

Model Participation Rules (MPR) Consultation Draft 5.1 Feedback

This table responds to the feedback received on Consultation Draft 5.1 of the MPR published in September 2018

#	Rule	Stakeholder Feedback	Action Taken	ARNECC Response
MPR 4 – Eligibility Criteria				
1	4.3 Character	As commented on previous drafts, there are serious concerns about the inclusion of Local Government Organisations as Subscribers without limiting its ability to act as a Representative for a Client that is not an entity related to the LGO or assist a self-represented party in a transaction.	None	Subscribers must comply with Jurisdictional laws about who can conduct conveyancing transactions. See MPR 6.15. ARNECC is not aware of any Jurisdictional laws that would allow a Local Government Organisation to represent a client.
MPR 5 – The Role of Subscribers				
2	2.1.2 Definitions; 5.6 Subscriber as Attorney; 6.3.2; 6.4(c); 6.5.1(f); 6.6(f); 7.10.2; Schedule 3 - Rule 7	Subscribers acting under a power of attorney will require changes to the NECDS and scheduling in a future release. It has been recommended that the ARWG Chair make representations to ARNECC that changes to the MPR in relation to Subscribers acting under power of attorney not be adopted until the end of 2019 at the earliest, so as to not cause confusion in the market. Changes to the MPR in relation to acting under power of attorney should not be adopted until the end of 2019 as a consequence of the timing of delivery based on the current ARWG prioritisation.	None	Availability will depend on when both ELNO and Land Registry system changes can be made, currently anticipated to be 2020.
3	5.6 Subscriber as Attorney	There is still some confusion regarding the changes relating to the Attorney regime. At the industry forum, ARNECC advised that solicitors will not be required to be appointed Attorneys but will act on valid client authorisations, and Attorneys will need a power and then a client authorisation. Attorneys in this context include lenders which are not Authorised Deposit-taking Institutions (non-ADI lenders) joining the workspace as incoming or outgoing mortgagees, who would be required to satisfy the rules of agency. In relation to the lack of safeguards applying to that model, previous concerns have not been addressed. In particular that only qualified persons should conduct conveyancing transactions.	None	Subscribers must comply with Jurisdictional laws about who can conduct conveyancing transactions. See MPR 6.15.

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4	5.6 Subscriber as Attorney	It is our understanding that property developers or ADIs or their related third-party entities or subsidiaries are now able to take advantage of this rule and act as subscribers under a Power of Attorney subject to jurisdictional laws. For more clarification, please provide examples of dealings, transactions or other circumstances rule 5.6 was intended for.	None	<p>In paper conveyancing, attorneys sign instruments in the following broad circumstances:</p> <ol style="list-style-type: none"> 1. For individuals - under enduring, general or specific powers of attorney. 2. For corporations - under specific powers of attorney. 3. For financial institutions - generally specific roles are appointed attorney to sign specific categories of instrument. The roles may be within: the financial institution itself, a related company, a law practice, or an unrelated company usually a service provider. 4. For property developers including the original landowner - generally specific roles are appointed attorney to sign specific categories of instrument. The roles may be within: the property developer company itself, a related company or a law practice. 5. For statutory bodies - generally specific roles are appointed attorney to sign specific categories of instrument for other statutory bodies. <p>Stakeholders asked ARNECC to replicate the paper practice in electronic conveyancing.</p> <p>These arrangements can be (and have been) put in place in an Electronic Lodgment Network today. However, this means that the donor is a Subscriber and then provides digital signing rights to its attorneys as individual Users. Stakeholders are not always able/willing to set up these arrangements because:</p> <ol style="list-style-type: none"> 1. They may not meet the eligibility requirements to be a Subscriber, most notably the insurance rules. 2. It means that an attorney is likely to have several different digital signing tokens, one for each of the donors they act for. <p>The alternative set out in the MPRs is that the attorney is a Subscriber. It does not apply to conveyancers and lawyers, nor in South Australia.</p> <p>Further information will be provided in an additional Guidance Note.</p>
5	5.6 Subscriber as Attorney	The proposed model requires the third-party donor of the power of attorney to sign the Client Authorisation. In our view, the Rules should allow for the Client Authorisation to be signed by the attorney for the third party. In these circumstances, we request further consideration to providing flexibility under its proposed power of attorney model that will allow the Bank to continue to rely on the existing powers of attorney for the purposes of complying with electronic lodgement requirements affecting the existing mortgages, for example in relation to discharges of the existing mortgages.	None	The Subscriber must be the attorney. It is then for the Subscriber to assess who should be a Signer.

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6	5.6 Subscriber as Attorney	We do not agree that the proposed donor model is necessary in order to satisfy the laws of agency, as these can be satisfied by other means. ADI groups have long established delegation and authorisation frameworks in place. The proposed model would prescribe a new method by which ADI groups must establish their delegation and authorisation frameworks in respect of dealings in land. Introducing a prescriptive model for delegating access in PEXA is not ideal and would add a further administrative burden for little, if any gain. It is preferable that ADI groups be permitted to delegate in accordance with their existing delegation and authority models which have worked well, noting that the proposal is inconsistent with: the method by which ADI groups currently (or previously) execute dealings in land under hand; the current method of appointing a Law Firm to deal in PEXA on a person's behalf; and the method by which ADI employees may discharge a PPS security interest on behalf of a subsidiary.	None	The Subscriber must be the attorney. It is then for the Subscriber to assess who should be a Signer.
7	5.6 (a) Subscriber as Attorney	The meaning of new Rule 5.6(a) is unclear. In particular, the reference to 'representative' when 'Representative' is a defined term is queried. This amendment requires further clarification. Rule 5.6(a) also states the Subscriber Attorney cannot also be a representative. Clarification is sought regarding what the position is for validly appointed Attorneys who are also solicitors and/or Subscribers or professional Attorneys.	The MPR have been amended	'Representative' has been amended to start with a capital. The Subscriber as Attorney provisions only apply to Subscribers signing as Attorneys and not any other Subscriber who may happen to be an Attorney e.g. a conveyancer or lawyer generally acting as their Client's Attorney.
8	5.6 (d) Subscriber as Attorney	Querying the utility of lodging the power of attorney with the Registrar. Under the model proposed by ARNECC, the authority that is to be established is granted by the Client Authorisation and the statutory effect of that document under the ECNL.	None	The Registrar needs to know who the Donor is, who the Attorney is and what is authorised.
9	5.6 (d) Subscriber as Attorney	It is suggested that the reference to 'Registrar' in Rule 5.6(d) should be to 'Land Registry'	None	Registrar is the appropriate reference.
10	5.6 (d) Subscriber as Attorney	If the requirement for a Client Authorisation is retained by ARNECC as part of the power of attorney model, it is submitted that consideration must be given to the consequences of a conflict between the terms of a power of attorney and the Client Authorisation.	None	It is the responsibility of the Subscriber to ensure there is no conflict.

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MPR 6 – General Obligations				
11	6.5.1 (f) Verification of identity	It was previously submitted that the obligation in relation to VOI of the donor should be limited to circumstances where a donor is appointing the Subscriber as Attorney, otherwise the identity of all donors would appear to require verification. As drafted, the additional provision in 6.5.1(f) introduces an obligation for a Representative Subscriber taking instructions from an attorney to identify the donor of the power. However, under Rule 6 of Schedule 8 of the Model Participation Rules (MPRs), the Subscriber is only required to verify the identity of the attorney, recognising that in most cases it will be impractical to identify the donor. It is requested that ARNECC reconsider this matter from a practical perspective.	The MPR have been amended	MPR 6.5.1(f) has been amended to limit it to circumstances where the Subscriber is an Attorney for the purposes of signing electronic Registry Instruments and other electronic Documents.
12	6.6 (f) Supporting evidence	Appears to require the retention by the Subscriber of the original power of attorney as part of the requisite supporting evidence. It is suggested again the need for Rule 6.6(f) to be amended to refer to a certified copy of the power of attorney. The response in the Feedback Table proposed that this is not an issue, because originals are returned after registration or production. However, the availability of the original after registration was not the issue. Powers of attorney are documents that are used in many situations and need to be retained and produced by the attorney as their authority to act for the donor in ongoing circumstances. Although it may sometimes be the case, powers of attorney are not usually created for one transaction and the creation of individual powers of attorney for each transaction is impractical. It is requested that ARNECC reconsider this matter from a practical perspective.	The MPR have been amended	MPR 6.6(f) has been amended to limit it to circumstances where the Subscriber is an Attorney for the purposes of signing electronic Registry Instruments and other electronic Documents. The original power of attorney should be retained by the Subscriber when acting as an Attorney.
13	6.15 Conduct of Conveyancing Transactions	The paramountcy of Rule 6.15 should be made express in the provisions of MPR 5.1. This could easily be achieved by adding to the opening words of Rule 6.15 so that it includes words to the effect of 'Despite any other provision of these Rules, the Subscriber must: ...'. This would provide some protection against potential misuse of the power of attorney model.	None	This is not required as ARNECC does not believe anything in other MPRs contradicts MPR 6.15.
MPR 7 – Obligations Regarding System Security and Integrity				
14	7.2.2 Users	Welcomed addition, however, please consider allowing process automation for digital signing or batch signing subject to a subscriber complying with certification rules and having adequate processes in place to ensure documents are verified prior to being included for batch automated signing, which is to be initiated by the required human user or signatory. The technology may not yet be available; however, we believe that this is the next logical step towards improved efficiency and convenience of the settlement process.	None	Feedback noted. Automated signing is not currently being considered.

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Schedule 4 – Client Authorisation				
15	Schedule 4 Client Authorisation	The added words “OR IDENTITY AGENT” should be removed or clarified as the legal purpose for these words is not clear and confusion in practice will arise from these words. It is recommended that these words be removed, or if not, amended to “OR IDENTITY AGENT (if applicable and if not Representative Agent)” and an updated Guidance Note be provided confirming that where the CA Form is signed by a Representative Agent this person should not also be named as the “Identity Agent” on the CA Form.	The MPR have been amended	The substance of the proposed amendment has been adopted. Guidance Note #2 to be updated.
16	Schedule 4 Client Authorisation	Extending the CA Form to a second page adds risk and processing burden and it is recommended ARNECC make all reasonable efforts to ensure that published templates of the CA Form are designed to enable the CA Form when printed to generally appear on a single self-contained on a single A4 page.	None	ARNECC has tested its online form and the signing details remain on one page. The ‘Terms of this Client Authorisation’ section form part of a Client Authorisation and must always be provided to parties signing a Client Authorisation. Therefore, the Client Authorisation as a whole will never be a single page.
17	Schedule 4 – Client Authorisation-Attorney	The definition of Power of Attorney refers only to a ‘written document’, which rule 5.6 of the MPR later defines to include one which complies with the laws of the state in which it is made and is valid. It is presumed that this means that the document has been duly signed and not revoked. Clarification in this regard would be appreciated.	The MPR have been amended	Feedback noted. MPR 6.3.2. has been amended.
18	Schedule 4 – Client Authorisation-Attorney	Reiterating concerns about the power of attorney model and the use of a Client Authorisation outside of the representative-client relationship. The proposed Client Authorisation is not supported.	None	Feedback noted.
Schedule 6 – Insurance Rules				
19	Schedule 6 – Insurance Rules	It is not clear why sub-paragraphs (i) – (iv) are included. If the intention is that certain Conveyancing Transactions require the Local Government Organisation or Statutory Body to demonstrate compliance with Insurance Rules 1 and 2, then clarification is required as it is not immediately apparent which transactions are excluded from the list in sub-paragraphs (i) – (iv).	None	A Local Government Organisation or Statutory Body is only deemed to comply for those transactions listed in Insurance Rule 3 (c). If carrying out any other transactions, the mandatory insurance cover would be required.