

## MODEL PARTICIPATION RULES GUIDANCE NOTE

### RETENTION OF EVIDENCE (CONSULTATION DRAFT)

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#### 1 INTRODUCTION

This guidance note aligns with Version 3 of the Model Participation Rules and explains:

- what evidence retention is;
- why evidence is required to be retained;
- when evidence must be retained; and
- how evidence is to be retained.

**This guide does not constitute legal advice nor does it replace prudent conveyancing practice. Nothing written in this guide overrides the Electronic Conveyancing National Law, Participation Rules, any other relevant legislation or Registrar's Prescribed Requirements.**

#### 2 WHAT IS EVIDENCE RETENTION?

Under the Participation Rules evidence supporting a conveyancing transaction must be kept for 7 years from the date of lodgment. The evidence must be legible, stored safely and securely, and accessible.

A Subscriber is required to retain evidence in relation to:

- Client Authorisation;
- Verification of Identity;
- Right to Deal;
- Other Prescribed Requirements; and
- Duty.

### **3 WHY IS EVIDENCE REQUIRED TO BE RETAINED?**

Evidence is required to be retained in order to demonstrate that the transaction was completed in accordance with legislative and other requirements and the certifications required were accurately made. Refer to Guidance Note #3: Certifications.

Evidence may be required to be provided to the Registrar for the purpose of monitoring compliance with legislative and other requirements. Under the Electronic Conveyancing National Law, the Registrar may conduct a compliance examination either as a result of receiving a request or complaint from any person or on the Registrar's own initiative. The Registrar may conduct a compliance examination for the purpose of ascertaining whether or not the Participation Rules have been complied with or investigating any suspected or alleged case of misconduct.

If there is a dispute that arises in relation to a conveyancing transaction a Subscriber may need to demonstrate in Court proceedings that the transaction was completed in accordance with legislative and other requirements. For example, evidence that reasonable steps were undertaken to verify the identity of a client and their right to deal may be required. Refer to Guidance Note #2: Verification of Identity and Guidance Note #4: Right to Deal.

### **4 WHEN MUST EVIDENCE BE RETAINED?**

Evidence must be retained whenever a conveyancing transaction is undertaken. It must be retained for at least 7 years from the date of lodgment of the registry instrument or document.

Evidence supporting the registry instrument is that which is required to demonstrate the validity of the conveyancing transaction. This will be what is required for a paper instrument, with the addition of the Client Authorisation and verification of identity evidence (if not currently kept). The evidence required is evidence which should be obtained as part of the process of undertaking the conveyancing transaction in accordance with prudent practice. A Subscriber is not required to seek additional supporting evidence.

There may be cases where there is little supporting evidence, for example for a discharge of mortgage lodged by the mortgagee. In this case there may only be the mortgagor's request for a discharge.

The following evidence must be retained:

## **4.1 Client Authorisation**

The Client Authorisation and any evidence supporting that Client Authorisation must be retained. Refer to Guidance Note #1: Client Authorisation.

Where there is a Client Authorisation and it is for a batch of conveyancing transactions the Client Authorisation is required to be kept for at least 7 years from the last conveyancing transaction lodged with the Land Registry. Similarly for a standing Client Authorisation it will need to be kept for at least 7 years from the last conveyancing transaction lodged with the Land Registry before the standing authority was revoked or expired.

## **4.2 Verification of Identity**

Any evidence supporting that reasonable steps were taken to verify the identity of the client, mortgagor, person to whom a certificate of title was provided, signer or Subscriber administrator (as applicable) must be retained. If the Verification of Identity Standard was used this evidence must demonstrate that the procedure for the Verification of Identity Standard was followed. If alternative reasonable steps were used to verify identity the evidence must show what these steps were. Refer to Guidance Note #2: Verification of Identity.

## **4.3 Right to Deal**

Any evidence supporting a party's right to enter into the conveyancing transaction must be retained. Refer to Guidance Note #4: Right to Deal.

Evidence supporting a party's right to enter into a conveyancing transaction may include but is not limited to originals, copies or records of: a current local government rates notice, or current utility bills for the property, or a current land tax assessment notice for the property, or loan documentation, or the mortgage granted by the mortgagor (if one exists), or the certificate of title/duplicate certificate of title for the property (if one exists) and/or a recently issued registration confirmation statement for the property, or the contract of sale for the property.

## **4.4 Other Prescribed Requirements**

Any evidence that demonstrates compliance with relevant legislation and prescribed requirements must be retained. What type of evidence is required to be retained is dependent on the type of transaction but may include statutory declarations, trust deeds, agency agreements or evidence of death.

## 4.5 Duty

Any evidence required by the duty authority must be retained.

## 5 HOW IS EVIDENCE TO BE RETAINED?

The evidence can be retained in a range of ways. It could be stored electronically and/or stored by an agent on a Subscriber's behalf. However, the medium and means in which documents supporting the conveyancing transaction are to be retained is to be determined by a Subscriber in light of the possible need to produce those documents as evidence to a Court. Evidence should be accessible, legible, and safely and securely stored whichever medium is used.

## 6 FREQUENTLY ASKED QUESTIONS

**Q1: Does the Evidence certification include all correspondence, emails and telephone attendance notes?**

A1: Evidence should be kept which supports the requirements and the validity of the conveyancing transaction.

For example, if the correspondence, emails or telephone notes support that reasonable steps were taken to verify the right to deal of the transacting party, they should be kept.

**Q2: Can evidence be retained electronically?**

A2: Yes. Evidence can be stored electronically. However, the medium and means in which documents supporting the conveyancing transaction are to be retained is to be determined by the Subscriber in light of the possible need to produce those documents as evidence to a Court.