THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Prop:RHgl1831416

20 February 2020

Ms Margery Nicoll
Acting Chief Executive Officer
Law Council of Australia
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By email: john.farrell@lawcouncil.asn.au

Dear Ms Nicoll,

Model Participation Rules and Model Operating Rules – version 6

The Law Society of NSW appreciates the opportunity to provide comments for a Law Council submission to the Australian Registrars' National Electronic Conveyancing Council ("ARNECC") in relation to the consultation drafts, version 6 of the Model Participation Rules ("MPR") and the Model Operating Rules ("MOR"). The Law Society's Property Law Committee has contributed to this submission.

Model Participation Rules ("MPR")

1. General comments

1.1. Verification of identity

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

The role of the VOI Standard, providing a means of deeming the taking of reasonable steps when verifying identity, has existed since the Model Participation Rules 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 same approach to VOI has also been mirrored in NSW for those transactions that are still conducted in the paper environment. In our view such a fundamental shift, with substantial practical implications, should not occur without a very sound rationale.

1.1.1. Verification of identity – rationale for the change

We understand from the Melbourne ARNECC forum and the Office of the Registrar General's Sydney forum that the justification for the change is the review of security requirements report commissioned by ARNECC from Kinetic IT ("Report"). This Report was not made available to stakeholders, and we understand that it will not be made available, as there are concerns about publicising perceived weaknesses in the current system. This

leaves us in a position where we cannot objectively review the justification for the proposed VOI changes.

In our view, analysis is required as to whether any failure to adequately verify identity has resulted in any loss in an eConveyancing transaction. To date, the overwhelming source of jeopardised eConveyances has been email hacking by fraudsters, not inadequate VOI practices by Subscribers. Cybersecurity awareness and best practice are the key issues which we note are appropriately reflected in other changes to the MPR and MOR. Changes to the approach to VOI will do little, if anything, to address these more significant risks.

We also note from the list of common compliance errors from the ARNECC website[1] 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. We suggest 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.

We would be interested to know if ARNECC has any data on the number of eConveyancing transactions where the VOI Standard is, and is not, utilised. Anecdotally we believe many practitioners take the extra step of utilising the VOI Standard to remove any doubt that reasonable steps have been taken. In our 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.

We are 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 eConveyance. 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 eConveyance.

1.1.2. Verification of identity – impacts of the change

The cost implications of mandating the VOI Standard are likely to be substantial. We submit that 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 eConveyancing, 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 we understand 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.

We are 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.

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[1] https://www.arnecc.gov.au/__data/assets/pdf_file/0017/1448000/subscriber-compliance-common-errors.pdf

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 our view in these and similar circumstances.

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.

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?

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.

We 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?

1.1.3. Verification of identity – timing of the change

If, despite our opposition and that of many stakeholders, ARNECC proceeds with the proposed change to VOI, we urge ARNECC to give proper consideration to an appropriate phased introduction of the new approach.

We understand that financial institutions are concerned about the proposed timing of the release of the MPR at the end of June 2020, to take effect 3 August 2020. This is an unrealistic implementation timetable for all of industry, but we agree that it is particularly unworkable for financial institutions, given the process changes required.

Given our strong concerns regarding the lack of a sufficient evidence based rationale for the change, the likely significant cost impost of the change together with the absence of a cost benefit analysis, we urge ARNECC to further consult with industry and refrain from implementing the proposed changes to MPR 6.5.2 in this round of amendments to the MPR.

1.2. Removal of the Attorney Subscriber provisions

We support the removal of the Attorney Subscriber mechanism, particularly due to the way it was implemented.

2. Specific comments

2.1. MPR 2.1 Definitions

Identity Agent: We support the clarification in the definition of Identity Agent with the addition of a new reference to an appointment in writing. Additionally, we suggest 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: In our view this new definition is drafted too widely. We suggest that words such as "to access the ELN" be added at the end of the definition.

2.2. MPR 4.3 Character

We suggest that 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...".

In relation to revised MPR 4.3.1(c), we are concerned that this new subrule is too broad. It 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.

2.3. MPR 4.5 Business Name

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

2.4. MPR 6.3 Client Authorisation

We suggest the new MPR 6.3(f) should be relocated in MPR 6.4 Right to deal. In our view 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. We also suggest that the words "bind the Client to" be replaced with the word "lodge" in MPR 6.3(f).

2.5. MPR 6.5. Verification of identity

Please see our comments above.

We also note that, following the amendment of MPR 6.5.1(b), s 56C of *the Real Property Act 1900 (NSW)* and the *Conveyancing Rules (NSW)* are likely to require updating.

2.6. MPR 6.6 Supporting evidence

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 we do 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.

2.7. MPR 7.2 Users

We oppose the introduction of new MPR 7.2.3(c). In our view, the requirements of new MPR 7.2.3(b) adequately address the issue.

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. Again, we query whether the practical consequences of this significant change have been considered.

If new MPR 7.2.3(c) is to remain, we submit that 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).

2.8. MPR 7.5 Digital Certificates

In our view 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.

In relation to MPR 7.5.5(a), we suggest 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. Surely it is sufficient that the digital certificate is secure in the Signer's control (eg locked away) than carried with them and more easily lost.

We also suggest 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.

2.9. MPR 7.7 Notification of Jeopardised Conveyancing Transaction

We suggest consideration be given to adding the Land Registry as a party that requires notification under MPR 7.7.1(b).

2.10. MPR Schedule 3 Certification Rules

We query the rationale for the change in wording from "legislation" to "law" in the third certification in the Schedule. We also note that the implementation of changes in the certifications requires a substantial lead time.

Model Operating Requirements ("MOR")

3. General comments

We support the greater focus on cybersecurity and education reflected in MOR 6.

3.1. MOR 2.1 Definitions

Potential ELNO: It is unclear at what stage of the process a Potential 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? This should be clarified.

Supplier: We suggest that the reference in line 2 to "the Cloud Service Provider" should read "a Cloud Service Provider".

3.2. MOR 4.3 Character

We query whether the required regular review should be part of the annual review process.

We note that 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 "No Change Certification or updated Self-Certification as required under Category One." If an *active* review is required, we suggest that Category Three should be amended accordingly. In our view, consideration should also be given to whether 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.

3.3. MOR 5.5 Integration

We understand the change from terms and conditions for integration to a set of principles, but the redrafting of MOR 5.5 appears also to suggest that an ELNO could decline to offer Integration. We query the basis for this change.

3.4. MOR 6.2 Further Testing

We suggest that this new MOR be clarified as to whether an obligation arises with respect to matters implemented in other jurisdictions, that is, whether regression testing is required in each jurisdiction.

3.5. MOR 7.1 Information Security Management System

In relation to MOR 7.1(b)(iii), we note that "Incident Response Plan" is defined, but a *set of* Incident Response Plans is not defined. The definition of "Incident" includes a Data Breach but we suggest 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.

3.6. MOR 7.6 Digital Certificate regime

We support the move away from restricted Community of Interest Digital Certificates, particularly in light of transitioning to interoperable ELNs.

We note 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.

We suggest consideration be given to a transitional provision allowing current Community of Interest Digital Certificates to expire and be replaced with open Digital Certificates.

3.7. MOR 14.1 Subscriber registration

We note that MOR 14.1.2 has been reframed in terms of a "Potential Subscriber" rather than the "applicant". The rationale for this change is unclear and we prefer the current wording of MOR 14.1.2.

We are also 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, we are concerned with the practical implications of this change and the increased cost of compliance. 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. Please clarify the rationale for the change to MOR 14.1.2(b)(i).

Revised 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.

3.8. MOR 14.6 Training

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'.

3.9. MOR Schedule 6 – Amendment to Operating Requirements procedure

We suggest 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 Land Registries (particularly where privatised).

If you have any further questions in relation to this submission, please contact Gabrielle Lea, Policy Lawyer on (02) 9926 0375 or email: gabrielle.lea@lawsociety.com.au.

Yours sincerely,

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President