

MODEL PARTICIPATION RULES GUIDANCE NOTE

RIGHT TO DEAL

1 INTRODUCTION

This guidance note aligns with Version 6 of the Model Participation Rules and explains:

- what right to deal is;
- why verification of right to deal is required;
- when right to deal must be verified; and
- how you verify right to deal.

Capitalised terms have the meanings given to them in the Model Participation Rules, Model Operating Requirements or Electronic Conveyancing National Law.

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 RIGHT TO DEAL?

Right to deal is the entitlement of a Person to be a particular Party to a Conveyancing Transaction.

The Model Participation Rules for electronic conveyancing require a Subscriber to take reasonable steps to verify the right to deal of their Client, and/or the mortgagor for a mortgage.

3 WHY IS VERIFICATION OF RIGHT TO DEAL REQUIRED?

Verifying right to deal is considered to be part of the due diligence required of conveyancing professionals. It is required to ensure that the Person who is your Client or the intended mortgagor has the right to deal with the subject property.

Verifying right to deal mitigates the risk of a fraudulent transaction and gives the other parties to an electronic transaction confidence they are transacting with the Person who has the right to transact.

4 WHEN MUST RIGHT TO DEAL BE VERIFIED?

Right to deal must be verified whenever you are representing a Client in a Conveyancing Transaction, or if you are a mortgagee taking a mortgage (or a Subscriber whose Client is a mortgagee).

A Representative must verify the right to deal of their Client. A mortgagee, or a Representative of a mortgagee, must verify the right to deal of a mortgagor. However, a Representative of a mortgagee need not take reasonable steps to verify that the mortgagor has the right to deal if the Representative is reasonably satisfied that the mortgagee it represents has taken reasonable steps to verify the mortgagor's right to deal. It is for a Subscriber to assess how it can be reasonably satisfied in the circumstances.

Verification of right to deal is closely linked to verification of identity. Prudent conveyancing practice would be to conduct these processes simultaneously. Refer to Model Participation Rules Guidance Note #2: Verification of Identity.

5 HOW DO YOU VERIFY RIGHT TO DEAL?

A Subscriber is required to take reasonable steps to verify the right to deal. Where a Subscriber is an organisation, any Person duly authorised by the Subscriber can undertake the verification of right to deal.

5.1 What are reasonable steps?

“Reasonable steps” is a commonly used legal concept. When applied to Subscribers and mortgagees, it means the taking of such steps as an ordinarily 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.

Verifying right to deal will require you to sight supporting evidence that includes the name of the Person whose right to deal is being verified and the property or transaction details. The supporting evidence should allow you to link the registered interest holder or transacting Party to the land.

More extensive checks and enquiries should be made where doubt arises, or should reasonably have arisen, in relation to a transaction and a Person's right to deal.

The following examples may help establish right to deal for parties involved in common transactions. **This list is not exhaustive and what constitutes reasonable steps to verify right to deal will depend on the circumstances.**

Reliance on any one Document is not conclusive evidence and how much evidence is required is dependent on the circumstances. For example, reliance on a duplicate certificate of title may only show that Person has access to that title, not that they are the Person who has the right to deal with the land. Such evidence would need to be coupled with verification of identity and sufficient supporting evidence to satisfy yourself of their right to deal.

The Subscriber should verify that its Client has the mental capacity to enter into the transaction. If the Subscriber doubts their Client has mental capacity, the Subscriber should make further enquiries, including obtaining a medical certificate as to capacity.

5.2 Outgoing Party and Mortgagor

For a Party that is relinquishing their interest, such as a transferor or a mortgagor, supporting documentation that may assist in establishing right to deal could include originals, copies or records of the following:

- a current local government rates notice
- current utility bills for the property
- a current land tax assessment notice for the property
- loan documentation
- the mortgage granted by the mortgagor (if one exists)
- 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.

A title search should be obtained to check who is named as a registered interest holder to ensure the correct Person's right to deal is being verified.

5.3 Incoming Party

For a Party that is coming onto title, such as a transferee or a mortgagee, supporting documentation that may assist in establishing right to deal could include the following:

- the contract of sale for the property
- loan documentation.

In Queensland, to verify right to deal for a caveator, you should take reasonable steps to determine that your Client is a Person who meets the eligibility requirements for lodging a Caveat under the *Land Title Act 1994* (Qld).

In all other Jurisdictions, to verify right to deal for a caveator, you should take reasonable steps to determine that your Client has a caveatable interest and that you believe the claims made by the caveator are true in substance and in fact.

5.4 Caveator (withdrawal of Caveat)

If you are the Subscriber that represented the caveator named in the Caveat, you should take reasonable steps to ensure that the caveator is the same Person you initially represented.

If you are a different Subscriber to the one that represented the caveator named in the Caveat, in addition to verifying the identity of the caveator, production by the caveator of supporting documentation for the Caveat could assist in establishing the caveator's right to deal.

5.5 Supporting Evidence

You must retain supporting evidence that shows the steps you took to reasonably verify your Client's or the mortgagor's right to deal.

This may include copies dated and endorsed as true copies of the supporting documentation used to verify right to deal and notes on the process undertaken including any further steps taken.

There are no restrictions on the ways in which you can demonstrate that you took reasonable steps.

5.6 Further considerations

There are many instances where further consideration is required of what steps need to be taken to establish a Person's right to deal.

For example, consideration should be given to the following:

- Does the transacting Party's name differ on the supporting documentation? If so, have they changed their name and can they provide documentation to show this?
- Is the transacting Party subject to a trust? If yes, is the Conveyancing Transaction permitted under the trust? Who are the current trustees?
- Is there an Insolvency Event involving one of the transacting parties? If there is an Insolvency Event, is the Conveyancing Transaction permitted under the relevant legislation?

- Is the transacting Party a statutory Person? What is the correct name of the statutory Person? Is the Conveyancing Transaction permitted under the relevant legislation? Are delegations permitted under the relevant legislation? Are the delegations relevant to the Conveyancing Transaction correct?
- Is the transacting Party a successor at law to the registered owner? On what basis is it a successor at law - statutory vesting, transfer of business or another basis?
- Is the transacting Party an executor? Is the Conveyancing Transaction contemplated by the will?
- Is the transacting Party a represented Person, e.g. under the Jurisdiction's guardianship and administration legislation? Is the Conveyancing Transaction permitted by the relevant orders and under the relevant legislation?
- Is a Person acting under a power of attorney? If there is a power of attorney, is the Conveyancing Transaction permitted under the power? Is the power still current or has it been revoked? Has the correct Person been identified as attorney? Are the attorneys required to act jointly or severally?
- Is the transacting Party an incorporated association? If the Party is an incorporated association, is the Conveyancing Transaction permitted under the relevant rules or constitution and legislation? Does the Conveyancing Transaction purport to give effect to a Court order? Is the Conveyancing Transaction contemplated by the order?

What constitutes reasonable steps is dependent on the circumstances of each individual case. Further enquiries should be made where doubt arises, or should reasonably have arisen, in relation to a transaction and a Person's right to deal. For example, where you know or ought to know:

- that the Documents being produced for verification of right to deal are not genuine; or
- that the age of the Person whose right to deal is being verified does not align with the likely age of the Person who has the right to deal (for example the purported transferor is too young to have purchased the property at the time it was purchased); or
- of any other circumstance that raises suspicion or should be investigated further.

Other circumstances could include where your Client is more than one Person and only one Person provides instructions, such as where your Client consists of a couple as joint tenants. You must verify the right to deal of all of the Persons constituting your Client. You should contact all Persons comprising your Client to confirm their instructions.

Similarly, where your Client is an incorporated entity you should ensure you are dealing with the Representatives of the incorporated entity that are duly authorised to provide instructions.

Some circumstances may not be directly linked to right to deal but may raise awareness that greater care should be taken in relation to a particular transaction. For example, the transaction is urgent, you doubt the veracity of the instructions, it involves a non-standard mortgage of an unencumbered title or your Client has limited English. Whilst such transactions may be legitimate, it may be necessary to verify the circumstances surrounding the transaction, for example, by checking the reason for urgency or engaging an independent interpreter.

6 FREQUENTLY ASKED QUESTIONS

Q1: 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?

A1: What is reasonable depends on the circumstances. You need to take steps to satisfy yourself which may include simultaneous verification of identity and verification of right to deal by obtaining supporting evidence to link John Smith to the property, such as one or more of the Documents referred to under ***Outgoing Party or Mortgagor*** above. You should also make further enquiries where doubt arises or should arise in relation to the 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.

Q2: What should I do if I doubt my Client has the mental capacity to enter into the transaction?

A2: You should make further enquiries if you doubt that your Client has the mental capacity to enter into the transaction. Such enquiries could include obtaining a medical certificate to verify that they have the mental capacity to enter into the transaction.

Q3: I am a Subscriber representing an incoming mortgagee. What are my obligations in relation to right to deal?

A3: You must verify the right to deal of your Client, in this instance the mortgagee. This could be done by obtaining loan documentation and any other supporting documentation that shows they are the intended incoming mortgagee for that property.

In addition to this you must take reasonable steps to verify that the mortgagor has the right to enter into the mortgage. However, if you are representing a mortgagee you do not need to take reasonable steps to verify that the mortgagor has the right

to deal if you are reasonably satisfied that the mortgagee you represent has taken reasonable steps to verify the mortgagor's right to deal.

Verifying that the mortgagor has the right to enter into the mortgage could be done by obtaining the contract of sale and other related documentation if they are the incoming proprietor. If they are the current proprietor, documentation tying that proprietor to the subject property is required. For example, documentation may include a current local government rates notice, current utility bills for the property, a current land tax assessment notice for the property, previous loan documentation and/or a certificate of title or registration confirmation statement for the property.

Q4: I am taking instructions from an attorney and have completed verification of identity of the attorney. Do I need to verify the identity of the donor?

A4: You need to satisfy yourself that your Client has the right to deal. In doing so you should decide whether to verify the donor's identity. You should also ensure that you retain any evidence that supports the Party's right to enter into the Conveyancing Transaction.

Q5: Can another conveyancer or lawyer act for my client in an electronic Conveyancing Transaction?

A5: A conveyancer or lawyer (Instructing Practitioner) may instruct a conveyancer or lawyer Subscriber (Subscriber) to act on its Client's behalf to undertake work in an Electronic Lodgment Network, including creating and Digitally Signing electronic Registry Instruments and other electronic Documents. In these circumstances, the Subscriber must obtain a Client Authorisation-Representative directly from the Client (not the Instructing Practitioner). The Subscriber will also need to take reasonable steps to verify the identity of the Client and the Client's right to deal, as well as comply with all other Model Participation Rules.

Refer to Model Participation Rules Guidance Note #9: Instructing Practitioner Engaging a Subscriber.

Q6: I am representing a company. What are my obligations in relation to right to deal?

A6: You are required to take reasonable steps to verify that the company is a legal entity and has the right to enter into the Conveyancing Transaction. Ultimately, you are to assess what is reasonable in the circumstances. For example, you may conduct an ASIC search to verify that the Client is a legal entity. You may decide to conduct a search of the Titles Register to determine current legal ownership, and review the constitution of the company to determine whether entering into the Conveyancing Transaction is permissible. Refer to Sections 5.3-5.4 above for more information.