Law Council
OF AUSTRALIA

Model Operating Requirements & Model Participation Rules:

Consultation Drafts Version 6

Australian Registrars' National Electronic Conveyancing Council

2 March 2020

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

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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.

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- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

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

Acknowledgement

The Law Council is grateful for the assistance of its National Electronic Conveyancing System Committee, the Law Society of New South Wales, the Law Institute of Victoria and the Law Society of South Australia 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 the Model Participation Rules (**MPR**) Consultation Draft Version 6 and the Model Operating Requirements (**MOR**) Consultation Draft Version 6.

2. The Law Council has provided comments on a number of the changes proposed in the Consultation Drafts. However, the Law Council is particularly concerned by the shift in the approach to verification of identity (**VOI**) in MPR 6.5.2.

Model Participation Rules

General Comments

Verification of identity

3. The Law Council strongly opposes the fundamental shift in the approach to VOI in MPR 6.5.2. The change effectively reverses the onus on the practitioner, mandating the use of the Verification of Identity Standard (**VOI Standard**) unless the practitioner is reasonably satisfied that it 'cannot be applied'.

4. The role of the VOI Standard, providing a means of deeming the taking of reasonable steps when verifying identity, has existed since the MPRs were first issued in April 2013. It was developed as an intrinsic part of the original risk and regulatory framework. The concepts of taking reasonable steps to identify, and the availability of a safe harbour through application of the VOI Standard, have become a daily part of conveyancing practice. The Law Council is aware that the same approach to VOI has also been mirrored in New South Wales for those transactions that are still conducted in the paper environment. In the Law Council's view, such a fundamental shift, with substantial practical implications, should not occur without a sound rationale.

Rationale for the change

5. The Law Council understands from the Notice to Subscribers released in November 2019 as well as the discussions at the ARNECC Industry Forum held in Melbourne and between various Registrars and Law Council Constituent Bodies, that the justification for the change arises from a recommendation from the review of security requirements report commissioned by ARNECC from Kinetic IT (**Report**).[1] This Report was not made available to stakeholders, and the Law Council understands that it will not be made available, as there are concerns about publicising perceived weaknesses in the current system. This means that the Law Council is not in a position to objectively review the justification for the proposed VOI changes.

6. In the Law Council's view, analysis is required as to whether any failure to adequately verify identity has resulted in any loss in an e-conveyancing transaction. To date, as far as the Law Council is aware, the overwhelming source of jeopardised e-conveyances has been email compromise by fraudulent actors, not inadequate VOI practices by Subscribers. Cybersecurity awareness and best practice are the key issues which the Law Council notes are appropriately reflected in other changes

[1] Australian Registrars' National Electronic Conveyancing Council, *Cyber Security* (Notice to Subscribers, 2019-NS1, November 2019) <https://www.arnecc.gov.au/__data/assets/pdf_file/0009/1461996/notice-subscribers-2019-ns1.pdf>.

to the MPRs and MORs. Changes to the approach to VOI will do little, if anything, to address these more significant risks.

7. The Law Council also notes from the list of common compliance errors from the ARNECC website that, while some errors relate to the use of the VOI Standard, the proposed VOI changes themselves will not address any of the common VOI errors found by the Registrars in conducting compliance reviews.[2] The Law Council suggests that a better course would be to focus on the education of Subscribers as to the correct use of the VOI Standard. Mandating the VOI Standard will not of itself improve Subscribers' application of the VOI Standard.

8. The Law Council would be interested to know if ARNECC has any data on the number of e-conveyancing transactions where the VOI Standard is, and is not, utilised. Anecdotally, many practitioners take the extra step of utilising the VOI Standard to remove any doubt that reasonable steps have been taken. In the Law Council's view, only when this type of information is obtained can there be any informed decision as to whether to increase the obligation to utilise the VOI Standard.

9. The Law Council is concerned that the wholesale change to VOI may be a disproportionate response to a theoretical risk identified in the Report. The new approach to VOI also overlooks the professional judgment of lawyers when conducting an e-conveyance. Using reasonable steps to verify the identity of your client is an extension of the very basic principle of knowing your client. To mandate the VOI Standard wholly disregards the professionalism of the lawyer conducting an e-conveyance.

Impacts of the change

10. The cost implications of mandating the VOI Standard are likely to be substantial. Therefore, a cost benefit analysis of the practical implications of this fundamental shift in approach to VOI is required. From the start of the development of e-conveyancing, one of the guiding principles has been that there should be no increased costs to practitioners or their clients. The mandated increased use of VOI is at odds with this principle. For example, as the Law Council understands it, the proposed shift in approach will require practitioners to re-identify a longstanding client every two years. This is unnecessary and will add time and cost to the provision of services.

11. The Law Council is also concerned with other practical implications and limitations of this new approach to VOI. For example, if the transacting party is a publicly listed company, applying the VOI Standard to office bearers is unworkable and disregards the reality of commercial practice. Other examples where applying the VOI Standard is unworkable include when the transacting party is the Crown or a local Council. The current requirement to take reasonable steps adequately deals with the question of appropriate identification through allowing the practitioner to determine appropriate identification having regard to the nature of the client. The 'one size fits all' approach of routinely requiring the VOI Standard to be applied (unless it 'cannot be') is not appropriate and disregards the reality of legal practice.

[2] Australian Registrars' National Electronic Conveyancing Council, *Common Errors from Subscriber Compliance Examinations* (June 2019) <https://www.arnecc.gov.au/__data/assets/pdf_file/0017/1448000/subscriber-compliance-common-errors.pdf>.

12. The current approach also provides a degree of flexibility where the location or circumstances of the client make the application of the VOI Standard difficult, for example, clients who have lost all their identity documents in the recent bushfires. A focus on reasonable steps to verify identity in the circumstances, rather than the rigid VOI Standard, is entirely appropriate in these and similar circumstances.

13. The current approach of reasonable steps to verify identity also allows Subscribers to take advantage of new technologies that have been, and will be, developed in the verification of identity, provided Subscribers are satisfied with the technology. This is another reason for retaining the flexibility of the current approach.

14. The breadth of the revised approach which mandates the VOI Standard unless the Subscriber is reasonably satisfied that the VOI Standard 'cannot be applied' is unclear. The reframing of approach clearly broadens the obligation on Subscribers to use the VOI Standard. However, the extent to which a Subscriber must try to apply the VOI Standard before it can be said that the Subscriber could be reasonably satisfied that the VOI Standard cannot be applied is unclear. For example:

    (a) What is the extent of the Subscriber's obligation to pursue the use of a Category 5 Identifier Declaration, before it can be said that a Subscriber could be reasonably satisfied that the VOI Standard cannot be applied? Must the Subscriber rule out the existence and availability of any person who could provide such a declaration?

    (b) What is the extent of the Subscriber's obligation to recommend to their overseas clients that they attend the offices of Identity Agents in Beijing and London, for example, to have their identity verified using the VOI Standard?

15. These are just two examples of how the fundamental shift in approach to the VOI Standard appears to have been ill-conceived and its practical ramifications not adequately considered.

16. The Law Council also understand that financial institutions are raising concerns about the impact of the changes generally, as well as particular issues, such as the impact on new financial institutions that do not have branches to facilitate a face-to-face identification. Another issue being raised is the difficulty faced in relation to the 'selling of bank books' where mortgages of one financial institution are transferred to another. Would the identity of each mortgagor need to be verified using the VOI Standard?

Timing of the change and potential exemptions

17. If, despite the Law Council's opposition and that of many stakeholders, ARNECC proceeds with the proposed change to VOI, the Law Council submits that consideration should be given to developing a non-exhaustive set of exemptions which permit practitioners to adopt a discretionary approach to applying 'reasonable steps' to certain parties, in certain circumstances, for example:

    (a) in-house counsel certifying the identity of their employer's directors (i.e. acting as a type of Identity Agent);

    (b) local practitioners certifying the identity of a client as agent for another law firm located elsewhere (as is already possible under the Identity Agent provisions);

(c) when acting for immediate family members and long standing personal friends;

(d) where an Aboriginal and Torres Strait Islander person can be appropriately identified by community elders; and

(e) when a person has previously been subject to a VOI and the practitioner has maintained close dealings with that person in the intervening period.

18. Further, ARNECC must give proper consideration to an appropriate phased introduction of the new approach. The Law Council is aware that financial institutions are concerned about the proposed timing of the release of the MPRs at the end of June 2020, to take effect 3 August 2020. This is an unrealistic implementation timetable for all of the industry and is particularly unworkable for financial institutions, given the process changes required.

19. The Law Council notes that ARNECC has committed to promoting 'information sharing and transparency', 'constructive co-operation and collaboration' and 'fact-finding and evidence-based commentary and decision making' as part of its Stakeholder Engagement Policy.[3] Given the Law Council's strong concerns regarding the lack of a sufficient evidence based rationale for the change (shared by many in the industry), the likely significant cost impost of the change together with the absence of a cost benefit analysis, the Law Council urges ARNECC to further consult with industry, in-line with the above principles, and refrain from implementing the proposed changes to MPR 6.5.2 in this round of amendments to the MPR.

VOI and artificial intelligence facial recognition

20. The Law Council seeks to clarify whether VOI must be 'in person', or whether artificial intelligence (**AI**) facial recognition technology can be used to identify a client. Should AI facial recognition be prohibited, this is likely to stifle innovation in the industry with flow-on effects for the property market. The Law Council suggests that before this method of verification be prohibited (in opposition to the wider societal move towards this sort of technology), the wider industry should be consulted further.

Removal of the Attorney Subscriber provisions

21. The Law Council supports the removal of the Attorney Subscriber mechanism.

Specific comments

MPR 2.1 – Definitions

Identity Agent

22. The Law Council supports the clarification in the definition of Identity Agent with the addition of a new reference to an appointment in writing.

[3] Australian Registrars' National Electronic Conveyancing Council, Stakeholder Engagement Policy and Procedures (18 November 2014) <https://www.arnecc.gov.au/__data/assets/pdf_file/0011/698447/ARNECC_Stakeholder_Engagement_Policy_Procedures_Nov2014.pdf>.

23. For added clarity, consideration should be given to replacing the words ‘to act as the Subscriber or mortgagee’s agent’, with the words ‘to act as the agent of the Subscriber or mortgagee’.

Subscriber’s Systems

24. In the Law Council’s view, this new definition is drafted too widely. To address this concern, words such as ‘to access the Electronic Lodgment Network’ (**ELN**) should be added at the end of the definition.

MPR 4.3 – Character

25. In MPR 4.3.1(a) it may be clearer to replace the words ‘not and have not…’ with the words ‘not be, or have been…’.

26. In relation to revised MPR 4.3.1(c), the Law Council is concerned that this new subrule is too broad and could mean that a partner in a law firm whose former firm is suspended will jeopardise the eligibility of the partner’s current firm. The operative timeframes require further consideration.

MPR 4.5 – Business Name

27. Consideration could be given to adding a new subrule (d) requiring that the business name would not easily be confused with that of another Subscriber.

MPR 6.3 – Client Authorisation

28. The Law Council suggests that the proposed MPR 6.3(f) should be relocated to MPR 6.4 (Right to deal) as it does not make sense to include the requirements for situations where a Client Authorisation is not obtained in MPR 6.3, which deals with the requirements of obtaining a Client Authorisation. The words ‘bind the Client to’ could also be replaced with the word ‘lodge’ in proposed MPR 6.3(f).

MPR 6.5. Verification of identity

29. Please see comments above.

30. In addition, the Law Council notes that the proposed change removes the practitioner’s ability to rely on an identity agent certification. As now proposed, if an identity agent did not in fact correctly apply the VOI Standard, and the Subscriber had no way of knowing that, it is nevertheless a strict liability issue. The Law Council does not believe that strict liability is appropriate in this instance (particularly given the compliance errors referred to in paragraphs 7 and 8 above). If an Identity Agent is used and supplies a certificate that appears correct on its face, and the practitioner has no way of knowing that the Identity Agent made a mistake, the practitioner should not be liable for failing to use the VOI standard.

31. The language of MPR 6.5.5 assumes greater risk with the proposed change to the use of the VOI Standard. Read literally it means that a Subscriber’s right to use an Identity Agent is contingent on the Identity Agent in fact using the Standard. It should not be a condition of a Subscriber’s right to appoint an Identity Agent that the Identity Agent in fact uses the VOI Standard. A Subscriber should obtain safe harbour protection by appointing a reputable Identity Agent and receiving that agent’s certification that they have followed the VOI standard.

32. While the Law Council is of the view that the proposed change should not proceed, if it is introduced, MPR 6.5.5 and 6.5.6 should be amended so that directing an

Identity Agent to use the VOI Standard, and receiving an Identity Agent Certification to the effect that the Identity Agent did so, will also be deemed to be the taking of reasonable steps by the Subscriber for the purposes of MPR 6.5.1. There is also a risk that professional indemnity insurers will not insure that risk and that practitioners will cease carrying out transactions if they are not covered by insurance. The Law Council suggests that without this amendment, the proposed change regarding the use of the VOI Standard is non-viable.

33. The Law Society of New South Wales has advised that, following the amendment of MPR 6.5.1(b), section 56C of *the Real Property Act 1900* (NSW) and the *Conveyancing Rules* (NSW) are likely to require updating (similar changes may also be required in other jurisdictions).

MPR 6.6 – Supporting evidence

34. The requirement for evidence in MPR 6.6(d) has been revised due to the change in approach regarding the use of the VOI Standard. As stated above, the Law Council does not support the revised approach. However, if the revised approach is adopted, MPR 6.6(d) should be amended to reflect the terms of MPR 6.5.1 such that the required evidence is evidence to substantiate that the Subscriber was *reasonably satisfied* that the VOI Standard cannot be applied. As currently drafted the element of reasonable satisfaction has been omitted. This in turn raises questions as to what is required from an evidentiary perspective.

MPR 7.2 – Users

35. The Law Council opposes the introduction of new MPR 7.2.3(c). In the Law Council's view, the requirements of new MPR 7.2.3(b) adequately address the issue.

36. The requirement to obtain police background checks for all Users every three years raises privacy issues and will have ramifications for the employment contracts of all Users. The practical consequences of this significant change require further consideration.

37. If new MPR 7.2.3(c) is to remain, MPR 7.2.4 should be amended such that legal practitioners and the other listed classes of Users are deemed to comply with MPR 7.2.3(b).

MPR 7.5 – Digital Certificates

38. The Law Council submits that the opening words of MPR 7.5.5 should be amended to require the Subscriber 'to take reasonable steps to ensure…'. It is not appropriate that this obligation be framed in absolute terms.

39. In relation to MPR 7.5.5(a), consideration should be given to the deletion of the words 'and possession'. The important point is the security and safety of the digital certificate, but as currently drafted it may be read as meaning the digital certificate must be physically kept on the Subscriber. It is presumably sufficient that the digital certificate is secure in the Signer's control (e.g. locked away) rather than carried with them and more easily lost.

40. The Law Council also suggests that the focus of MPR 7.5.5 should be that the access credentials are not *shared* in the first place, rather than just focusing on actual misuse.

MPR 7.7 – Notification of Jeopardised Conveyancing Transaction

41. Consideration should be given to adding the Land Registry as a party that requires notification under MPR 7.7.1(b).

MPR Schedule 3 – Certification Rules

42. The Law Council queries the rationale for the change in wording from 'legislation' to 'law' in the third certification in the Schedule.

43. The Law Council also notes that the implementation of changes in the certifications requires a substantial lead time.

Model Operating Requirements

General Comments

44. The Law Council supports the greater focus on cybersecurity and education reflected in MOR Consultation Draft Version 6.

Specific Comments

MOR 2.1 – Definitions

Potential ELNO

45. It is unclear at what stage of the process a Potential Electronic Lodgment Network Operator (**ELNO**) becomes an 'ELNO'. Presumably at the very least, this occurs once Category 2 approval has been obtained, but should the other point of reference be the commencement of operations in one or more jurisdictions? In the Law Council's view, this should be clarified.

Supplier

46. The Law Council suggests that the reference in line 2 to 'the Cloud Service Provider' should read 'a Cloud Service Provider'.

MOR 4.3 – Character

47. The Law Council queries whether the required regular review should form part of the annual review process. In the reporting requirements set out in Schedule 3, currently under Category Three for MOR 4.3.1, 4.3.1(a) and 4.3.1(b), the current requirement is '[n]o Change Certification or updated Self-Certification as required under Category One'. If an *active* review is required, Category Three should be amended accordingly.

48. Consideration should also be given to whether the Category One and Two requirements in relation to Governance, which are currently matters for self-certification, should be reviewed and possibly changed to independent certification.

MOR 5.5 – Integration

49. The Law Council understands the change from 'terms and conditions' for integration to a 'set of principles', but the redrafting of MOR 5.5 appears to also suggest that an ELNO could decline to offer Integration. The Law Council queries the basis for this change.

MOR 6.2 – Further Testing

50. The Law Council suggests clarification as to whether an obligation arises with respect to matters implemented in other jurisdictions, that is, whether regression testing is required in each jurisdiction.

MOR 7.1 – Information Security Management System

51. In relation to MOR 7.1(b)(iii), the Law Council notes that 'Incident Response Plan' is defined, but a *set of* Incident Response Plans is not defined. The definition of 'Incident' includes a Data Breach, however, it may be beneficial to expressly provide for other scenarios such as email fraud, the Land Registry or Revenue Office being offline or issues with various ELN systems.

52. The Law Council notes that some members of the Law Institute of Victoria (**LIV**) have expressed concerns with ARNECC's proposed obligations for Subscribers to obtain appropriate cybersecurity awareness training under Clause 7.1(b)(ii)(D). Those members felt it is inappropriate for ARNECC to impose education standards on subscribers. The LIV members noted that it is more appropriate for the regulator and the law societies to recommend and deliver the relevant training in cybersecurity, in order to ensure it is up-to-date, relevant and is delivered by practitioners with relevant expertise. Accordingly, the LIV members prefer for ARNECC to increase their compliance check and audit function to ensure subscribers are complying with their MPR and MOR obligations. In the event that they are not, then the proper educative and disciplinary measures should be taken to ensure that subscribers are aware of the liability risks associated with non-compliance.

MOR 7.6 – Digital Certificate regime

53. The Law Council supports the move away from restricted Community of Interest Digital Certificates, particularly in light of likely transitioning to interoperable ELNs.

54. The Law Council notes that as drafted it appears that an ELNO is not required to issue open Digital Certificates, allowing them to be used in an alternative ELN, but the ELNO must accept the use of open (as well as Community of Interest) Digital Certificates.

55. Consideration should be given to a transitional provision allowing current Community of Interest Digital Certificates to expire and be replaced with open Digital Certificates.

MOR 14.1 – Subscriber registration

56. MOR 14.1.2 has been reframed in terms of a 'Potential Subscriber' rather than the 'applicant'. The rationale for this change is unclear. In the absence of further information, the current wording of MOR 14.1.2 is preferred.

57. The Law Council is concerned that the changes made to MOR14.1.2(b)(i) (changing 'or' to 'and') may be read as meaning that all partners in a law firm (the 'Potential Subscriber') will need to have their identity verified at the initial registration to use the ELNO, rather than just the partner who will be signing the Participation Agreement to register the firm as a subscriber. If this is the intent, the Law Council is concerned with the practical implications of this change and the increased cost of compliance.

58. The identity of the partners and staff being allocated User and Signer roles will be verified in accordance with MPR 6.5.1 before they are given User or Signer privileges. That is the appropriate time for such verification to be undertaken. The identity of an entire partnership – especially partners having no involvement in the firm's participation as a Subscriber – does not need to be verified at the point of registration with the ELNO. The Law Council would be grateful for clarification of the rationale for the change to MOR 14.1.2(b)(i).

59. Revised MOR 14.1.2(b)(ii) is also problematic because the Potential Subscriber will be the firm and it does not need authority from itself. Only the person acting on behalf of the firm requires the authority to bind the firm in the Participation Agreement. The interplay with MOR 14.1.2(d) also needs to be considered.

MOR 14.6 – Training

60. The concept of 'secure usage' and the extent of the ELNO's obligations under revised MOR 14.6 are unclear, in particular in relation to the extent of the obligation to provide resources and information regarding the 'usage of email'.

MOR Schedule 6 – Amendment to Operating Requirements procedure

61. The Law Council suggests that the reference to 'the ELNO' in clause 1.1 should be amended to allow for consultation with multiple ELNOs and Potential ELNOs. It would also be appropriate to reflect that consultation occur with industry in general and with the Land Registries (particularly where privatised).