

COMMON ERRORS FROM SUBSCRIBER COMPLIANCE EXAMINATIONS

CLIENT AUTHORISATION

If a Client Authorisation is not properly completed, the Subscriber may not have the authority to sign a Registry Instrument or other electronic Document and complete the Conveyancing Transaction(s). Not having authority would arise, for example, if the Client is specified incorrectly, the Conveyancing Transaction is not set out, the Representative is not set out, and the Client Authorisation is not signed by the Client/Client Agent.

The common errors relating to a Client Authorisation include use of the wrong form, incomplete or incorrect details, lack of or incorrect signing, and no date:

1. **An older version of the Client Authorisation is used after a new version has become effective**

A Subscriber is required to use the version of the Client Authorisation that is in effect at the time that the Client Authorisation is signed. Except as set out in item 14, any properly completed Client Authorisation in the form set out in the Model Participation Rules at the time of execution is valid, unless revoked earlier, until:

Specific Authority: the Conveyancing Transaction(s) to which it relates is concluded;

Standing Authority: the expiry date (if there is one);

Batch Authority: the Conveyancing Transaction(s) to which it relates is concluded.

2. **The Client Authorisation is incorporated into an authority to act or retainer**

The Client Authorisation is a prescribed form and is required in addition to any usual retainer agreement or authority to act. Production of a retainer agreement or authority to act in place of a Client Authorisation will result in a non-compliant outcome.

3. **The Client Authorisation does not include the full legal name of the Client or Client Agent**

The Client Authorisation must include the full legal name of the Client or Client Agent. This includes any middle names, or if the Client or Client Agent is a body corporate, the full registered name of the body corporate.

4. **The Client Authorisation names individual(s) as the Client (director(s)) when the Client is a company**

If the Client or Client Agent is a company, the full registered name of the company must be inserted as the Client or Client Agent name on the Client Authorisation, not the names of the director(s) of the company or a business or trading name. The director(s) can sign the Client Authorisation on behalf of the company, in which case their capacity must be completed on the Client Authorisation.

5. The Client Authorisation names the Client Agent as the Client

A Client Agent is a person authorised to act on behalf of the Client, but they are not the Client. A Subscriber must ensure that the Client Authorisation only names the intended Client as the 'Client' for the purposes of the authorisation. When a Client Agent signs on behalf of the Client, their details should be completed. For example, a donee/attorney under a power of attorney is the Client Agent and a donor/principal is the Client.

6. The authority type is not selected, or incorrectly selected

It is important that the correct authority type in the 'Transaction Details' panel is selected.

'Specific Authority' is to be selected when the Client authorises the Subscriber to act for the Client in a specific Conveyancing Transaction. The Property Address and Land Title Reference(s) must also be completed, together with selecting the categories of Conveyancing Transaction(s) authorised by the Client.

'Standing Authority' is to be selected when the Client authorises the Subscriber to act for the period set out in the Client Authorisation, until a specified expiration date, or if no date is specified, until the Client Authorisation is revoked by the Client or the Subscriber. The categories of Conveyancing Transaction(s) must be selected.

'Batch Authority' is to be selected when the Client authorises the Subscriber to act in a batch of Conveyancing Transactions, such as in an apartment or greenfield development. Details of the Conveyancing Transactions the Batch Authority is intended to cover should be attached.

7. 'Other' is selected in the Conveyancing Transactions section of the Transaction Details panel but the details of the other Conveyancing Transactions have not been included

When the 'Other' box has been selected in the Conveyancing Transactions section of the Transaction Details panel, the Subscriber must ensure that sufficient details have been inserted to clearly identify the Conveyancing Transaction(s) the Client has authorised the Subscriber to sign and complete on their behalf. The details may be inserted in the space under the 'Other' box, or in an attachment to the Client Authorisation.

8. All relevant Conveyancing Transactions are not ticked on the Client Authorisation

All Conveyancing Transactions and related Conveyancing Transactions must be specified in the Client Authorisation. For example, if a Client is undertaking a transfer, but then also instructs the Subscriber to undertake a related transmission application or change of name, all of these related transactions must also be specified in the Client Authorisation. Where this has not been included, authorisation by the Subscriber to sign and complete the related transactions has not been provided by the Client.

9. The Client Authorisation omits Client Agent details

The Client Authorisation must include the full name of the Client Agent and the capacity in which they signed the Client Authorisation (for example as an attorney, administrator or executor).

10. The Client Authorisation is not signed and dated by the Client or Client Agent

The Client or the Client Agent must sign and date the Client Authorisation.

If the Client Authorisation is signed by the Client Agent, the Client does not also need to sign the Client Authorisation.

11. No evidence is provided of steps taken to verify the authority of a Client Agent (e.g. Director or Secretary) signing on behalf of a company Client to bind the company to the Client Authorisation and the Conveyancing Transaction

When a Client Agent for a company Client purports to sign on behalf of the company and bind the company to the Client Authorisation and the Conveyancing Transaction, the Subscriber must ensure that they have taken reasonable steps to verify the authority of the Client Agent to do so, and ensure that this evidence is retained.

The Subscriber should also ensure the Client Authorisation is executed by the Client Agent for a company in a way that is permitted by law. If the execution is not under section 127 of the *Corporations Act 2001 (Cth)* the parties (including the Subscriber) will not be able to rely on the assumptions set out in section 129 of that Act and the Subscriber will need to take other steps to verify the authority of the Client Agent to execute in that manner. For example, the Subscriber may need to confirm that the Client Authorisation has been executed in accordance with the company's constitution by sighting a copy of that document.

12. Details of the Representative or Representative Agent are not completed

The details of the Representative must always be completed. If a Representative Agent is appointed, its details must also be completed.

13. The Client Authorisation is not signed and dated by the Representative or Representative Agent

The Representative, or their Representative Agent, also needs to sign and date the Client Authorisation.

If the Client Authorisation is signed by the Representative Agent, the Representative does not also need to sign the Client Authorisation. An Identity Agent should not sign as Representative Agent unless they have also been appointed as the Subscriber's Representative Agent.

If the Client Authorisation is witnessed by an Australian Consular Office officer, the Australian Consular Office officer must insert their name and the date in the panel under the Client signature.

If the Client Authorisation is witnessed by an Identity Agent, the Identity Agent must insert their name and the date in the panel under the Client signature.

14. Continuing to rely on a Client Authorisation where the Client is deceased

The Client Authorisation ends upon the death of the Client, except in the case of South Australia.

In South Australia, when a Client who has completed a Client Authorisation dies, an instrument which has been executed pursuant to that Client Authorisation after the Client's death remains valid (see section 59 of the Real Property Act 1886 (SA)).

In all other Jurisdictions, the death of a Client effectively renders the Client Authorisation invalid. This means that any instruments or Documents (whether signed prior to the death of the Client or not) cannot be used and cannot be Lodged for registration.

For more information read the Model Participation Rules Guidance Note #1 – Client Authorisation available at https://www.arnecc.gov.au/publications/mpr_guidance_notes.

VERIFICATION OF IDENTITY

The common errors relating to verification of identity are:

1. **Not providing sufficient evidence of steps taken to verify identity or retaining evidence supporting verification of identity**

Written details of the steps taken to verify identity together with the supporting evidence of those steps must be provided. The material provided in response to the Compliance Examination must:

- be sufficient to demonstrate the steps that were taken (including the timing of the steps); and
- include copies of any identity documents sighted, which must be retained by the Subscriber for at least seven years from the date of Lodgment as set out in Model Participation Rule 6.6.

2. **The AML/CTF ‘know your customer’ regime and the 100 point check are not equivalent to the Verification of Identity Standard**

Under Model Participation Rule 6.5, a Subscriber can either apply the Verification of Identity Standard as per Schedule 8 of the Model Participation Rules or verify the identity of a Person in some other way that constitutes the taking of reasonable steps.

The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF) ‘know-your-customer’ regime and the 100 point check are not equivalent to the Verification of Identity Standard as set out in Schedule 8 of the Model Participation Rules. If a Subscriber uses the AML/CTF regime or the 100 point check, it is up to the Subscriber to determine whether this use constitutes the taking of reasonable steps.

3. **Incomplete application of the Verification of Identity Standard**

When Subscribers indicate that they have undertaken verification of a Client or Client Agent’s identity in accordance with the Verification of Identity Standard in the Model Participation Rules, then all aspects of that Standard must be followed.

For example, the Verification of Identity Standard is not followed if there is no face-to-face in-person interview with the Person Being Identified, even if copies of the documents listed in the Categories are provided.

If the Verification of Identity Standard is not followed in its entirety, a Subscriber must ensure they retain sufficient evidence of the verification of the Client or Client Agent’s identity to demonstrate the taking of reasonable steps.

4. **Names in verification of identity documents and other supporting evidence do not align with those of transacting parties in the instruments submitted for Lodgment**

Subscribers should ensure that when entering data such as a Client’s name, care is taken to ensure that the details align with the verification of identity documentation and other supporting evidence.

A transacting party's full legal name must be used in an instrument submitted for Lodgment. When there has been a change in a transacting party's legal name, appropriate supporting evidence to show they are one and the same person must be provided.

5. No evidence of the timing of verification of identity compared to the signing of the Client Authorisation

Ideally, a Client Authorisation should be signed at the same time that the verification of identity is undertaken in order to ensure that it is signed by the Client or the Client Agent.

When this cannot occur, the Subscriber must take reasonable steps to ensure that the Client Authorisation is signed by the Client or Client Agent whose identity has been verified. Evidence of these reasonable steps must be retained and provided as part of a Compliance Examination if relevant.

For more information read the Model Participation Rules Guidance Note #2 – Verification of Identity available at https://www.arnecc.gov.au/publications/mpr_guidance_notes.

VERIFICATION OF RIGHT TO DEAL

The common errors relating to verification of the right to deal are:

1. Not providing sufficient evidence

Written details of the steps taken by the Subscriber, together with supporting evidence of those steps, to verify the right to deal must be provided. The material provided in response to the Compliance Examination must:

- be sufficient to demonstrate the steps that were taken (including the timing of the steps); and
- include copies of any documents supporting right to deal sighted by the Subscriber.

2. Supporting evidence provided does not demonstrate link to transacting party

Verifying right to deal will require you to sight and retain 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. Reliance on any one Document is not conclusive evidence and how much evidence is required is dependent on the circumstances.

Supporting evidence must show a Subscriber has taken reasonable steps to verify that the transacting party has the right to deal with the land, not just that they have access to relevant information. For example, a title search or copy of a certificate of title are not sufficient alone and must be supported by verification of identity and sufficient supporting evidence to satisfy yourself of the transacting party's right to deal.

For more information read the Model Participation Rules Guidance Note #4 – Right to Deal available at https://www.arnecc.gov.au/publications/mpr_guidance_notes.

SUPPORTING EVIDENCE

The common error related to supporting evidence is:

1. Evidence for the Registry Instrument or Document is not retained

Model Participation Rule 6.6 requires a Subscriber to retain the evidence supporting an electronic Registry Instrument or other electronic Document for at least seven years from the date of Lodgment. For example, a copy of a death certificate supporting a survivorship application/notice of death or a copy of a Grant of Probate/Letters of Administration supporting an application by a legal personal representative must be kept on file as supporting evidence.

For more information read the Model Participation Rules Guidance Note #5 – Retention of Evidence available at https://www.arnecc.gov.au/publications/mpr_guidance_notes.

CERTIFICATONS

The common error relating to certifications is:

1. Certificates of title are produced following a certification that the duplicate certificate of title is destroyed or made invalid

In Victoria, Subscribers must certify that they have retrieved and either securely destroyed or made invalid the (duplicate) certificate(s) of title for the folio(s) of the Register listed in the Registry Instrument or Document. When a valid version of the (duplicate) certificate of title is produced at a later date, it will be assumed that the certification was given improperly. A copy of an invalidated or destroyed (duplicate) certificate of title could be produced along with details of the steps taken to securely destroy a destroyed certificate of title.

For more information read the Model Participation Rules Guidance Note #3 – Certifications available at https://www.arnecc.gov.au/publications/mpr_guidance_notes.

SUBSCRIBER COMPLIANCE

Common errors relating to subscriber compliance are:

- 1. Not responding to a Compliance Examination notice**
Not responding in a timely manner to a Compliance Examination notice
Providing an incomplete response to a Compliance Examination notice

Section 34 of the *Electronic Conveyancing National Law* and Model Participation Rule 10 requires Subscribers to cooperate with Compliance Examinations and comply with the Compliance Examination procedure. A failure to respond to and/or cooperate with a Compliance Examination notice will be a breach of the Model Participation Rules and may lead to suspension or termination of that Subscriber from an Electronic Lodgment Network (ELN).

- 2. Not updating contact details in the ELN**

Model Participation Rule 6.2 requires Subscribers to keep any information that forms part of their System Details (System Name, Contact Details etc) up to date. This means the Subscriber must promptly update its System Details or, if the Subscriber does not have the level of access to the ELN required to make the necessary updates, promptly notify the ELN Administrator of the changes required.

- 3. Not returning a Subscriber Compliance Examination checklist, or returning an incomplete checklist**

Section 34 of the *Electronic Conveyancing National Law* and Participation Rule 10 requires Subscribers to cooperate with Compliance Examinations and comply with the Compliance Examination procedure. When a Subscriber receives a Compliance Examination notice they must ensure that the Compliance Examination checklist is fully completed and returned as requested.

For more information read the Model Participation Rules Guidance Note #6 – Subscriber Examinations available at https://www.arnecc.gov.au/publications/mpr_guidance_notes.

INSTRUCTING PRACTITIONER ENGAGING A SUBSCRIBER (E-LODGMENT SUBSCRIBER)

The common error relating to engaging a Subscriber (e-lodgment Subscriber) to act on behalf of an instructing conveyancer or lawyer (Instructing Practitioner) is:

1. An Instructing Practitioner is not a licensed conveyancer or Australian legal practitioner

If an e-lodgment Subscriber is engaged to act on behalf of an Instructing Practitioner, they should take reasonable steps to ensure that the Instructing Practitioner is an Australian Legal Practitioner or Licensed Conveyancer.

2. E-lodgment Subscriber not undertaking actions required for certifications

As the e-lodgment Subscriber is the Subscriber undertaking the work in an ELN, it is an e-lodgment Subscriber that must provide the certifications as to Identity, Authority, Evidence and Correctness when Digitally Signing electronic Registry Instruments and other electronic Documents.

An e-lodgment Subscriber must ensure they:

- take reasonable steps to verify the identity of the Client;
- take reasonable steps to verify the Client is a legal Person and has the right to enter into the Conveyancing Transaction;
- enter into a Client Authorisation directly with the Client, except in specific circumstances;
- retain the supporting evidence for the Conveyancing Transaction for at least seven years; and
- take reasonable steps to ensure the Registry Instrument or Document is correct and compliant with relevant law and any Prescribed Requirement.

An e-lodgment Subscriber must not rely solely on the Instructing Practitioner to take these steps or do these things.

For more information see the Model Participation Rules Guidance Note #9 – Instructing Practitioner Engaging a Subscriber (E-Lodgment Subscriber) available at https://www.arnecc.gov.au/publications/mpr_guidance_notes.