

## **Industry Engagement Forum Consultation Drafts 6 MPR & MOR Q&A Session**

The following questions were posed to a panel comprised of Jane Allan (VIC), Edith Graveson (QLD), Bianca Uyi (NSW) and Leanne Hughes (NSW) during the ARNECC Industry Forum on 5 February 2020. ARNECC will consider these questions, and the surrounding issues and feedback, as an important part of this consultation process.

ARNECC would also greatly appreciate written submissions outlining any concerns of industry, including specific examples. All written submissions will be considered before finalisation of Versions 6 of the Model Participation Rules and the Model Operating Requirements.

### **Client Authorisation**

- 1. Why has the privacy statement in the Client Authorisation been expanded to include Compliance Examinations?**  
Compliance examinations are an integral part of the electronic conveyancing process. It is important that clients are aware of the fact their personal information may need to be examined in order to protect the security and integrity of the electronic system. The specific reference to compliance examinations in the Client Authorisation puts it beyond doubt that compliance examinations are covered by the client's privacy consent.
- 2. Model Participation Rule 6.3(a) currently permits that if you are acting for say a bank, and you get a standing Client Authorisation at the outset, you can still use that Client Authorisation even though there have been variations to the form. My reading of the changes is that is no longer going to be possible. Is that the intention?**  
No, the form is the relevant form at the time that the Client Authorisation was signed.
- 3. What is the background to the changes to clause 4 of the Client Authorisation and specifically does it limit how the information is used by Land Registries?**  
The change in words does not further limit use. There are other provisions that allow the use of the data in other ways relating to the land transaction – for instance, sending it to Councils, title search products.

### **Verification of Identity**

- 4. When would a subscriber be reasonably satisfied that the Verification of Identity Standard cannot be applied?**  
For example, in the rare case that a person does not have sufficient identity documents to satisfy any of Categories 1 to 6 or where a person is overseas and uses the Australian Embassy/High Commission/Consulate Overseas Verification of Identity and Witnessing Process set out in the Model Participation Rules Guidance Note.
- 5. What if the person being identified is overseas and cannot get to a consulate to get their identity verified, like in Japan or China?**  
There is no requirement to go to a consulate office for verification of identity. Other options would be to go to an international law firm, and other international organisations may also have offices where verification of identity can occur. See the Model Participation Rules Guidance Note.

**6. If it is just highly expensive or inconvenient to meet face to face, can other reasonable steps be taken?**

Subscribers can use an Identity Agent, which would cover a wide range of circumstances. There are a limited number of cases where the requirement to use the Verification of Identity Standard could not be applied. It is up to the Subscriber to assess what is reasonable in the circumstances.

ARNECC will consider the impact of the proposed changes to VOI as raised by stakeholders. ARNECC would welcome submissions outlining these concerns in detail, with specific examples.

ARNECC updates guidance notes for the Model Participation Rules and the Model Operating Requirements when required and as a result of the consultation process. Depending on the outcomes of this round of consultation, we will consider where appropriate further guidance is needed on VOI and be guided by the clarification sought by stakeholders.

**7. Currently a Subscriber does not need to meet their Client face to face when it has the option to determine what amounts to reasonable steps. The change gives no other option.**

Verification of identity is one of the most fundamental aspects of conveyancing. It is essential to establishing who the transacting parties are. ARNECC's security review raised verification of identity as an issue. The recommendation from the review is that the verification of identity process is front and centre and highlighted that there are risks involved in Subscribers not applying the same standard.

The way that Subscribers are undertaking verification of identity varies quite broadly. These changes would mean that everybody within the whole conveyancing system is applying the same standard.

However, the implementation of proposed changes is being done through this consultation process. ARNECC wants to make sure that it can be practically implemented by Subscribers.

From ARNECC's perspective, a vulnerability around the verification of identity process has been identified. Verification of identity is a key component for maintaining the integrity of the property sale process. As part of the transactions, it is important that Subscribers know their clients/customers, and that they can link identity back to the authority to transact.

When verification of identity was originally brought in, practitioners queried the necessity for it. ARNECC introduced verification of identity, the concept of reasonable steps and a requirement for a face to face component of that verification of identity in order to raise the bar to prevent fraud.

ARNECC is here to protect the integrity of the sale process and the integrity of the Titles Registers. The vulnerability that was identified has led to the recommendation that the Verification of Identity Standard be applied across the board, rather than allowing reasonable steps. Reasonable steps is still in place, but as a fallback position.

Registrars are the first port of call when someone loses their interest in land, so ARNECC's interest in verification of identity and its link to authority to transact is to ensure a transaction has integrity.

8. **As an example, during the recent bushfires one of our customers who lives on an island has had his documentation destroyed. The client wanted to discharge his mortgage, but his mortgage brokers were based in Melbourne. Technically he could travel to Melbourne to have his identity verified. One other option would be to go to Australia Post; however, it was also burnt down.**  
The Subscriber would need to be satisfied it is not reasonable in the circumstances to apply the Verification of Identity Standard.
9. **Is ARNECC relying on any empirical evidence to warrant such a significant change?**  
ARNECC is primarily relying on evidence of deficiencies of VOI that it has become aware of through the Subscriber Compliance Examinations process. ARNECC is unable to share any claims history at this time. Claims can take several years to materialise. It is clear from compliance examinations that verification of identity in some cases is not being undertaken, and in others a single photocopy of one piece of evidence is emailed to the Subscriber.
10. **Will the security review be made public?**  
The review will not be made public as it contains sensitive security information. It was prepared for the benefit of ARNECC, subsequent to the events of last year, when some very public security issues arose.
11. **I am not aware that there has been a rush of claims due to practitioners not performing verification of identity under the current scheme. This change is going to add significant overheads. What justification does ARNECC have that indicates it is required?**  
See Question 7.
12. **We had an indigenous client who wanted to be identified by her elders. What evidence do you require that the Verification of Identity Standard cannot be met?**  
The client could be identified through an Identity Declarant under the Verification of Identity Standard. In terms of the evidence required that the Verification of Identity Standard could not be met, it depends on the circumstances. However, ARNECC anticipates that a Subscriber would need to explain why it came to that decision.
13. **As I understand it, this variation now means that I will need to undertake a verification of identify of my mother if I was doing a transaction for her.**  
Yes, that is correct.
14. **These changes mean that any digital verification of identity or biometric technology cannot be used to verify an individual. For example, the business model of digital banks that do not have physical branches is not viable given they are required to meet the Verification of Identity Standard.**  
ARNECC is monitoring what is happening in the digital identity space.
15. **There is a divergence of ARNECC and other (Commonwealth) government policy e.g. to promote competition and innovation.**  
There is not just one policy position from the different levels of Government. The different parts of Government have different remits and objectives. The Registrars are responsible for land titling administration not the Commonwealth. For example, the 2015 Queensland Organised Crime Commission of Inquiry report recommended mandatory face to face verification of identity for land transactions. This led to changes to the requirements in Queensland for paper transactions.
16. **The real issue is about a Client's right to deal, rather than their identity, and in determining their right to deal it is still only reasonable steps that are required.**  
Verification of identity needs to be established first before right to deal.

17. **In 65% of our conveyancing transactions, the conveyancer does not operate within the same area as the property. These changes effectively transfer the costs and risks of the transaction to the Subscriber.**  
ARNECC does not require that it be the Subscriber in person who has to undertake a verification of identity. They can use Identity Agents. The risk is, and always has been, a Subscriber risk.
18. **In an industry that is tight on transaction fees, to make any money out of conveyancing it will be difficult for small firms to survive if face to face verification of identity is required.**  
Compliance examinations show that it is the many smaller firms that are already complying with the Verification of Identity Standard.
19. **A Subscriber can pick Identity Agents it deems to be reputable and insured, because ARNECC does not say who specifically meets the requirements of being an agent.**  
The Model Participation Rules set out what is required to be an Identity Agent. It is for a Subscriber to assess if those requirements are met.
20. **Do the new verification of identity requirements operate retrospectively?**  
No, the requirements would come into effect in July or August and any Subscriber from then on would have to comply with those requirements.
21. **Is there any plan to amend the statutory provisions regarding verification of identity in the Transfer of Land Act 1958 (Vic), for instance section 87A?**  
There are currently no proposals for legislative change.
22. **You could argue that this constitutes a legislative change, now that reasonable steps requires compliance with the Verification of Identity Standard?**  
The Model Participation Rules and Model Operating Requirements are legislative instruments and the changes are being made to these instruments not Acts.  
  
However, failure to comply with the Model Participation Rules has consequences, e.g. suspension or termination.
23. **In a situation where an institutional client has the Client Authorisation originally signed by the general counsel and then instructions actually come from other officers, is there any requirement for Subscribers to undertake a verification of identity of all the instructors?**  
No, the person whose identity must be verified is the person who signs the Client Authorisation. The Subscriber must then be satisfied that the person giving instructions has the authority to bind the Client.
24. **In a transfer of mortgage, Victorian legislation allows the transferee mortgagee to rely upon the transferor's verification of identity of the mortgagor. This change seems to reverse that position?**  
ARNECC will consider this feedback.
25. **A mortgage is a contract between a mortgagor and a mortgagee. The mortgagor does not care what happens down the track, for example, if their mortgage is later sold. Why should they have to produce their verification of identity documents for a transaction that has happened between two financial institutions?**  
ARNECC will consider the impact of this change given the feedback. This has been a requirement in paper conveyancing for some time. Now that these instrument types are becoming available electronically, it has been added to the Model Participation Rules.

## Cyber Security Training

**26. What is the context behind Model Participation Rule 7.2 regarding cyber security awareness training?**

ARNECC conducted a security review and cyber security awareness training was recommended.

**27. Will ARNECC be accrediting training?**

ARNECC will not be accrediting training. Cyber security is of broader relevance to Subscribers and is not limited to transactions with land. For example, in Victoria, the Law Institute and the Legal Practitioners' Liability Committee are combining to offer training, in NSW the Law Society of NSW is offering regular information updates and advice on training and the Australian Institute of Conveyancers is offering courses on cyber security in a number of jurisdictions. ARNECC imagines that will happen in other jurisdictions as well.

## Police Checks

**28. In relation to the 3 year rolling police checks, why is there no exception for lawyers and conveyancers when, to hold a practicing certificate or licence, they have higher thresholds to meet?**

ARNECC will consider this feedback.

## Subscriber as Attorney Provisions

**29. What analysis did you conduct to assess the demand for the Subscriber as attorney provisions?**

ARNECC contacted the ELNOs and asked for details of organisations seeking to use these provisions. ARNECC was made aware of only one such entity.

**30. What options did you look at, other than the difficult technical one?**

The Land Registries looked at what could be acceptable to them and what would comply with the Land Titles legislation. ARNECC would be happy to receive submissions on this point.

## Suspension

**31. Model Participation Rule 4.3 provides that reasonable steps must be taken to ensure that directors etc. are not suspended. How does someone take reasonable steps to verify that they are not suspended? Is there going to be a register of suspended individuals?**

A public register is not intended. Each of the Land Registries have internal records of which Subscribers have been suspended or terminated but not individuals. It is necessary for Subscribers to take reasonable steps. It is up to each Subscriber to determine what those reasonable steps are in the circumstances.

**32. When an individual has left a firm, but that firm has been suspended, the individual can still be tainted by the suspension.**

ARNECC will consider redrafting the rule to better reflect ARNECC's intention to address phoenixing behaviour.

**33. Do international partners of international firms need to meet this standard?**

As Australia is the only country with electronic conveyancing, it is not clear how international partners could be subject to a suspension or termination.

## Consultation

**34. What consultation has ARNECC engaged in with stakeholders including APRA, ASIC, ACCC, AUSTRAC, and end users?**

ARNECC is in its consultation phase now.

**35. What about consumers?**

We send material to consumer groups, but it is difficult to consider their positions when they do not participate in the consultation process. ARNECC hopes that Subscribers will pass on any information to their clients as it is very difficult to consult with end users.

## Digital Certificates

**36. Regarding Model Operating Requirement 7.6.3, can you please explain the reasons for the wording and whether any consideration has been given to the costs of parties who will need to verify those digital certificates?**

Cost was not a consideration. It was implemented because there is an understanding that Subscribers have open digital certificates that they will want to use. Both open and closed digital certificates are currently being used.

**37. Was there much demand from people wanting to use open digital certificates?**

Yes, there is demand. There are Subscribers who are currently using, and would like to continue using, open digital certificates.

**38. If Model Participation Rule 5.6 is removed, could the rules allow for the use of one digital certificate across multiple subscriptions. We have people that carry around five.**

This Model Operating Requirement relates to who is providing the digital certificates, not Signers signing on behalf of different organisations.

**39. It is my view that it is in the interest of ELNOs to support open digital certificates. Has ARNECC considered making it a requirement that ELNOs only issue open digital certificates?**

The amendments were intended to require ELNOs to permit Subscribers to use open digital certificates to digitally sign instruments, provided those open digital certificates meet all other relevant Model Operating Requirements. The requirements do not prevent ELNOs from issuing closed certificates that can only be used to digitally sign in their ELN. There is no current intention to require ELNOs to only issue open digital certificates.

**40. Does new Model Operating Requirement 7.6.3 mean that ELNOs will not be able to issue digital certificates that can only be used to digitally sign in their ELN?**

Proposed new Model Operating Requirement 7.6.3 now explicitly requires ELNOs to permit Subscribers to use open digital certificates to digitally sign instruments and documents in their ELN, provided those open digital certificates meet all other relevant Model Operating Requirements. It does not prevent ELNOs from also permitting Subscribers to use closed digital certificates that can only be used to digitally sign in their ELN.

## Other

**41. Why has the document capability for ELNOs been expanded?**

Previously ELNOs were required to enable a minimum number of standard documents. The proposed changes to Model Operating Rule 5.2 allow the Registrars to require additional documents and functionality from ELNOs, so that electronic lodgment can have a much wider

application. This will give potential for all documents to be lodged electronically and remove the likelihood of transactions reverting to paper.

- 42. In regard to Model Participation Rule 7.2.3, the definition for ‘insolvency event’ appears too broad. For example, banks issue financial hardship loans that go to people who are facing divorce, have lost their job, or are affected by bushfires. These individuals are all captured by the rule as being insolvent, when in practice the banks may not treat them as such. The definition within Model Participation Rule 7.2.3 is punitive and it is too broadly drafted.**  
The definition has not changed since the Model Participation Rules were first introduced. ARNECC would appreciate it if these concerns are expanded on in a written submission.
- 43. Has the proposed timeframe for implementing these broad amendments taken account of the IT and business changes that may be required?**  
ARNECC would welcome written submissions about any concerns about the timing of technical or operational implementation.
- 44. Have you had any specific submissions from insurers about the transfer of risk from title assurance funds to practitioners?**  
ARNECC does not consider that there is a transfer of risk. All insurers have been included in this consultation period.
- 45. Removing the requirement in Model Operating Requirement 5.5 for ELNOs to publish Integration terms and conditions could lead to ELNOs discriminating between different types of integrators.**  
The requirement for an ELNO to treat integrators on an Equivalent Basis in Model Operating Requirement 5.5.3 has not been amended. The proposed amendments aim to strike a balance between transparency and feedback that the ELNOs integration terms and conditions contain security requirements and other commercially sensitive information.