

MODEL PARTICIPATION RULES GUIDANCE NOTE

RIGHT TO DEAL (CONSULTATION DRAFT)

1 INTRODUCTION

This guidance note aligns with Version 3 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.

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 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?

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. Verifying right to deal 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).

Verification of right to deal is closely linked to verification of identity. Prudent conveyancing practice would be to conduct these processes simultaneously. Refer to 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 duly authorised person 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.

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; 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.

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; or
- if you are a Subscriber acting for the lender, official loan documentation from the lender.

5.4 Caveator (caveat)

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*.

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.

5.5 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, production by the caveator of supporting documentation for the caveat could assist in establishing the caveator's right to deal.

5.6 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.

5.7 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:

- Is a 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 eg 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? Has the correct person been identified as attorney? Are the attorneys joint or several?
- 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. You must verify the right to deal of all of the persons constituting the client. You should contact all persons comprising your client to confirm their 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 the 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 ***Relinquishing Party*** 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.