

27 March 2020

Mr Ian Ireson
Chief Executive Land Use Victoria
Registrar of Titles
Department of Environment, Land, Water and Planning

by e-mail only: ian-ireson@delwp.vic.gov.au

Dear Registrar,

ARNECC – Model Operating Requirements and Model Participation Rules Version 6 Consultation Drafts

The Law Institute of Victoria ('LIV') wishes to raise concerns about the proposed amendments to the current Model Operating Requirements ('MORs') and Model Participation Rules ('MPRs') by Version 6 Consultation Drafts ('Consultation Drafts').

Some LIV members raised concerns in the meeting of Property Law Committee members with Land Use Victoria ('LUV') representatives on Tuesday 18 February 2020 about the proposed amendment to MPR Clause 6.5.2 ('Amendment Clause'). The Amendment Clause states as follows:

- 6.5.2 For the purposes of complying with Participation Rule 6.5.1, the Subscriber ..., ~~can either:~~
- (a) must apply the Verification of Identity Standard; or
 - (b) if reasonably satisfied that the Verification of Identity Standard cannot be applied, verify the identity of a Person in some other way that constitutes the taking of reasonable steps; or
 - (c) for Participation Rules 6.5.1(b)(iii) and 6.5.1(iv), either apply the Verification of Identity Standard or verify the identity of a Person in some way that constitutes the taking of reasonable steps.

The effect of the Amendment Clause will be to abolish the discretion of a subscriber to use 'reasonable steps' as an alternative to the Verification of Identity Standard ('VOI Standard').

At the Industry Forum held by the Australian Registrars National Electronic Conveyancing Council ('ARNECC') on 5 February 2020 it was stated that "ARNECC had commissioned an independent review of the cyber security requirements currently placed on Electronic Lodgment Network Operators (ELNOs) and Subscribers under the MPRs and MORs to understand whether they represent industry best practice for mitigating cyber fraud within the boundaries of what is within the Registrars' power under

the Electronic Conveyancing National Law to require”.¹ The stakeholder representatives who attended the forum were informed that the current version of MPR 6.5.2 was identified in the report commissioned by ARNECC as being a high security risk and prone to fraud.

The LIV understands that no evidence of actual fraud previously committed by subscribers was offered at the forum, and the ARNECC report was not circulated. The LIV observes that the Industry Forum meeting appears inconsistent with ARNECC's principles of best practice consultation which include transparency, and “fact-finding and evidence-based commentary and decision-making”.²

The LIV submits that the proposed Amendment Clause will cause substantial practical difficulties in identifying clients and is likely to increase costs for consumers. The Amendment Clause will require practitioners to carry out the VOI Standard for clients every two years even where the following situations, which the LIV submits present a very low risk of fraud, apply:

1. the lawyer identified a client according to the VOI Standard initially and has subsequently continued to act for the identified person for 2 years with no apparent change to that person's identity.
2. clients who have been personally known to lawyers for many years, such as family members and long-term friends. Many lawyers have acted for a particular client for several years in relation to different matters. This would particularly apply in country areas, where there is a comparatively stable population and often very few law firms.

The LIV is hopeful that the consultation with various stakeholders which has widely criticized the proposed Amendment Clause results in a decision by ARNECC not to abolish the practitioner's discretion to use reasonable steps to satisfy the VOI Standard. The initial introduction of the ‘reasonable steps’ discretion is viewed by some LIV members as one of the essential pillars of the profession's support for an electronic conveyancing network when the model was formulated for the introduction of electronic transactions in Victoria in October 2018.

In the LIV's view, the complete abolition of the discretion to use reasonable steps will result in a costly administrative burden which the LIV submits is being unjustly imposed on subscribers and potentially may be passed onto their clients.

In light of the concerns raised by some LIV members if the proposed Amendment Clause is implemented, the LIV proposes that the following exceptions to the strict requirement to use the VOI Standard at all times be adopted:

- (a). Directors of a proprietary company can have their identity certified by In-House Counsel (if such counsel exists);

¹Australian Registrars National Electronic Conveyancing Council, Industry Forum, ‘Version 6 Model Participation Rules, Model Operating Requirements’, Melbourne 5 February 2020 p.3 Retrieved from <https://www.arnecc.gov.au/__data/assets/pdf_file/0019/1471303/arnecc-stakeholder-briefing-february-2020.pdf>

²ARNECC STAKEHOLDER ENGAGEMENT POLICY AND PROCEDURES Retrieved from <https://www.arnecc.gov.au/__data/assets/pdf_file/0011/698447/ARNECC_Stakeholder_Engagement_Policy_Procedures_Nov_2014.pdf>

- (b). if there are special circumstances which prevent the consumer from satisfying the VOI Standard, such as someone who no longer drives or holds a passport and lives in an aged care home, or a refugee who has little to no documentation, the current reasonable steps discretion can continue to be used. However, the LIV recommends the ARNECC provides further guidance (available on its website) setting out examples of what is not considered to be reasonable steps on the basis that, if those steps are then used, they will not provide a safe harbour for the subscriber;
- (c). immediate family members and long-standing personal friends of the subscriber can be identified using reasonable steps;
- (d). Aboriginal and Torres Strait Islander persons who do not have sufficient documentation to satisfy the VOI standard can be identified by elders of their own tribe; and
- (e). prior to a VOI expiring after 2 years, the subscriber can renew the VOI using the reasonable steps discretion. If this is shown to be a genuine security risk, the LIV recommends additional requirements that are deemed to be reasonable steps could be adopted. These could require the 2-year-old VOI and supporting VOI documents to be part of an updated VOI that contains a statement by the subscriber that he or she has reviewed the original VOI and continues to have regular dealings with the client, that is, the subscriber has met face to face with the person on numerous occasions and the subscriber is satisfied that they are dealing with the same person and has no reason to believe that they have changed their name (subject to an acceptable maximum period, for example 6 years). If thought necessary by ARNECC, the updated VOI could require the client to produce the original of at least one identity document to confirm that there has been no change in the preceding 2 years.

If the intention of ARNECC in amending MPR Clause 6.5.2 is to prevent the use of AI facial recognition technology in fulfilling the subscribers obligation to satisfy the VOI Standard, the proposed amendment will adversely affect Identity Agents such as IDSecure, ZipID and WebVOI, to name a few. Consequently, consumers who live remotely will be burdened with the additional cost of physically travelling to either their lawyer or an alternative Identity Agent in order to satisfy the VOI Standard.

In the LIV's view, the cost of conveyancing services Australia-wide will significantly increase should the above exceptions not be adopted by ARNECC.

We welcome the opportunity to meet with you to discuss our concerns. In the interim, please do not hesitate to contact me, or Senior Lawyer of the Property and Environmental Law Section, Paul Snow at PSnow@liv.asn.au or on (03) 9607 9314 if you wish to discuss any of the matters raised above.

Yours faithfully



Sam Pandya
President
Law Institute of Victoria