



AUSTRALIAN REGISTRARS NATIONAL ELECTRONIC CONVEYANCING COUNCIL

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Attention: Forum Attendee

ARNECC Industry Forum – June 2015

Thank you for intending to attend ARNECC's Industry Forum in Melbourne next Monday afternoon 15 June starting at 2pm. The forum is being held at Land Victoria on Level 16, 570 Bourke Street.

ARNECC is very aware that it is some months since consultation closed on the latest version of the Model Operating Requirements (MOR) and Model Participation Rules (MPR). Addressing all of the issues raised on the proposed amendments to the MPR in particular has been challenging and has required specialist advice to be sought in several areas.

ARNECC recognises that all industry participants are looking for stability in the regulatory framework and for this reason is keen that once the current versions are settled they will remain so for sufficient time for all parties to concentrate on building up volume through the electronic channel for completing conveyancing transactions.

With this in mind, the Forum is to concentrate on the MPR amendments only, and only the most significant of those amendments. A marked-up copy of the proposed amendments to the MPR is being provided with this note for those who wish to see how the most significant amendments as well as all other amendments are intended to be made. It is not intended however to deal with the drafting of any specific amendment at the Forum.

At the Forum, five principal issues will be addressed. Not unsurprisingly, they are all related to the Verification of Identity (Vol) regime which can be summarised as follows:

Overview of Vol regime

A Subscriber, or a mortgagee represented by a Subscriber, can either apply the Vol Standard or conduct the verification in some other way that constitutes taking reasonable steps.

Where an Identity Agent (formerly Subscriber Agent) is used, the Subscriber or the mortgagee must:

- reasonably believe that the Identity Agent is reputable and competent and holds the required insurances; and
- direct the Identity Agent to use the Vol Standard.

Compliance with the Vol Standard by a Subscriber, by an Identity Agent engaged by a Subscriber or, where the Subscriber represents a mortgagee, by that mortgagee or that mortgagee's Identity Agent, will be deemed to constitute taking reasonable steps, ie the so-called "safe harbour".

In other instances the Subscriber can use any agent to apply either the Vol Standard or other reasonable steps appropriate to the circumstances, including overseas and in remote areas and exceptional situations.

The five principal issues are:

1. Subscriber responsibility in Vol

Submissions received on the proposed changes to the MPR drew attention to the extent to which a Subscriber should be responsible for a Subscriber Agent conducting a Vol on their behalf. Views varied on this and to resolve some uncertainties ARNECC sought independent advice.

ARNECC's view is that, in line with other Subscriber obligations, the common law of agency should apply notwithstanding that such an approach does not give some stakeholders the absolute certainty they were seeking. Under this approach a Subscriber is responsible for all of the acts of their Subscriber Agent in the conduct of a Vol reasonably within the scope of the Agent's engagement. This means generally a Subscriber will be held responsible for an Agent's negligent conduct but not, with some limited exceptions, the Agent's fraudulent conduct.

ARNECC's reasoning in taking this approach is that it best replicates existing arrangements in the conveyancing process. The legislated compensation arrangements in each jurisdiction will remain unaffected by this approach.

(Rule 6.5.4(c) in the Consultation Draft is no longer in the accompanying further amended MPR.)

2. Subscriber Agent insurance for Vol

Submissions drew attention to the insurance requirements for Subscriber Agents, particularly the minimum aggregate requirement for both professional indemnity and fidelity cover, as being either unrealistically high or difficult to obtain commercially and preventing some industry participants from conducting Vol as Subscriber Agents.

ARNECC's view is that the current insurance requirements should be retained for the time being while a thorough independent risk assessment is undertaken of the Vol regime, including both the Vol of Subscriber applicants by ELNOs and the Vol of transacting parties by Subscribers, by mortgagees represented by a Subscriber and by their respective Subscriber Agents. ARNECC intends to invite key industry representatives to be involved in the risk assessment. When the risk assessment is completed the insurance requirements for Subscriber Agents and for ELNO Agents will be reviewed. This work is expected to take between 6 and 12 months.

ARNECC has obtained advice that the insurance requirements are available commercially and believes that the ability to use any agent (see issue 3) ensures all those required to undertake Vol can do so.

3. Use of Subscriber Agents in Vol

Submissions also raised concern about possible disruption of the mortgage origination process if mortgage brokers, that generally don't hold the levels of insurance required to be Subscriber Agents, were unable to conduct Vol in accordance with the MPR. Others raised concerns that persons holding the insurance may not be available in remote areas and in exceptional circumstances such as for verifying the identity of persons in gaols and aged care establishments.

ARNECC's view is that Subscriber Agents should only need to comply with the insurance requirements in the MPR when applying the Vol Standard and when the Subscriber or mortgage lender engaging them for that purpose wants to obtain safe harbour for their verification, that is, to know at the outset that the process the Agent has applied will always be considered as satisfying the requirement for reasonable steps to be used.

This means that lenders using mortgage brokers to originate their mortgages can use any agent who they consider appropriate to comply with their Vol obligations, including mortgage brokers whether regulated or not. The lender's agent need not satisfy the insurance requirements in the MPR as long as the lender does not want safe harbour. Lenders may determine a minimum level of insurance of their choosing that they require their agent to hold, including the level of insurance that mortgage brokers hold. And provided they apply reasonable steps to the Vol, including if they choose the Vol Standard, then it is likely that they will be found to have complied with their obligations under the MPR.

It also means that for clients and mortgagors in remote areas, including overseas, or in exceptional circumstances, Subscribers can use any person they consider appropriate to carry out the Vol. These Subscribers will not however have the certainty of knowing at the time of the transaction that they will be considered to have taken reasonable steps should a fraud be revealed at a later time.

(The amendment is at Rule 6.5.5 in the accompanying further amended MPR.)

4. The Vol Standard

Many of the submissions raised issues with the way the Vol Standard was drafted. This was evident through the issues raised and through the interpretations made of the drafting that gave rise to some of those issues.

To deal with this and to also ensure it can be readily applied to transactions to be lodged on paper, the Standard has been amended. Principal among the amendments are:

- all references to Subscriber and Subscriber Agent have been removed
- the role of the person undertaking the verification is to be known as an Identity Verifier
- a category of identity documents has been added for Australian nationals with foreign passports and other identification documents issued by governments overseas
- all references to concurrent signing or witnessing of documents has been removed (see issue 5)
- all references to using an agent to conduct the verification have been moved to the body of the MPR
- the provisions for re-verification every two years have been clarified
- the provisions for verifications overseas by consular offices and defence force personnel have been removed.

With respect to the services previously included for verifications overseas, their removal has been a result of their having been found to not be sufficiently robust for inclusion in the Standard. However, ARNECC is conscious of the need for a robust process for both Australian citizens and residents overseas and for foreign nationals overseas and intends working with the Department of Foreign Affairs and Trade (DFAT) with the intention of developing a mutually satisfactory process using consular offices. This inclusion in the Standard will not be immediately available.

(The amendments are at Schedule 8 and Rule 6.5 in the accompanying further amended MPR.)

5. Document Signing

Finally, submissions drew attention to the difficulties that will arise if documents have to be signed or witnessed at the same time that a Vol is conducted. This issue was particularly raised in the context of the mortgage origination process and in the paper process generally when the requirements are applied by jurisdictions to their paper processes as part of aligning the electronic and paper processes.

ARNECC's view is that wherever possible document signing or witnessing at the same time as Vol is best practice and limits the opportunities for fraud. Nevertheless, the difficulties that may arise from making it a requirement are recognised.

The MPR has been amended to require Subscribers to take reasonable steps to ensure that any document needing to be signed, such as a Client Authorisation or mortgage, is signed by the person whose identity has been verified. This makes it the obligation of Subscribers to ensure the link between document signing and Vol.

(The amendments are the deletion of clause 2.3 in Schedule 8 and the addition of Rule 6.14 in the accompanying further amended MPR.)

These issues and the reasoning behind ARNECC's thinking on each will be expanded upon at the Forum.

As well, there will be plenty of time for you to ask questions and to raise any residual or new concerns you may have.

I look forward to seeing you there.

Yours faithfully,



Brenton Pike

Chair

Australian Registrars National Electronic Conveyancing Council

10 June 2015