



## Précis Paper

### Reasonable Steps for e-Conveyancing

New requirements have recently been introduced relating to the verification of identity of clients for the purpose of minimising the risk of fraudulent land conveyances, including property transfers, the lodging of caveats, and the registration of leases and mortgages.

#### **Discussion Includes**

- e-Conveyancing
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- Legislative Requirements
- Verification of Identity
- Reasonable steps
- A firm's written policy
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- An overseas client
- Red flags
- The risks associated with using verification agents
- Protections for solicitors or conveyancers
- Some key take home points for practitioners

# Précis Paper

## Reasonable Steps for e-Conveyancing

1. In this edition of BenchTV, Lee-Ann Walsh (Barrister - Frederick Jordan Chambers, Sydney) and Andrew Bailey (Barrister - Frederick Jordan Chambers, Sydney) discuss the new requirement for solicitors and licensed conveyancers to take reasonable steps to verify the identity of clients or agents of their clients who intend to instruct them to carry out a conveyancing transaction or hand over some certificate of title.

### e-Conveyancing

2. A new e-conveyancing system is being rolled out in the States and Territories. The verification of identity (VOI) component of the system requires a practitioner to make reasonable steps to verify the identification of their client. This will be important for practitioners who practice in transactional property, especially since the electronic conveyancing system is due for universal implementation any day now.
3. In NSW, solicitors and licensed conveyancers can now electronically lodge Land Titles dealings and documents via an online platform owned and operated by an electronic lodgement network operator (ELNO). In Australia, the only ELNO is Property Exchange Australia (PEXA). It is still possible to lodge Land Title dealings and documents by paper form but, by 1 July 2018, the PEXA platform must be used and certain statutory requirements must be complied with.
4. From 1 July 2018, all conveyancing transactions will need to be completed online. By October 2018, all paper certificates of title held by banks will be converted to electronic certificates of title. By next year, all remaining paper certificate of titles will be cancelled.
5. e-Conveyancing was a concept first proposed by stakeholders working in the property industry because they wanted a streamlined, efficient system for completing property settlements that would be uniform across Australia.

### The framework

6. In 2010 COAG launched an initiative to develop a single, uniform electronic conveyancing system across Australia by entering into inter-governmental agreements with each of the States and Territories. PEXA is the network that gives effect to the electronic lodgement of Land Titles dealings with the land titles services in each State and Territory. PEXA is regulated by the Australian Registrars National Electronic Conveyancing Council (ARNECC). ARNECC developed the regulatory framework under which PEXA and property lawyers are meant to operate which is overseen by each of the Land Titles Registrars in each of the State and Territories.

7. The Registrars are responsible for implementing the rules of the e-Conveyancing scheme within their own jurisdictions. ARNECC also has an advisory role and is responsible for giving guidance to the States and Territories in relation to the proposed changes to the National Law.
8. ARNECC has developed and published model operating requirements and participation rules on its website which ensure uniform application of the scheme across jurisdictions.

#### Legislative Requirements

9. The principle pieces of legislation that practitioners need to be aware of are the *Electronic Conveyancing National Law* (ECNL) (Cth) and the *Real Property Act 1900* (NSW).
10. The Real Property Act has been amended to include definitions and provisions that deal with certification of documents and the electronic lodgement of surveys and plans and electronic signatures

#### Verification of Identity

11. The verification of identity check is one of the most significant changes. Rule 6.5 of the National Law provides:  
6.5.1 The Subscriber must take reasonable steps to verify the identity of:  
(a) Clients: each Client or each of their Client Agents; and  
(b) Mortgagors:  
    (i) for mortgages, each mortgagor or each of their agents, where the Subscriber is a mortgagee, and the mortgagor (in its capacity as mortgagor) does not have a Representative; and  
    (ii) for mortgages, each mortgagor or each of their agents, where the Subscriber represents a mortgagee, and the mortgagor (in its capacity as mortgagor) does not have a Representative - however, the Subscriber need not take reasonable steps to verify the identity of each mortgagor or their agent if the Subscriber is reasonably satisfied that the mortgagee has taken reasonable steps to verify the identity of each mortgagor or their agent; and  
(c) Persons to whom certificates of title are provided:  
    (i) any Client or Client Agent, prior to the Subscriber providing a (duplicate/paper) certificate of title to that Client or Client Agent; and  
    (ii) any existing mortgagor, former mortgagor or their agent, prior to the Subscriber providing a (duplicate/paper) certificate of title to that existing mortgagor, former mortgagor or their agent - however, the Subscriber need not take reasonable steps to verify the identity of each mortgagor, former mortgagor or their agent if the Subscriber is reasonably satisfied that the mortgagee has taken reasonable steps to verify the identity of each mortgagor, former mortgagor or their agent; and  
(d) Signers: each of its Signers, prior to the initial allocation of a Digital Certificate to the Signer; and  
(e) Subscriber Administrators: each of its Subscriber Administrators, prior to their appointment as a Subscriber Administrator.

12. Solicitors and licensed conveyancers, as subscribers to the system, are required to take reasonable steps to verify the identity of clients or agents of their clients who intend to instruct them to carry out a conveyancing transaction or hand over some certificate of title.
13. The definition section in section 3 of the National Law defines "conveyancing transaction" as
  - a. transaction that involves one or more parties and the purpose of which is:
    - (a) to create, transfer, dispose of, mortgage, charge, lease or deal with in any other way an estate or interest in land, or
    - (b) to get something registered, noted or recorded in the titles register, or
    - (c) to get the registration, note or record of something in the titles register changed, withdrawn or removed.
14. The definition is quite broad and includes property transfers, the lodging of caveats, and the registration of leases and mortgages.
15. The process is similar to a 100 point ID check. There is a level of sophistication and responsibility incumbent on solicitors and conveyancers who are required to show that they have taken reasonable steps to verify the identity of their clients

#### Reasonable steps

16. The requirements for a practitioner to undertake reasonable steps are guided by ARNECC's Rules. The purpose is to minimise the risk of fraudulent land conveyances. The regime applies to individuals, powers of attorney, and corporations. At the core of the process is the face-to-face interview. Schedule 8 of the Rules provides:

SCHEDULE 8 – VERIFICATION OF IDENTITY STANDARD 2 Face-to-face regime

2.1 The verification of identity must be conducted during a face-to-face in-person interview between the Identity Verifier and the Person Being Identified.
17. If ARNECC's Schedule 8 Verification of Identity Standards are followed, they will be deemed to have taken reasonable steps under the scheme. However, it is not mandatory to adhere to Schedule 8.
18. If the Standards are unable to be followed, it is incumbent on the practitioner to satisfy themselves that they have taken reasonable steps to verify the identity of their client that can be later justified. Remote VOI cannot be undertaken over Skype or other video calls as they are not considered reasonable under the scheme.
19. Although the ARNECC standards cover common identity checks, they do not provide any detailed guidance as to what a practitioner should do in a problematic identity check that falls outside the guidelines.
20. Ultimately, the onus is on the practitioner to satisfy themselves that they have taken reasonable steps in the identification process. Though the reasonable person standard is a familiar one, the concept of reasonable steps has not been tested in litigation and no case law yet exists to guide practitioners on what "reasonable steps" may be.

21. 'Reasonable steps' in this context are specifically directed at property transactions conducted over a paperless system. e-Conveyancing and VOI will not eliminate the incidence of identity fraud.
22. When a court comes to determine whether a practitioner has taken reasonable steps in undertaking a VOI, each case will turn on its own facts. It is reasonable to surmise that there may be some core elements in relation to how the court will go about determining whether reasonable steps were taken:
  - (1) What the practitioner should have done in the circumstances - this is where ARNECC's guidelines and best practice will be useful and may inform the court's determination;
  - (2) What the practitioner ought to have done in the unique circumstances that they faced in the particular VOI;
  - (3) When the practitioner conducted the VOI and whether it was reasonable to conduct it at that time.
23. There needs to be an objective standard to ensure the safety and integrity of the Torrens register.
24. There is no dispensation for practitioners with long term clients or those that are personally known to them. The reasonable steps must still be followed and their ID verified.

#### A firm's written policy

25. There needs to be a standard response in relation to those situations to either accept the ID or not.
26. Law firms should develop a written policy to deal with VOI to ensure that the onus is discharged when it comes to taking reasonable steps. The policy should set out all of the steps that need to be taken in order for the person conducting the VOI to take reasonable steps. Every staff member who will be responsible for conducting VOI must be familiar with the policy and the ARNECC participation rules particularly Schedule 8. The policy should contain a checklist that can easily be followed and a standard set of questions in the case of a problematic ID. There should be a requirement that anyone conducting a VOI keeps careful file notes of anything that a client says in relation to a problematic ID.
27. Practitioners need to be able to show that they have made a proper and genuine attempt to verify the identity of their clients for every VOI conducted. The way to do this is to refer back to their firm's written policy and file notes. The firm's policy needs to set out in detail what steps need to be taken if the person conducting the VOI encounters circumstances that fall outside of the ARNECC guidelines.

#### Common problems for practitioners

28. A practitioner might experience a situation where a client bears no reasonable likeness to the photo ID that they present at the VOI. A person's physical appearance can change due

to the ageing process, significant gain or loss of weight, facial surgery or cosmetic procedures.

29. ARNECC does not provide any guidance for these situations so it is up to the practitioner to make an informed judgement call on whether they will accept the ID. This requires a combination of common sense, attention to detail, and self-preservation. If the core facial features correspond to the client's – for example, jawline, cheek line, hairline – a reasonable likeness can be ascertained.
30. If there is any remaining doubt by the practitioner, it would be best practice to err on the side of caution, as the consequences of fraud can be potentially disastrous.
31. If the person conducting the VOI can point to an objective procedure that they have followed in relation to satisfying themselves that this is the person appearing in the ID, then this will go a long way to discharging their obligation to take reasonable steps.
32. If the practitioner has a client with different names, ARNECC does not have any specific guidance for this situation. In the case of a marriage name change or a legal name change, a client would ordinarily be able to present a marriage certificate or change of name certificate. In relation to the Anglicisation of names, there are uncontroversial forms of these.
33. If the client has different names on multiple IDs, the person conducting the VOI has to find out why there is a discrepancy and make a careful file note of any explanation. If the explanation is not logically consistent or sounds implausible, it is best to err on the side of caution and reject the ID.
34. If the client does not have a birth certificate or has only an extract thereof, the practitioner needs to decide if it is reasonable to accept the extract in conjunction with other forms of ID in accordance with the firm's documented policy.

#### An overseas client

35. ARNECC's recommendation in these circumstances is that the client presents to a consulate or embassy and has their documents certified there and returned to the practitioner in Australia. The immediate problem with this recommendation is that the risk of fraud is not managed. The client is themselves responsible for the handling of the certified document there is no real objective accountability as to the bona fide nature of the documents. The risk of fraud is still present in these situations.
36. It is therefore up to the law firm to come up with their own written policy to enable them to point to an objective process that they have applied consistently.

#### Red flags

37. Issues that will cause problems for practitioners include:
  - If a client was unable to produce supplementary or collateral ID at a VOI
  - If a client failed to provide the supplementary ID

- If a client expressed a concern to get out the VOI interview as soon as possible
  - If the client only had copies of their ID and not originals
  - If a client only had expired ID
38. *Pedulla v Panetta and Others* [2011] NSWSC 1386, *Vella v Permanent Mortgages Pty Ltd* [2008] NSWSC 505 and *Printy v Provident Capital Ltd* (2007) 13 BPR 24,603 are cases where, if a face-to-face VOI process was followed, it would be more likely that the fraudsters would not have hoodwinked a solicitor.
  39. A practitioner would need to familiarise themselves with all different forms of ID and the features and information generally present therein. A translation must be obtained from documents in a foreign language. Contact with a particular embassy might be required to verify the bona fide nature of the documents.
  40. A practitioner should immediately verbalise any concerns with any documents presented during the VOI to the client and a careful file note taken of the response.
  41. The timing of the VOI check during the transaction is not addressed by any guidelines. It would be sensible to conduct the VOI at the point of exchange of contracts so that the solicitor can determine whether their client is capable of completing the transaction.

#### The risks associated with using verification agents

42. Smaller practitioners can utilise companies that provide verification of identity services including Australia Post. A VOI report is then produced by the service which is provided to the referrer.
43. Verification agents need to enter into a Verification Agency Agreement which warrants that the agency has performed their VOI check with all due care and skill in accordance with the VOI rules, and contains an indemnity to all the referrers who suffer loss as a result of an agent not carrying out their responsibilities in accordance with their warrant.
44. It is important to read the fine print in the Verification Agency Agreements.

#### Protections for solicitors or conveyancers

45. If the VOIs are conducted by the practitioners themselves, there are safe harbour provisions inbuilt into the VOI system. The provisions provide that, if the verification standard produced by ARNECC is followed in the participation rules, a practitioner will be deemed to have taken reasonable steps and is protected from any claims that may arise for a fraudulent transaction or a property transaction that is affected by some kind of identity fraud.
46. Another safeguard is at the completion of every VOI check carried out, when a client authorisation form ('CA form') needs to be signed by the client whose identity is being checked.
47. The CA form becomes the legal document granting the solicitor or licensed conveyancer authority to carry out the transaction on behalf of the client. At the bottom of the CA form is

a declaration that the client acknowledges that they have the legal authority to provide instructions to carry out the conveyancing transaction.

48. If the law firm has engaged an agent, the CA form should be completed at the same time as the VOI check. A firm's VOI policy should mandate that a CA form be completed at the same time as the VOI check.

#### Some key take home points for practitioners

- Familiarise yourself with ARNECC's participation rules, particularly Schedule 8
- Regularly check ARNECC's website for updated rules
- Have a written policy that sets out the steps of a VOI
- Develop a checklist and a set of questions to be asked and answered if there is a situation that falls outside the verification standard
- Make it mandatory that all questions asked and given are recorded in a file note kept for 7 years
- Resist the temptation to skip over the ID requirements because it is a longstanding client or personal associate
- Err of the side of caution in relation to the reasonable steps taken



## **BIOGRAPHY**

### Lee-Ann Walsh

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Lee-Ann was called to the Bar in 2012. Prior to this, she worked in the legal publishing, research and policy fields, and was tipstaff and Associate in the NSW Court of Appeal. She has appeared as junior counsel in key property and commercial cases in the High Court and has developed a diverse range of practice areas including commercial, equity, property and employment law. Lee-Ann was recently appointed Editor of Hallmann's Legal Aspects of Boundary Surveying.

### Andrew Bailey

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Andrew was a Senior Associate at a mid-tier national firm and practised in both Queensland and NSW before coming to the Bar in 2014. Andrew practises in commercial, equity, property, construction, bankruptcy and insolvency law, administrative law and costs. He is published regularly in the NSW Law Society Journal, and holds a Master of Laws from Sydney University.

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