

# ALERT

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## Identification of mortgagors to ensure a valid mortgage

Victoria has now followed the lead of New South Wales, Queensland, South Australia and Western Australia by introducing strict requirements for mortgagees to take positive steps to verify the identity of a mortgagor as part of the process to eventually introduce electronic conveyancing.

### New requirements

The law now requires that, at the time of execution of a mortgage or variation of mortgage, a mortgagee must take **reasonable steps to verify the authority and identity of a mortgagor** to ensure that the person executing the mortgage, or on whose behalf the mortgage is executed, as mortgagor, is the same person who is, or is to become the registered proprietor of the land that is security for the payment of the debt to which the mortgage relates.

### How is this different?

Currently, lenders rely on documentary evidence such as driver's licences, passports and so on to satisfy the 100 point test for

the purposes of identification of borrowers under anti-money laundering or counter-terrorism legislation.

Now, as a result of these changes, whenever a mortgage is taken as security, identification will be required by a lender irrespective of whether it is a large institution or a one-off lender, and from a mortgagor whether or not it is the borrower and no matter how unsophisticated the transaction may be.

Importantly, it is the identification of the mortgagor that will be required to be satisfied – even if the mortgagor is not the borrower but a third party guarantor providing a mortgage.

It should be noted that identification is required in the following circumstances:

- when a **mortgage** is taken;
- when a **variation of mortgage** is entered into; or
- where there is a **transfer of mortgage**.



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In the case of a transfer of mortgage, it is permissible for a transferee mortgagee to take reasonable steps to either confirm that the *original mortgagee* took reasonable steps or must take reasonable steps themselves. Hence a lender should ensure that it retains evidence on its file.

## Document the steps taken: what are 'reasonable steps'?

Determining at this early stage of the legislation what are reasonable steps is not easy.

It is also unclear how much of the verification process can be passed on to the mortgagor's legal advisor by the mortgagee or its legal advisor. However, anticipating that the system will be similar to that in other states, we recommend the following process be adopted:

- obtain personal identification evidence by way of Australian

passport **plus** Australian driver's licence or photo card **plus** change of name or marriage certificate if necessary. Cornwall Stodart has prepared a list of acceptable categories of identification documents, which can be included in documentation to be issued by a lender;

- obtain evidence by way of a rates notice confirming that the mortgagor is the registered proprietor to ensure that it conforms with the evidence shown on a title search of the property, confirming that it is in fact the mortgagor and has the requisite authority;
- obtain not only a certified copy of any power of attorney or other authorising documentation where applicable to a mortgagor **but also obtain** the personal identification evidence listed above for the attorney;
- for execution by a **company or incorporated association** as mortgagor, the law requires that an ASIC search be undertaken in addition to taking reasonable steps to establish who is authorised to sign or witness the affixing of the common seal and verify the personal identity of the individual(s) signing or affixing the seal;
- for execution of mortgages under **power of attorney**, in addition to verifying the power of attorney and its scope, the identity of the attorney also needs to be verified;
- have a face to face meeting with the proposed mortgagor and in its presence obtain evidence of identity. A mortgagee must not only request but retain certified copies of the authority and identity of the mortgagor on its file and advise the solicitor acting for the mortgagee of the identification

information provided – particular care should be taken with self acting mortgagors;

- prepare a certification statement similar to that adopted in other states for execution by the mortgagor's solicitor, which certifies that the identification relates to the mortgagor, the date the identification was carried out, and that lists the original current identification documents that are also endorsed as true copies and attached to the certificate. Cornwall Stodart has prepared a certificate to assist you;
- retain evidence of authentication of identity and authority for at least 7 years.

## Can I rely on the mortgagor's solicitor to do the identification compliance?

What is as yet unclear is whether it is sufficient for a mortgagee or its solicitor to rely on the mortgagor's solicitor to satisfy the verification of identity and authority: from a practical perspective, if a mortgagee is to rely on a mortgagor's solicitor, it should ensure that the mortgagor's solicitor strictly complies with the new law.

Amendments to a mortgagee's standard certificate by legal practitioner and mortgagor's acknowledgement (if carefully worded to ensure compliance) should be the appropriate way to deal with this significant legislation. Cornwall Stodart can assist you in updating your documents to ensure that they comply.



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## What if I fail to comply?

The amendment addresses situations where lenders do not confirm that they are dealing with the registered proprietor, which could have consequences over and above the protection provided in the event of fraudulent transactions.

The law now provides that if the Registrar is satisfied that the mortgagee did not take reasonable steps to verify the authority and identity of the mortgagor, and the registered proprietor of the land did not grant the mortgage, the Registrar may:

- (a) if the mortgage or variation of mortgage has not been registered, refuse to register the mortgage or variation of mortgage; or
- (b) if the mortgage or variation has been registered, remove the mortgage or variation of mortgage from the register.

Once removed from the register, the mortgagee no longer has an indefeasible interest in the mortgaged land and **the mortgage or variation of mortgage is void.**

Similar provisions apply to a transfer of mortgage.

## Comment

It is early days in terms of determining what would be considered 'reasonable steps to properly verify the authority and identity of a mortgagor'. We recommend that, at this stage, 'over engineering' your enquiries is certainly the prudent course until the position becomes clearer and lenders establish protocols acceptable to the Registrar.

Particular care should be taken by mortgagees if a mortgagor is acting without a solicitor – in those circumstances, we strongly recommend that independent legal and/or financial advice be mandatory and that such advice incorporates identification compliance.

Cornwall Stodart can assist you whether as mortgagor or mortgagee to ensure you are adequately protected.

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