6.5.1(c). Consideration should be given to highlighting the party whose identity needs to be verified in each subclause to assist clarity. Alternatively a tabular format may be appropriate.

Schedule 3 – Certification Rules

16. The Law Society of New South Wales Property Law Committee submits that the certification number 6 in relation to the retrieval and secure destruction or making invalid

the duplicate (paper) certificate of title appears to be inconsistent with the NSW Registrar General's Prescribed Requirement in relation to CoRD Holder Consent, which requires retention on file of the paper certificate of title. If this certification is not to apply in NSW this must be made abundantly clear; *otherwise practitioners may mistakenly destroy the duplicate certificate of title.*

17. The Law Institute of Victoria previously raised the very practical consideration of the possible need to revert to a paper settlement upon the failure of an electronic settlement, but the difficulties in doing so if the paper certificate of title had been destroyed, noting that the relevant certification is made at the time of Signing. The Law Council questions whether it is appropriate to require this certification given the difficulties in at least two jurisdictions if it is retained.

18. The Law Council also suggests that certification number 5, should be redrafted to assist clarity. For example, it could be amended to read:

The Subscriber:

- (a) is reasonably satisfied that the mortgagee it represents, or
- (b) itself,

has taken reasonable steps to verify the identity of the mortgagor, and holds a mortgage granted by the mortgagor on the same terms as this Registry Instrument.

Schedule 4 – Client Authorisation

19. The Law Council notes that the words “collected by and” have been added to revised clause 4 of the Client Authorisation as agreed. For completeness and consistency, the Law Council suggests that the words “collection and” be inserted as shown below:

The Client acknowledges that information relating to the Client that is required to complete a Conveyancing Transaction, including the Client's Personal Information, may be collected by and disclosed to the Duty Authority, the ELNO, the Land Registry, the Registrar and third parties (who may be located overseas) involved in the completion of the Conveyancing Transaction or the processing of it, and consents to the **collection and** disclosure of that information to any of those recipients, including to those who are overseas.

20. The Law Council notes that the definition of transfer in the Client Authorisation has been amended further. In MPR3, transfer was defined in the Client Authorisation as:

Transfer includes the preparation of all documents required to effect a purchase or sale of land and the liaison with, where relevant, any proposed mortgagee.

21. In MPR3F, transfer is defined in the Client Authorisation as:

Transfer includes the preparation of all documents required to effect a purchase or sale of land or any other transfer of land, and the liaison with, where relevant, any mortgagee or proposed mortgagee.

Please clarify the intent of the addition of the words “or any other transfer of land”?

22. The Law Council also queries the inclusion in the definition of caveat in the Client Authorisation of the words “purported claim”. The word “purported” is not appropriate.

Schedule 6 – Insurance Rules

23. The Law Council notes that only limited changes to the approach to insurance have been made in MPR3F and that ARNECC will monitor and review the operation of the current requirements over the next 6 - 12 months. The Law Council would be pleased to be included in the work ARNECC proposes.

24. The Law Council notes that ARNECC has not made any changes to include run-off insurance for Identity Agents in the event that they cease operation. The Law Council suggests that ARNECC's further work in relation to appropriate insurance for Identity Agents include consideration of run-off cover for Identity Agents. The Law Council notes that the Law Institute of Victoria also has concerns in relation to the need for run-off insurance if an Identity Agent ceases business.
25. The Law Council remains concerned in relation to the practical operation of an annual aggregate, in particular that the success of a claim may depend upon when a claim is made in the calendar year.

Schedule 9 – Identity Agent Certificate

26. The Law Council supports the separation of the Identity Agent Certificate from the Verification of Identity Standard. This provides greater clarity as to when the certificate is required.
27. The Law Council queries the reference in paragraph (c) of the certificate to the “Registrar’s Verification of Identity Standard”. The word “Registrar’s” should be deleted.
28. The Law Council notes the overlap between the “List of identification Documents produced (see (c) above)” and “Description of identity Documents produced and sighted”. Consideration could be given to merging these two requirements and the provision of a tabular format.

Digitally Sign and Digital Signature

29. The Law Council has previously made a number of comments regarding definitions relating to the process of digitally signing registry instruments and documents in the regulatory framework established by ARNECC. The Law Council's position is that the full suite of definitions including ‘digitally sign’, ‘digital signature’, ‘digital certificate’, ‘user’, ‘signer’ and ‘key holder’ are defective and require amendment, as further outlined in its submission to ARNECC dated 7 February 2014. The Law Council remains concerned that these defective definitions may result in the regulatory framework not operating as intended and that a Subscriber will ultimately bear this risk.

Other outstanding issues

30. The Law Council would like to record our continuing concern with issues surrounding the PEXA Source Account and with *Privacy Act 1988* compliance. Whilst not strictly speaking matters for the MPRs, the Law Council would not wish by its silence to signify that no other issues of substance remain to be dealt with. The trust account issue is one that may preclude legal practitioners who do not maintain a trust account from using PEXA. The regulatory consequences of using the PEXA Source Account are not entirely clear. And the *Privacy Act* issue arises from PEXA's wish that Subscribers be the vehicle for obtaining from Clients permission for PEXA to use their personal information for commercial purposes not intrinsic to the conveyancing transaction for which it is provided.

Conclusion

31. The Law Council looks forward to working with ARNECC to finalise MPR3 and would be pleased to discuss with ARNECC the matters raised above.

Attachment A: Profile of 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 Large Law Firm Group, 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 Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 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 Executives. 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, led by the President who serves a 12-month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2015 Executive are:

- Mr Duncan McConnel, President
- Mr Stuart Clark, President-Elect
- Ms Fiona McLeod SC, Treasurer
- Dr Christopher Kendall, Executive Member
- Mr Morry Bailes, Executive Member
- Mr Ian Brown, Executive Member

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