

# Banking and finance update

March 2015



## Proposed Changes to Verification of identity requirements

### **Will lenders ever find “safe harbour”?**

ARNECC (Australian Registrars' National Electronic Conveyancing Council) is proposing changes to the Model Participation Rules for Electronic Conveyancing, which if implemented will make it more difficult for lenders to rely upon the safe harbour rules prescribed in relation to verification of identity requirements for property transactions. A consultation period concluded at the end of February and stakeholders are awaiting an outcome.

#### **LET US EXPLAIN THE SIGNIFICANCE OF THESE PROPOSED CHANGES.**

In recent years land titles offices in Western Australia and then South Australia introduced verification of identity (VOI) requirements for paper-based property transactions.

More recently Victoria and New South Wales have followed suit.

In the lead-up to implementation of electronic conveyancing VOI requirements were set out in the model participation rules introduced under the new electronic conveyancing national laws.

We have previously published articles on this issue (see links).

[Implementation of VOI requirements for paper based mortgages](#)

[South Australia Verification of Identity policy](#)

## WHAT ARE VOI REQUIREMENTS

For lenders, VOI requires the lender/mortgagee to take **reasonable steps** to verify the identity of proposed mortgagor (normally one and the same as the borrower).

For general property transactions, parties to the transaction are also required to take "reasonable steps" to verify the identity of the parties to the transaction, such as vendors and purchasers.

What amounts to taking "reasonable steps" in any given situation is uncertain and is dependent upon a whole range of circumstances and factors.

## SAFE HARBOUR TO THE RESCUE

Governments have come to the rescue of parties to a property transaction by providing a "safe harbour" mechanism. By this they mean that mortgagees/lenders (and other parties to a property transaction) will be deemed to have taken reasonable steps to identify a party to the transaction if they follow certain specified steps as set out in the legislation, manuals or model rules.

If a party to a property transaction follows the specified **safe harbour** procedures, then they are deemed to have taken reasonable steps to verify identity and are protected from claims if the transaction is later found to have been fraudulent or otherwise flawed due to matters such as stolen identity.

## WHEN SHOULD VERIFICATION OF IDENTITY BE CARRIED OUT? – CRITICAL ISSUE

This has become a critical issue.

Lenders will normally verify identity at the time application is made for a loan. Yet, the loan contract and mortgage documentation might not be prepared until sometime later.

As mentioned above, Western Australia was the first state to introduce what we call the modern form of verification of identity requirements.

## WHEN SHOULD VERIFICATION OF IDENTITY BE CARRIED OUT? – WESTERN AUSTRALIA

The West Australia requirements are set out in Chapter 14 of the Land Titles Registration Practice Manual issued by Landgate.

Importantly, in Western Australia a lender does not need to identify the mortgagor/borrower at the time that person executes the mortgage documentation. In other words, the person identifying the mortgagor/borrower does not have to witness the signature of that person on the transaction document.

The Landgate Manual states at page 507:

### When Verification of Identity Must Occur 14.4.3

*Verification of Identity is to be undertaken at any time after receiving instructions and before execution of a document to which this Practice applies.*

*Identification and execution of the documents may not necessarily occur at the same time. However, it is essential that the verification of identity has occurred before the documents are lodged for registration or noting.*

*Ideally, verification of identity should occur immediately prior to the execution of the document, so that the Identifier and witness, (if a witness is required), are the same person.*

*The Registrar of Titles and Commissioner of Titles consider that verification of identity immediately prior to execution of documents provides for the lowest risk of potential fraud.*

*As to category 4 documents, where a Declaration of Identity is being used as an identity document, Verification of Identity of the person making the Declaration of Identity (refer to 14.4.5.1.2) should take place:*

- *at the time of execution of the Declaration of Identity, and*
- *before the Verification of Identity of the person relying on the Declaration of Identity as an identity document.*

So, in Western Australia, while the Registrar suggests VOI be conducted close to the time of execution of the transaction documents – it is not a requirement, except in the case of category 4 verification.

## WHEN SHOULD VERIFICATION OF IDENTITY BE CARRIED OUT? – THE SITUATION UNDER E-CONVEYANCING

Under e-Conveyancing, it was initially assumed that similar types of rules to those applicable in Western Australia would apply. Certainly the categories of identity documents that need to be obtained in order to rely upon the safe harbour procedures are generally the same.

However, it is now clear that ARNECC (Australian Registrars National Electronic Conveyancing Council) is taking the position that before the safe harbour rules may be relied upon, the person identifying a party to a transaction must also witness their signature on the mortgage document or "client authorisation".

The relevant model participation rule was previously somewhat ambiguous on this issue.

ARNECC has recently engaged in a consultation process with industry on proposed changes to the Model Participation Rules. The consultation period has now closed. What ARNECC are proposing is to amend the Model Participation Rules dealing with verification of identity requirements to read as follows:

## 2. FACE-TO-FACE REGIME

2.1. *The verification of identity must be conducted during a face-to-face in-person interview between the Subscriber and the Person Being Identified.*

2.2. *Where Documents containing photographs are produced by the Person Being Identified, the Subscriber must be satisfied that the Person Being Identified is a reasonable likeness (for example the shape of his or her mouth, nose, eyes and the position of his or her cheek bones) to the Person depicted in those photographs.*

2.3. *Except where paragraph 8.1(b) or (c) of this Verification of Identity Standard applies, where a Client Authorisation, Registry Instrument or other document is required to be executed by the Person Being Identified, the Subscriber who is conducting the verification of identity in accordance with this Verification of Identity Standard must ensure that **the completed Client Authorisation, Registry Instrument or other document is signed in the same interview:***

- a. *by the Person Being Identified in the presence of the Subscriber; and*
- b. *by the Subscriber.*

In practice, this makes it most difficult for lenders to rely upon the "safe harbour" mechanism for reasons outlined above. A lender normally verifies identity at an early stage of a lending transaction, well before the mortgage documents are prepared for execution.

## RAMIFICATION OF CHANGES IF IMPLEMENTED

These changes, if implemented, will have broad ramifications for the finance industry and all participants, including those external service providers who offer a verification of identity service. If implemented, those external service providers will not only have to verify identity, but will have to provide a service under which they witness the actual transaction documents signed by the party to the transaction.

These changes, if implemented, will not only affect e-Conveyancing transactions, but paper based property transactions in Victoria and New South Wales, because their VOI requirements are based on the Model Participation Rules, as amended from time to time. It is important to note as well that in Victoria the property legislation itself contemplates identification at the time of execution in any event. See section 87A of the Transfer of Land Act 1958 (Victoria). The situation in New South Wales might also be further complicated because the definition of 'eligible witness' in section 117(4)(b) of the Real Property Act 1900 (NSW) excludes a party to the transaction, in this case the mortgagee.

## WHAT LENDERS NEED TO DO?

All lenders need to be aware of these developments and give consideration to how they will deal with the situation, if the proposed amendments to the Model Participation Rules take effect. Third party suppliers will need to review their service offering.

## WE ARE HERE TO HELP

We are here to help clients work through these issues and the potential impact on our client's businesses. We advise on how to manage potential changes in risk profiles.

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