

# CONVEYANCING SERIES 2022

Mastering the essentials

# Conveyancing and VOI

## Contact information

Phil Nolan | Risk Manager, LPLC

Please contact me with any risk management issues

T: 03 9672 3800      E: [phil.nolan@lplc.com.au](mailto:phil.nolan@lplc.com.au)

## Website / social media

[lplc.com.au](http://lplc.com.au)



@LPLC\_AU



@LPLCAU



[Linkedin.com/company/lplc](https://www.linkedin.com/company/lplc)

## Thought

Who is my client?

## Quote

*Most people are other people. Their thoughts are someone else's opinions, their lives a mimicry, their passions a quotation. Oscar Wilde*

## CPD information

1 CPD      Practice Management

0.5 CPD      Substantive law

For all queries relating to CPD rules please refer to the *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015*. Information can also be found [here](#). LPLC does not keep records of practitioner CPD.

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## Four key points

- Know your verification of identity (VOI) obligations.
- Have a written office policy about VOI.
- Use a VOI checklist.
- Audit files to check for compliance.

## Introduction

Doing a verification of identity is how you find out who the client is and also how you verify who they say they are.

The failure to properly deal with any VOI issues may have a number of serious consequences including breaches of your legal and ethical obligations and may result in a claim and a complaint to the Legal Services Commissioner.

LPLC has published its view about VOI, that it is good risk management to verify the identity of every client. One reason for this, as stated on the LPLC website, is that doing VOI well protects you and your good clients and deters bad clients.

To know your verification of identity obligations you need to go to the source. For example, make sure you are familiar with the ARNECC Model Participation Rules.

Having a written office policy about VOI ensures all staff have a consistent approach to verification of identity. You may want to apply the keep it simple rule by having an office policy which states that staff must always use the safe harbour provisions in the ARNECC Model Participation Rules.

Applying the safe harbour provisions is the best method for doing VOI but may be unnecessary in some circumstances. This is something you need to decide in your office policy. Your policy may provide that reasonable steps are only necessary for an existing clients known to a staff member.

### Your comments

## Why do a VOI

### Quiz

What is your reason for doing a VOI?

Do you do a VOI of every client?

The main reason for doing a VOI is to prevent identity fraud.

Marsh has prepared a video which contains details about fraud and scams targeting law firms including details on how fraudsters operate.

You can find the video [here](#).

According to Marsh fraudsters are determined and persistent but often not sophisticated preferring to rely on traditional criminal artistry of making financial gain through misplaced trust, attacking peoples vulnerabilities and sensibilities.

In the video Marsh explains the use of social engineering to induce others to help them. For example, the fraudsters rely on lawyers natural helpfulness. They might for example call the lawyer saying they have an urgent problem that needs solving and may appeal to vanity, authority and greed.

## More about fraud prevention

There is the higher risk that there may be a fraud where:

- You take on a matter which is partly completed.
- You are instructed by an Attorney, agent or broker, in fact anyone who is in between you and your client.
- The client says their matter is urgent as this is one of those social engineering tricks used by fraudsters.
- The client is difficult to contact. For example, they tell you that you can only contact them by email as they work on an oil rig in Bass Strait.

### Tips

Here are a few tips to help you detect a possible fraud in response to some of these issues:

- Hover over the email address to check the details. Your suspicious should be aroused where the details in the email are different to the those shown when you hover over the email.
- Do a google search of the email address. You never know what you might find.
- Always telephone the client to verify instructions about any funds transfers and tell the client to call you before transferring funds.
- Contact the principal / donor direct where your suspicions are aroused in relation to the conduct of an agent, attorney or other third party providing instructions.

Another reason for doing a VOI is because of Australia's international obligations to prevent money laundering and fraud.

The relevant legislation is the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cwlth).

Note also the recent report by the Senate handed down on 30 March 2022. Given this report it is expected that further anti-money laundering obligations will be imposed on lawyers. You can find details about the report [here](#).

On a micro level VOI requirements have been imposed on practitioners doing conveyancing transactions by [ARNECC](#) including pursuant to the Model Participation Rules (MPR) and in particular clause 6 and schedules 3, 4 and 8.

Also refer to the ARNECC MPR VOI Guidance note no. 2 which you will find on the ARNECC website: [www.arnecc.gov.au](http://www.arnecc.gov.au).

Note also the obligations imposed by the Registrar of Titles including about unrepresented parties. Refer to the Registrar's requirements for paper conveyancing transactions first published 30 September 2015 and guide to verification of identity for paper conveyancing transactions for conveyancers, lawyers and mortgagees which contains 40 frequently asked questions.

Also note the VOI obligations pursuant to [section 87A](#) of the *Transfer of Land Act 1958* (Vic).

This section commenced on 24 September 2014 and impose obligations on the mortgagee to identify the mortgagor.

For a recent case about this section see *C&F Nominees Mortgage Securities Ltd v Karbotli & Ors* [2020] VCC 987.

Also refer to the LPLC LIJ article about this case titled '[Establishing identity](#)'.

Last but not least lawyers have common law obligations to verify the identity of their clients.

### **Did you know?**

The Registrar of Titles has the power to require any person to submit any information required by the registrar relating to any land. See [section 104](#) of the *Transfer of Land Act*.

### **Your comments**

## When to do the VOI

### Poll

When do you do the VOI when acting for a vendor?

- a. Start of the matter
- b. During the matter. For example, after the contract of sale is signed.
- c. Towards the end of the matter. For example, just prior to giving your certifications to Land Registry.

### Your comments

### Most conservative approach

Always do a VOI at the start of a matter for every client using the VOI standard in schedule 8 of the ARNECC Model Participation Rules – known as the safe harbour.

### Poll

#### Background

You act for a vendor selling their home. The purchaser is not represented.

#### Question

Are you obliged to do a VOI of the purchaser?

- a. Yes
- b. No
- c. Don't know

### Your comments

If you do the VOI at the start of the matter and there are any problems then you have more time to try and fix them before settlement.

For example, the client may need to apply for a new birth certificate and it can take many weeks to obtain one.

You may also detect a problem such as:

- A name spelt incorrectly.
- A hyphen missing.
- The name on the title different to the identity documents.

Where the identity documents don't match with the title you will also probably have a problem where the name on the title does not match the CGT clearance certificate.

By doing the VOI at the start of the matter you are more likely to detect any issues



which means that you can tell the client at the start of a matter about any problems and the need to fix them.

The client may need to:

- Lodge a change of name form with the Land Registry. Refer [section 32](#) of the Transfer of Land Act. You can find further information [here](#).
- Correct their name on their MyGov account.
- Change their name with births deaths and marriages.
- Obtain a new driver licence or passport showing the correct name.

### **Did you know?**

The ATO states on its website that the name of the vendor on the CGT clearance certificate must match the name on the certificate of title.

However the ATO will accept that purchasers have fulfilled their obligation if they have sighted a certificate where the first name and last name match which means you can ignore any middle name for the purposes of a valid CGT clearance certificate and you can accept an Australian marriage certificate as proof of a change of name if there is a different surname.

You can find the ATO information [here](#).

## How to do a VOI

### Poll

Do you have a written policy about doing a VOI?

- a. Yes
- b. No

The starting point for the how is to have an office policy which covers verification of identity.

The policy should state as a minimum:

- Identify the staff who are trained to undertake any VOI.
- When client identification should occur.
- How the client will be identified.

There are a number of verification of identity processes that can be considered including the safe harbour or taking reasonable steps.

Prudent practice would suggest the need for a face to face in person meeting and production at the meeting of at least a current Australian driver licence or passport. If the client has neither of these the policy should set out what secondary documents will be acceptable.

If the client is unable to attend the office the policy should state what needs to be done. For example, use of an identity agent.

- How the identification information will be stored.



## Did you know?

The Land Registry and PEXA can audit your conveyancing transaction files to make sure you are doing the VOI properly.

A failure to comply with the ARNECC requirements may result in being removed from PEXA.

## Exercise

### Background

You are instructed to act for a foreign person buying an off-the-plan apartment in Melbourne.

The client was referred to you by the selling agent. The agent informs you that the client resides in Panama and is buying the apartment for his son to live in. The client's son tells you that he will be obtaining a loan from ANZ to fund half of the purchase price.

### Question

What three reasonable steps you would take to verify the identity of your client?

### Your comments

## Example of reasonable steps

Some practitioners have requested that LPLC tells them what LPLC believes are reasonable steps.

Unfortunately the answer is not that simple because it mostly depends on the circumstances.

The following is an example of a simple 'how' to do a face to face VOI which may constitute reasonable steps depending on the circumstances.

This process is probably best suited to existing clients known to someone currently working in your firm.

### Step 1

Compare the client to their photo ID. Take a couple of photos of the client at this point – one of their face and the other of them holding the photo ID document.

### Step 2

Closely look at and feel the identity document(s). A lot of identity documents are plastic, so check to make sure the ones provided by the client are plastic and not paper.

Check whether it is damaged in any way. It may have been damaged in the process of altering it. Look at the front and back.

### Step 3

Compare the signature on the document being signed to that on the photo ID by placing them next to each other.

If you are using the LPLC client information sheet compare the signature on the ID document to the one on the LPLC client information sheet.

### Step 4

Keep a copy of the identity documents, both back and front and if a passport keep a copy of all pages showing the client's identity and personal details.

## VOI resources

- LPLC Capacity, authority and identity notes

<https://lplc.com.au/resources/checklists/voi-notes-capacity-authority-and-identity>

This document contains information about these three areas including a list of resources including links to the most relevant ARNECC documents which I have mentioned today.

Also refer to the attached flow chart about these three issues.

- LPLC Face-to-face VOI checklist

<https://lplc.com.au/resources/checklists/verification-of-identity>

The checklist is designed in a check box style so you can check off on each issue.

The checklist refers to giving the client the LPLC information sheet to complete and explains how to do a simple face to face VOI.

- LPLC VOI client information sheet

<https://lplc.com.au/resources/checklists/voi-client-information-sheet>

This form has been created so that it can be given to the client.

We have created two versions of this form – the second version contains notes for practitioners to assist you to understand how the form works and to explain some of the content. Is anyone using this form?

By giving this to the client, the client will understand what is required of them for you to do a VOI.

- ARNECC verification of identity standard

Refer to schedule 8 of the ARNECC Model Participation Rules.

### Your comments

## Did you know?

You must use the verification of identity standard when doing a practitioner's certificate such as giving when advice to a guarantor. Refer to rule 11 of the [Legal Profession Uniform Legal Practice \(Solicitors\) Rules 2015](#).

Another reason for using this process is because compliance with the verification of identity standard is deemed to constitute the taking of reasonable steps in accordance with clause 6.5.5 of the ARNECC Model Participation Rules.

## Poll

Do you use the safe harbour process when doing a VOI?

- a. Yes
- b. No
- c. Sometimes

## Your comments

## VOI cases

In the case of [Trani & Anor v Trani & Ors \(No 2\) \[2019\] VSC 723](#) the Court found a conveyancer was liable for providing false certifications as to identity and authority to the Registrar of Titles. The property in this case was located at 331 Dromana Parade, Safety Beach and was owned by three siblings, two brothers and a sister, who were registered on title as tenants in common in equal shares. The two brothers alleged their sister, without their knowledge, consent or authority, fraudulently entered into a contract to sell the property for \$1,350,000 and received the funds from the sale.

The two brothers also alleged that the conveyancer acting for the sister failed to verify their identity. The court described the certification requirements including about VOI as going to: 'the heart of the checks and balances required for the protection of interests in land associated with registration and had a real facilitative role in the fraud'.

The certifications given by the conveyancer that they had taken reasonable steps to verify identity were found to be false and misleading and deceptive under section 18 of the Australian Consumer Law.

The fact that the conveyancer had made some assumptions about authority and identity based on representations made by the sister, did not change the fact that the certifications were misleading and deceptive.

The conveyancer should have taken reasonable care to confirm those assumptions and only given the certifications if they had verified identity and authority.

The conveyancer was found to be a concurrent wrongdoer with the sister and her associated company.

In [XPAK Pty Ltd v Scibilia & Ors \[2013\] VCC 1260](#) a practitioner was asked by a husband and a person pretending to be his wife to provide a solicitors certificate, which included identifying them for the lender.

You can find more information about the Xpak case in the LPLC [Managing mortgage risk](#), practice risk guide on the LPLC website.

#### **Your comments**

The case of [Michelangelo Alfredo Mascarello & Anor v Registrar General of New South Wales \[2018\] NSWSC 284](#) also illustrates the importance of a solicitors' duty when identifying clients before witnessing their signatures on loan and associated security documents.

For more information about this case refer to the article Who do you think you are? By Tony Reynolds and Deborah Morris from Lawcover in the NSW Law Society Journal issue 47 August 2018. If you can't find the article, email [phil.nolan@lplc.com.au](mailto:phil.nolan@lplc.com.au) and a copy can be provided.

#### **Your comments**

Probably also do worth having a read of [Braham v Catalano & Anor \[2013\] VSC 437](#). Although not specifically about VOI it is about fraud where a party who amended a transfer of land by changing the details of the transferee so they could be registered on title and subsequently mortgage the land.

[Mulder v Director of Public Prosecutions \(Cth\) \[2015\] NSWCA 92](#) is about one twin who stole the identity of the other twin to obtain a loan by deception.

Reading the Braham and Mulder cases should also give you an insight into the crimes that may be committed involving identity fraud and to appreciate even further how important it is to verify the identity of all of your clients.

#### **Your comments**

## VOI – do the right thing

There are a number of ethical issues that may arise in relation to verification of identity.

For example, in relation to complying with rule 14 of the [Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015](#). Rule 14 is about handing over documents to clients and relevantly provides:

*'...A solicitor with designated responsibility for a client's matter, must ensure that...the client...is given any client documents...as soon as reasonably possible when requested to do so by the client..'*

The ethical issue is whether you can insist on a VOI for the client before handing over the documents. For example, when another law firm requests your file.

### Poll

Before handing over a paper title to another law firm can you insist that the client verifies their identity?

- a. Yes
- b. No
- c. Don't know

### More information

LIV ethics ruling no. R4924

### Poll

Can you make a report to the police about a client whose identity you cannot confirm and where you are suspicious about their conduct?

- a. Yes
- b. No
- c. Don't know

### More information

LIV ethics ruling no. R3500.

### Need help with a VOI ethical issue?

Contact LIV ethics:

Phone: 03 9607 9336

Email: [ethics@liv.asn.au](mailto:ethics@liv.asn.au)

## Reflection

Once you have completed reading this booklet and watching the accompanying webinar, Conveyancing and conflict, take time to reflect on what you have learned that might help you and your colleagues in your work.

Appendix One  
Flowchart

