

MODEL PARTICIPATION RULES GUIDANCE NOTE

ELIGIBILITY CRITERIA

1 INTRODUCTION

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

- what Eligibility Criteria are;
- why Eligibility Criteria are necessary;
- when compliance with Eligibility Criteria is required; and
- how to comply with Eligibility Criteria.

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 ARE ELIGIBILITY CRITERIA?

Eligibility Criteria are requirements that an individual, body corporate or partnership seeking to become or remain a Subscriber must satisfy. The Eligibility Criteria for Subscribers are specified in Model Participation Rule 4 and include requirements related to:

- ABN
- Status
- Character
- Insurance
- Business name

An individual, body corporate or partnership will not be considered eligible to become or remain a Subscriber if they do not comply with the requirements of the Eligibility Criteria.

3 WHY IS ELIGIBILITY CRITERIA REQUIRED?

The inclusion of Eligibility Criteria in the Model Participation Rules helps to ensure the security and integrity of Conveyancing Transactions and that the Titles Register is safeguarded.

4 WHEN IS COMPLIANCE WITH ELIGIBILITY CRITERIA REQUIRED?

Model Participation Rule 3(a) requires an individual, body corporate or partnership to comply with the Eligibility Criteria at the time of their application to become a Subscriber. Model Participation Rule 3(b) requires Subscribers to maintain compliance with the Eligibility Criteria at all times.

Eligibility Criteria are reviewed by an Electronic Lodgment Network Operator (ELNO) as part of its Subscriber Registration Process in accordance with Model Operating Requirement 14.1. An ELNO may also assess compliance with the Eligibility Criteria as part of the ELNO's Subscriber Review Process under Model Operating Requirement 14.7.

5 HOW TO COMPLY WITH THE ELIGIBILITY CRITERIA?

5.1 Complying with the ABN criterion

A Subscriber must hold an Australian Business Number (ABN).

5.2 Complying with the status criterion

A Subscriber must be a Person or a partnership. Additionally, if the Subscriber is a body corporate, they must ensure the following:

- the body corporate has been incorporated, formed, or constituted under the Corporations Act 2001 (Cth) or under any other legislation, such as, for example, under legislation empowering or formalising statutory bodies, incorporated associations and owners corporations; and
- the constituting documents empower the body corporate to assume the obligations of, and to do all things that it could reasonably contemplate would be required by the Model Participation Rules.

5.3 Complying with the good character criteria – 4.3.1(a), 4.3.1(b), 4.3.1(c) and 7.2.3

The Subscriber must be of good character and reputation and must not be and have not been subject to:

- (i) an Insolvency Event within the last five years;

- (ii) a conviction for fraud, a conviction for an indictable offence which may impact on a Conveyancing Transaction or a conviction for an offence for dishonesty against any law in connection with business, professional or commercial activities;
- (iii) a disqualification from managing a body corporate under the Corporations Act;
- (iv) any determination of a disciplinary action of any government or government authority or agency, which may impact on the conduct of a Conveyancing Transaction;
- (v) any refusal of an application to subscribe to an electronic Lodgment service;
- (vi) any current suspension under Model Participation Rule 9.2 for Suspension Events (a)(i) to (v) in any Jurisdiction; or
- (vii) any termination under Model Participation Rule 9.3 for Termination Events (a)(i) to (v) and (b) in any Jurisdiction.

The definition of Insolvency Event excludes some matters, such as a Hardship Notice and a temporary arrangement to postpone a debt.

Eligibility Criteria are reviewed by ELNOs in accordance with Operating Requirement 14.1. If a Subscriber does not satisfy or comply with the above requirements, the Subscriber is not eligible to become or remain a Subscriber. An ELNO must not register a Subscriber where the Person does not comply with the requirements and is required to remove a Subscriber's access to the Electronic Lodgment Network (ELN) where they no longer meet the requirements.

Model Participation Rule 4.3.2 provides that a Subscriber is deemed to comply with the good character requirements under Rule 4.3.1(a) if they are any of the following:

- an ADI; or
- an Australian Legal Practitioner or a Law Practice; or
- a Licensed Conveyancer; or
- the Crown in right of the Commonwealth, a State or a Territory; or
- a Public Servant acting on behalf of the Crown in right of the Commonwealth, a State or a Territory; or
- a holder of an Australian Credit Licence; or
- a Local Government Organisation; or
- a Statutory Body.

A Subscriber must take reasonable steps to ensure that its principals and Officers who have access to the ELN or control over Persons who have access to the ELN and Subscriber Administrators are not and have not been subject to any matters listed under the items (i) to (iv) listed above.

A Subscriber must also take reasonable steps to ensure that its principals and Officers who have access to the ELN, or control over Persons who have access to the ELN, and Subscriber Administrators are not and have not been a principal or Officer or Subscriber Administrator of a Subscriber that is or has been subject to any of the matters listed under (v) to (vii) above. This applies unless the principal, Officer or Subscriber Administrator did not materially contribute to the refusal of the application, suspension or termination.

If a principal, Officer or Subscriber Administrator does not meet the requirements, they should not be a principal or Officer for the Subscriber and the Subscriber should remove their Subscriber Administrator role. If they cease to meet the requirements, they should cease to be a principal or Officer for the Subscriber and the Subscriber should remove their Subscriber Administrator role.

Model Participation Rule 7.2.3(a) sets out the eligibility requirements for Users to become or remain as Users. It requires a Subscriber to take reasonable steps to ensure that the User is not or has not been subject to matters (i) to (iv) listed above, or any current restriction on their right to access an ELN.

A Subscriber is deemed to comply with the requirements if its principals, Officers, Subscriber Administrators or other Users fall into one of the following categories:

- an Officer or employee of an ADI; or
- an Australian Legal Practitioner; or
- a Licensed Conveyancer; or
- a Public Servant acting on behalf of the Crown in right of the Commonwealth, a State or a Territory; or
- a fit and proper Person for the purpose of performing duties in relation to the credit activities authorised by an Australian Credit Licence; or
- a Local Government Officeholder acting on behalf of a Local Government Organisation; or
- a Statutory Body Officeholder acting on behalf of a Statutory Body.

Notwithstanding the deeming provisions, an ELNO or Registrar may request that the Subscriber provide evidence of their compliance with the good character requirements if they know or have reasonable grounds to suspect that the Subscriber does not meet the requirements. The Subscriber must be able to provide evidence that they have taken reasonable steps to ensure that it or its principals, Officers, Subscriber Administrators and Users are not and have not been subject to the particular matter or matters.

5.4 What are “Reasonable Steps”?

“Reasonable steps” is a commonly used legal concept. When applied to Subscribers in this scenario it means the taking of such steps as an ordinarily prudent Subscriber would have taken in the circumstances, in the ordinary course of their business, and applying their professional judgment. What reasonable steps should be taken will be a question of fact dependant on the circumstances of the individual case. Where any doubt arises, or should reasonably have arisen, more extensive steps and enquiries should be made.

5.5 Complying with the insurance criterion

Subscribers must comply with the Insurance Rules specified in Schedule 6 to the Model Participation Rules. These rules impose obligations on Subscribers to obtain and maintain current, specific insurance policies and to provide the ELNO with evidence of insurance when requested. Evidence of insurance includes certificates of currency for the policies held by a Subscriber.

Insurance Rule 3 lists self-insured Subscribers, which are ADIs, the Crown in right of the Commonwealth or a State or a Territory or Local Government Organisations or Statutory Bodies undertaking their own conveyancing work. These entities do not need to take out any insurance to be a Subscriber.

Insurance Rule 4 lists Australian Legal Practitioners, Law Practices and Licensed Conveyancers as those deemed to comply with the Insurance Rules and sets out the requirements that need to be met in order for the deeming provision to apply.

5.6 Satisfying the business name criterion

Model Participation Rule 4.5 requires that a Subscriber who wishes to use a business name that is the same as its System Name must ensure that the business name is registered (unless exempt by law) to the Subscriber, and not in use by another Subscriber.

ELNOs provide fields for both a business name, which must be registered, and also a business unit, which does not need to be registered. The business unit field may be used to differentiate between different divisions of a business.

6 FREQUENTLY ASKED QUESTIONS

Q1: What effect will it have if one of my principals, Officers or Subscriber Administrators is or has been subject to the matters listed under the Eligibility Criteria?

A1: They are not eligible to be a principal or Officer of a Subscriber or a Subscriber Administrator. The Subscriber should remove the Person’s access to the ELN and

give notice in writing to the Registrar and the ELNO. An ELNO is responsible for registering Subscribers and monitoring Subscribers' compliance with the Model Participation Rules, including assessing and monitoring compliance with the Eligibility Criteria.

Q2: What evidence can I produce if I have been asked to demonstrate compliance with the Eligibility Criteria in Model Participation Rules 4.3.1(a), (b) and (c) or 7.2.3(a)?

A2: The Model Participation Rules do not prescribe a method or form of providing evidence to demonstrate compliance with the Eligibility Criteria. The evidence requested would depend on the circumstances of the individual case. Subject to an ELNO's specific requirements, one possibility is for the Subscriber to submit its own statutory declaration or obtain a statutory declaration from each of its principals, Officers, Subscriber Administrators and other Users confirming their compliance with the Eligibility Criteria or matters specified under Model Participation Rule 7.2.3(a).

Subject to an ELNO's specific requirements, the Subscriber may also consider searching professional or government licensing registers and public disciplinary registers kept and maintained by the appropriate agencies in each of the Jurisdictions to determine whether an Individual is or has been subject to any disciplinary action or disqualification.

A police check completed as part of an employee's or Officer's onboarding process may also assist in providing evidence that the individual has not been convicted of any relevant offences.

Subject to an ELNO's specific requirements, the Subscriber may also consider undertaking a search of the ASIC register, insolvency register or bankruptcy register kept and maintained by the appropriate agencies to determine whether an Individual is or has been subject to any matters listed in the Model Participation Rules.

Q3: Can the business name field be used to differentiate between the different divisions within the same business?

A3: A business name must be registered to the Subscriber for it to be used by the Subscriber. Where a Subscriber wishes to separate different divisions within the same business, such as a lending division and a property division of a firm or company, the Subscriber may use the business unit field to differentiate those divisions.