

Banking and finance update

November 2015



“The sleeper awakes” e-Conveyancing: the right to deal

In e-Conveyancing most of the focus to date has been on how to satisfy verification of identity (VOI) requirements. The VOI obligation is to take reasonable steps to verify the identity of each party to the conveyancing transaction.

However, when one examines the Model Participation Rules – Version 3 (MPR), it will be obvious that there are in fact two circumstances in which the representative of a party to a transaction must take “reasonable steps”.

Under the MPR:

- reasonable steps must be taken to verify identity (MPR clause 6.5), and
- reasonable steps must be taken to verify the right to deal (MPR clause 6.4).

The “right to deal” has always been present in the MPR, but to date has been very much a “sleeper” issue, because no specific guidance has been issued on how to fulfil the obligation to verify the “right to deal”.

It is fair to say that the “sleeper has awoken” with the release of a consultation draft of MPR [Guidance Note #4 – Right To Deal](#) on 22 September 2015 by the Australian Registrars’ National Electronic Conveyancing Council (ARNECC).

Feedback on the consultation draft is due by 31 October 2015.

WHAT IS THE OBLIGATION IN RELATION TO THE RIGHT TO DEAL?

Clause 6.4 of the MPR states the following.

“6.4 Right to Deal

- where the subscriber is a representative, for each conveyancing transaction the subscriber must take reasonable steps to verify that its client is a legal person and has the right to enter into the conveyancing transaction.*
- where the subscriber is a mortgagee, or the subscriber represents a mortgagee, for each mortgage the subscriber must take reasonable steps to verify that the mortgagor is a legal person and has the right to enter into the mortgage.”*

The requirement to verify the right to deal is a twofold requirement, being:

- that the person who is the party to the transaction is a “legal person” and
- has the right to enter into the transaction/mortgage.

In summary we see the right to deal as being the right of a party to the transaction to deal with an interest in the land.

WHAT'S CHANGING?

In many ways, establishing the right of a party to deal in a property transaction is probably something both conveyancers and lenders have always undertaken intuitively as part of normal prudent conveyancing/lending practices. However, what is now changing is that:

- a new express legal obligation is created;
- conveyancers and lenders must now consciously turn their minds to the issue of “right to deal”;
- records need to be kept for seven (7) years describing the process by which the right to deal in any given transaction was established;
- documentation evidencing the right to deal needs to be kept for seven (7) years; and
- liability will attach where reasonable steps have not been taken, or evidence to support the conclusion that a party has the right to deal with an interest in the land has either not been gathered or not retained.

KEY ISSUES FROM THE CONSULTATION DRAFT

The consultation draft issued by ARNECC itself illustrates how vexed an issue this is. Specifically the consultation draft notes the following issues:

1. WHEN MUST THE RIGHT TO DEAL BE VERIFIED?

The right of a party to a conveyancing transaction or a mortgage must be verified each time a transaction is entered into.

In addition, it is suggested that because verification of the right to deal is so closely linked to verification of identity that prudent conveyancing practice would be to conduct these processes simultaneously. I disagree with this suggestion.

2. HOW DO YOU VERIFY THE RIGHT TO DEAL?

Well, obviously one takes “reasonable steps”!

Any duly authorised person by an organisation can undertake that verification.

Unlike VOI, there are no provisions deeming that reasonable steps have been taken if specified steps are taken.

3. WHAT ARE REASONABLE STEPS?

The draft guidance notes state that reasonable steps:

“When applied to subscribers and mortgagees ... means the taking of such steps as an ordinary prudent subscriber or mortgagee would have taken in the circumstances and in the ordinary course of his or her business. Whether “reasonable steps” were taken will be a question of fact depending on the circumstances of the individual case. Ultimately this would be determined by a court on an objective basis.”

Supporting evidence needs to be sighted. That evidence must link the relevant party to the interest in land being dealt with.

No “safe harbour” or deeming provisions to ascertain “reasonable steps”

While there are safe harbour/ deeming rules as to what constitutes taking reasonable steps to verify identity, there are no such deeming rules available for assessing what amounts to taking reasonable steps to verify the right to deal.

4. EXAMPLES OF THE TYPE OF EVIDENCE THAT CAN BE USED TO VERIFY RIGHT TO DEAL IN PARTICULAR CIRCUMSTANCES

The draft guidance note gives guidance in connection with a number of scenarios such as:

a. Vendor and Mortgagor

Types of documentation which may be relevant here to verify right to deal include:

- current local government rates notice;
- current utility bills for the property;
- current land tax assessment notices;
- loan documentation ;
- existing mortgage; and
- title to the property.

Importantly, it is suggested that a title search should be obtained to check who is named as the registered proprietor of the land to ensure the correct person's right to deal has been verified. For lenders, this will be problematic because a title search is often only obtained late in the transaction, usually after external solicitors are instructed or the matter proceeds to the settlement department.

b. Incoming mortgagee

This is a difficult concept for lenders to grasp. If a lender has a legal representative acting for them, then that representative will need to verify the right of the "lender" to take a mortgage over the property! It is suggested that this can be done by the representative of the lender sighting a copy of the official loan documentation.

c. Purchaser.

The obvious evidence where there is a purchase transaction is the contract of sale for the property showing the transferee as purchaser.

5. SUPPORTING EVIDENCE

There is a specific obligation to retain supporting evidence (for 7 years) to show what steps you took to reasonably verify the right to deal.

It is unclear whether it is necessary to sight copies of original documents, or whether certified copies or plain copies are sufficient.

6. SPECIAL CASES

Verification of right to deal in special cases is examined in the draft guidance note under the section headed "further considerations" at clause 5.7. These include examining what is required to verify the right to deal where the transacting party is:

- subject to a trust
- an insolvency event has occurred
- an entity created or governed by statute
- a successor at law to the registered owner
- an executor
- subject to guardian and administration legislation
- acting under a power of attorney
- an incorporated association

DOES THE REQUIREMENT TO TAKE REASONABLE STEPS TO VERIFY THE RIGHT TO DEAL GO TOO FAR?

At the end of the draft guidance note there is a section dealing with when further enquiries ought to be made. It strikes me that some of the circumstances mentioned and the further enquiries that should be made really go too far.

Consider the following:

- if you are instructed to act for more than one person and only one person provides instructions then you need to contact all persons to confirm their instructions
- where the transaction is urgent you need to enquire as to why the urgency
- where the client has limited English you probably need to engage an independent interpreter
- where the transaction involves a non-standard mortgage of an unencumbered title then one needs to make further enquiries
- if you doubt your client's mental capacity then you might need to obtain a medical certificate to verify that they have the capacity.

Question: How do I know that my client John Smith is the same John Smith that is the proprietor on title who has the right to deal?

Answer: What is reasonable depends on the circumstances ... You should make further enquiries where doubt arises or should arise in relation to instructions and transaction. For example, the purported transferor is too young to have purchased the property at the time it was purchased and therefore suspicion should arise that they may be John Smith Junior. "

This is an example Q&A provided in the draft guidance note

CONCLUSION

Verifying the "right to deal" is a difficult concept. It is clear that there are no and can be no hard and fast rules as to what constitutes "taking reasonable steps" to verify the right of a person to deal with an interest in land in any given circumstance.

The fact that there cannot be any hard and fast rules makes it particularly difficult for lenders wishing to systematise their processes and procedures and to have tasks performed at a more junior level.

Investigations need to be conducted and subtle judgments made, neither of which sit comfortably with today's modern banking practices which demand streamlined processes, standardised policies and procedures, speed and efficiency.

It will be interesting to see how conveyancers and lenders deal with this issue in practice.

FURTHER LINKS

ARNECC Consultation draft of MPR Guidance Note #4 – Right To Deal, 22 September 2015

Author : **Richard Williams, Partner**

CONTACT US:

Penny Cable, Sydney

Jill Milburn, Sydney

Richard Williams, Melbourne

Neville Debney, Melbourne

Mary Nemeth, Melbourne

Shannon Adams, Adelaide

Rick Harley, Adelaide

Stefan Jury, Adelaide

Troy Hawthorn, Brisbane

Paul Morris, Brisbane

Darren Miller, Perth

Marcus Easthope, Perth

Antony Logan, Hobart