



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: JC:lb:1300974
Direct Line: 9926 0202

22 December 2009

Land and Property Management Authority
Confirmation of Identity Review
Legal Services Branch
DX 17 SYDNEY

Email: legal.services@lpma.nsw.gov.au

Dear Sir/Madam,

**Consultation Paper: Confirmation of Identity
Sections 56C and 117 of the *Real Property Act 1900***

The Law Society thanks you for the opportunity to comment on the consultation paper.

The Society's Property Law Committee (Committee) has considered the paper and the Committee's comments are set out below.

Regulations

The *Real Property and Conveyancing Legislation Amendment Act 2009* introduced two new provisions to be included in the *Real Property Act 1900* (Act) effective from a date to be proclaimed.

Section 56C requires that before presenting a mortgage for lodgment, the mortgagee must take reasonable steps to ensure that the person who executed the mortgage is, or is to become, the registered proprietor of the land that is to be mortgaged.

Section 117 requires that a witness to a land dealing or caveat must have known the person signing the dealing or caveat for more than twelve months or must have taken reasonable steps to ensure the identity of that person.

In each case the sections provide that, without limiting the generality of the obligation to "take reasonable steps", the mortgagee or the witness, as the case may be, is considered to have taken reasonable steps if that person has taken the steps prescribed in the regulations.

The consultation paper discusses the appropriate standard of identification and the types of matters that should be covered by the regulations.

General comments

The Committee recognises the need for enhanced measures to verify client identification in order to manage the risk of fraud or improper dealings in transactions with land.

However, it is the Committee's view that the issue of security measures to minimise fraud in relation to the execution of instruments needs to be considered as part of a wider approach to the issue of client identity verification. The Committee favours postponing implementation of these measures until the details of the NECS security measures, which may be more stringent, are known. The introduction of differing standards for identity verification on a State-by State basis, then followed by national (NECS) standards, may tend to confuse lawyer and other professional participants in the land transaction industry and their clients and lead to unintended difficulties in having dealings registered in the prompt fashion intended by the Torrens system.

If introduction of these measures will not be postponed, then consideration must be given to the implementation of a regime that is as close as possible to the likely regime for client identity verification proposed for NECS, as far as this can be ascertained at this time.

Section 56C – Mortgagee's obligation to verify the identify for the mortgagor

Paragraph 2.3 sets out a summary of the basic requirements as follows:

"It is considered that a verification regime sufficient for the purposes of section 56C should be based upon:

1. A face to face interview with the mortgagor(s);
2. Document – based verification rather than electronic - based verification;
3. A minimum of two, preferably three, identification documents, at least one of which should include a photograph; and
4. Original documents to be sighted, rather than certified copies.

Based upon this standard of identification, the paper states that the regulation would need to address the specific matters set out below.

3.1 Where the Mortgagor is a natural person

The consultation paper suggests that the "reasonable steps" required under Section 56C would follow one of the following methods:

Method 1 – the mortgagee must identify the identity of the mortgagor by conducting an identification check in the presence of the mortgagor using at least two original identification documents. At least one of these documents must be a photographic identification document from category one.

It is proposed that the identification check may be carried out by:

- The mortgagee;

- A lawyer acting for the mortgagee; or
- A person appointed as agent of the mortgagee for this purpose under a commercial arrangement.

The Committee notes as a general comment that the concept of "commercial arrangement", mentioned in the third bullet point above, is too vague and requires further refinement.

This category would appear to include mortgage brokers as persons authorised to carry out an identification check. The Committee notes that there is currently controversy as to whether a mortgage broker acts as agent for the mortgagee or for the borrower. The Committee is also concerned because of the current lack of regulation of mortgage brokers, particularly given their large numbers in the market and the relatively large number of mortgage fraud cases involving mortgage brokers.

Method 2 under this heading specifies that the mortgagee "must receive and adopt a record of an identification procedure carried out by a solicitor or licensed conveyancer acting for the mortgagor in relation to the mortgage transaction." The identification procedure carried out by the mortgagor's solicitor or licensed conveyancer must, if envisaged, must comply with Method 1 above.

The Committee considers that the obligation to carry out the identity verification should be limited to the mortgagee or its representative.

This proposal also envisages that the mortgagee would receive copies only, rather than sighting original identity documents, which is less stringent than it is suggested is required to minimise the scope for fraud.

Method 3 – "Where, in exceptional circumstances, it is not possible to use method 1 or 2 (such as where the mortgagor is out of Australia) method 3 may be used..." Method 3 specifies that the mortgagee must receive and adopt a record of an identification procedure carried out by those persons specified in the consultation paper, and the procedure must be carried out during a face-to face interview with the mortgagor and must comply with method 1 above

"AND

(b) after receiving the record, take reasonable steps to confirm that the record is genuine".

The Committee notes that the requirement "to take reasonable steps", prescribes a procedure which includes a requirement "take reasonable steps". This appears rather circular and vague and may not assist those persons required to carry out the procedure.

3.2 Where the mortgagor is an incorporated body

The paper states at page 4:

"The mortgagee must adopt lending practices that a prudent lender would consider appropriate and reasonable".

On page 5 of the paper, it is suggested that as an example of this that the mortgagee must, in the second bullet point:

- “verify in line with prudent lending practice, that the mortgage was executed for the incorporated body in an authorised manner”.

The Committee considers that this statement of the mortgagee’s obligation should be amended so that it is not expressed in absolute form. The obligation should be to verify that the mortgage “appears” to have been executed in an authorised manner.

The Committee also notes that there are incorporated bodies that are not registered with the Australian Securities and Investments Commission.

The Committee also has concerns with the use in this section of the paper (and elsewhere) of the word “prudent”. Those concerns are discussed in more detail in the comments on section 3.7 of the paper.

3.6 Identification in loan application process

The Committee considers that the timeframe referred to in this paragraph should be specified rather than be expressed as “executed within a reasonable time frame”.

3.7 Prudent lending practice - further checks

The Committee notes that it is vital to the integrity of the Register and of those relying on it that there is a prescribed code for verification of identity.

The paper states that:

“In most cases compliance with these proposed regulations would satisfy “the reasonable steps” under section 56C of the *Real Property Act*. However mere mechanical compliance... will not be sufficient”.

The Committee considers, consistent with the views that it has expressed in relation to the client identity procedures under NECS, that compliance by a legal practitioner acting as an identifier for the purposes of the Act, with the steps prescribed by the regulations for the verification of identity, should be sufficient for the purposes of the Act. Although a person defrauded may establish that they did not authorise the transaction, the party carrying out an identification relying on the forged documents may have complied with any prescribed requirements in the regulations. Legal practitioners are not, and cannot be expected to be expert in the detection of forged identity documents. No identity verification system will detect or eliminate all fraud and the design principles governing the implementation of the new regime must recognise and deal with this risk rather than transferring it solely onto the identifier.

The committee considers that a robust system can be maintained, without unnecessary reallocation of liability to identifiers, by updating the “code” for identification prescribed in the regulations, from time to time as considered necessary. This would be preferable to a system where the identification procedure is prospectively open to challenge by stating that the steps taken in a particular case are not those that would have been carried out by “prudent lender”. This is particularly important in view of the Registrar General’s power to “de-register” a mortgage.

The overlay of a “prudent lender” test may impact on, for example, a transferee if there is a delay in the registration of the mortgage which leads to a delay in registration of the transfer.

3.8 Existing customer taking out a new mortgage or varying an existing mortgage

The paper states, at page 6:

“Where an existing customer of the mortgagee takes out a new mortgage or varies an existing mortgage, it may not be necessary for the mortgagee to conduct another verification of identity procedure. However, the mortgagee must take steps to ensure that the person executing the mortgage is one and the same person as the existing customer...”

The Committee suggests that this statement is too vague to be of assistance to mortgagees. The legislation states that the mortgagee must take reasonable steps and this does not appear to take the matter any further.

The Committee suggests that the regulations should make it clear that the requirement to “take reasonable steps” is flexible – i.e.: a mortgagee can establish its own procedures to comply with the relevant sections of the Act. If, however, a mortgagee or witness does follow the steps prescribed in the regulations, then this should be a sufficient compliance with the requirement without more or additional “prudent checks”.

4. Eligible Witnesses [Section 117 *Real Property Act 1900*]

The Committee’s comments in relation to flexibility and the sufficiency of compliance with any procedure prescribed in the regulations apply equally to the “reasonable steps” required to be taken by witnesses under this section. Clearly these requirements will need to be reviewed as there are moves towards an electronic environment for these transactions.

The Committee also noted that the last statement on page 6 should be qualified by adding the words “for the purpose of the regulations” after the word “required”.

Satisfactory Documents

In relation to the documents listed under the heading “Satisfactory documents” for the purposes of the regulations relating to both Sections 56C and 117 of the *Act*, a “NSW photo card” is listed, in contrast with an “Australian” passport or driver’s licence. It may be the case that New South Wales is currently the only state issuing a photo card (although it is understood that proof of age cards are issued in some other jurisdictions). The Committee suggests that there is no reason that this type of photographic identification document be limited to a photo card issued in New South Wales rather than any Australian State or Territory. In this regard the Committee notes that in the Australian Capital Territory one of the acceptable forms of Primary Proof of Identity for a photographic driver licence or vehicle registration is an “Australian Proof of Age Card (includes NSW Photo Card) with appropriate security features, showing date of issue by an Authority, that is current or expired up to 2 years”.

Conclusion

The Committee has repeatedly expressed its view that it is undesirable for there to be incremental changes to the client identification process to avoid the risk of confusing practitioners and other stakeholders in the tiling system. If a new regime is to be introduced prior to introduction of a prescribed procedure under the legislation governing the NECS, then the aim must be for consistent regimes.

If you have any questions regarding the Committee's comments, please contact Ms Liza Booth, by telephone on (02) 9926 0202 or by email to liza.booth@lawsociety.com.au

Yours sincerely



Joseph Catanzariti
President