

National E-Conveyancing Legal Framework Update



**Jurisdictional Stakeholder
Information Session
24 October 2012**

Background

- On 30 March 2012 ARNECC launched a national consultation on the Electronic Conveyancing National Law (ECNL), the Model Operating Requirements (MORs) and the Model Participation Rules (MPRs)
- Valuable feedback has been received from stakeholders including: the Australian Bankers' Association, Australian Finance Conference, the Australian Institute of Conveyancers, the Law Council of Australia and the Legal Practitioners' Liability Committee

Background ... continued



- Subsequent consultation sessions held with the Australian Bankers' Association, the Australian Institute of Conveyancers, insurers and the Law Council of Australia
- ARNECC has considered the feedback and has made extensive amendments, particularly to the MPRs
- Noteworthy changes to the ECNL and the MPRs will be covered today
- The MORs have also been amended and are available on ARNECC's website

Electronic Conveyancing National Law (ECNL)

- The ECNL was introduced in the NSW Parliament (as the host jurisdiction for the Law) on 17 October 2012
- Other jurisdictions will either enact application or corresponding legislation

Noteworthy Changes to the ECNL

- Clause 5 – the objects have been amended to clarify that the ECNL does not derogate from the fundamental principles of Torrens system
- Clause 12 – Attribution Rule (changes set out in following slides)
- Clause 28 - appeals to be preceded by the Registrar's written grounds for a decision

Noteworthy Changes to the ECNL ... continued

- Clause 34 - self incrimination is not a reasonable excuse not to comply with a Compliance Examination but in most cases the evidence cannot be used in criminal proceedings



Changes to the Attribution Rule – Clause 12



A Subscriber can repudiate the Digital Signature if the Subscriber establishes:

- that the Digital Signature was not created by the Subscriber, and
- that the Digital Signature was not created by a person who, at the time the Subscriber's Digital Signature was created:
 - was an employee, agent, contractor or officer (however described) of the Subscriber, and
 - had the Subscriber's express or implied authority to create the Subscriber's Digital Signature for any document or documents, and
- that neither of the following enabled the Subscriber's Digital Signature to be created:
 - a failure by the Subscriber, or any of the Subscriber's employees, agents, contractors or officers, to fully comply with the requirements of the participation rules, or
 - a failure by the Subscriber, or any of the Subscriber's employees, agents, contractors or officers, to take reasonable care

Attribution Rule ... continued

If a Subscriber's Digital Signature is created for a Registry Instrument then:

- unless that Subscriber repudiates that Digital Signature, that Registry Instrument is to be taken to be signed by that Subscriber, and is binding, on:
 - that Subscriber, and
 - all other persons (if any) for whom that Subscriber acts under a Client Authorisation, and
- for the benefit of:
 - each party to that Conveyancing Transaction, and
 - each Participating Subscriber, and
 - the Registrar, after lodgment
- the Subscriber cannot repudiate that Digital Signature except in the circumstances set out in clause 12 (4)

Attribution Rule ... continued

- The attribution rule does not prevent the unsigned of a Registry Instrument or other document
- The MPRs will impose an obligation on a Subscriber to unsign documents where it is discovered that the transaction has been jeopardized or compromised
- An ELNO is required by the MORs to provide a facility to unsign documents
- Unsigning is the electronic equivalent of tearing up a signed document prior to settlement and, in practice, will likely be achieved by deleting the Digital Signature

Noteworthy Changes to the MPRs



Reasonable Steps

- Most significant change is the replacement of strict liability with taking reasonable steps, eg, a Subscriber must take reasonable steps to:
 - verify the authority of each person signing a Client Authorisation (6.3(d))
 - establish that their Client is entitled to enter into the Conveyancing Transaction (6.4)
 - identify their Client (6.5)
 - supply accurate information (6.11)
 - ensure that only Users use an ELN (7.2(a)) and Signers sign (7.5.3)

Eligibility - Character

- ADIs, Australian legal practitioners, law practices, licensed conveyancers and government are deemed to comply with the character requirements for Subscribers (4.3.2)
- Similar deeming applies to Signers (7.3.2)

Subscriber Roles

- Representatives must comply with the laws of the Jurisdiction as to who can conduct a Conveyancing Transaction and take reasonable steps to ensure that Signers do the same (5.3)
- Participating Subscribers must agree on the Responsible Subscriber (5.4)

Supporting Evidence (6.6)

- Clarified to include copies where appropriate
- Categories of documents limited to those relating to duty, Client Authorisations, a Client's entitlement to enter into the Conveyancing Transaction, verification of identity and Prescribed Requirements

Mortgages (6.13)

- Where a mortgagor is not a Subscriber, or represented by a Subscriber, the mortgagee must:
 - ensure it has a mortgage signed by the mortgagor
 - provide a specific certification
- The position that a mortgagee only signs on its own behalf, not on behalf of the mortgagor, has been clarified

Security and Integrity

- The protection measures have been clarified so that a Subscriber must take reasonable steps to comply with an ELNO's security policy regarding technology, virus protection and protecting passwords, user ids, Private Keys and Digital Certificates and training and monitoring of its Users (7.1)
- In specific situations the Subscriber now has an obligation to unsign electronic Documents where possible and, where not, to notify the ELNO (7.7.1 and 7.9.2)

Schedule 2 - Amendment to Participation Rules



- The procedure has been simplified
- Consultation with peak bodies has been included
- Notification of an amendment must contain the effective date
- Grounds for when prior consultation can be dispensed with limited to where required by law or an emergency situation exists

Schedule 3 – Certification Rules



- Amended in line with other amendments in the MPRs
- Certification as to correctness limited
- Mortgage related certification amended
- New certification for retrieval and destruction of Certificates of Title included

Schedule 4 – Client Authorisation

- Minor amendments made as this is the subject of a joint stakeholder/ARNECC working group
- A draft indemnity clause has been added for Subscribers representing mortgagees, where the mortgagee conducts their own verification of identity

Schedule 6 - Insurance Rules



- Licensed Conveyancers, Australian Legal Practitioners or a Law Practice are deemed to comply



Schedule 7 – Suspension and Termination



- Objectivity included in Registrar’s decision making process – Registrar must know or have reasonable grounds to suspect/believe
- Fraud or negligence must impact on a Conveyancing Transaction
- New Termination Event included – order or direction of court, tribunal, professional regulator that may impact on a Conveyancing Transaction
- Show Cause Notice procedure added

MPR 6.5 and Schedule 8 – Verification of Identity



- Compliance with the Verification of Identity Standard is deemed to constitute taking reasonable steps
- No longer necessary to verify the identity of a mortgagor when the mortgage is being discharged
- It is now a requirement to identify a person to whom a Certificate of Title is to be given

Verification of Identity ... continued

- A new category has been added to cover Australian citizens or residents who may have difficulty obtaining identity documents – specific people to provide an Identifier Declaration
- Changed to taking reasonable steps to establish:
 - who is authorised to sign on behalf of a body corporate
 - that a Conveyancing Transaction is authorised by a power of attorney

Verification of Identity ... continued

- Verification in a Foreign Country has been added
- No longer strict liability for a Subscriber Agent but the Subscriber must:
 - appoint a Subscriber Agent they reasonably believe to be reputable, competent and insured
 - direct the Subscriber Agent to use the Verification of Identity Standard

Questions

