

Consultation paper

Confirmation of identity

Sections 56C and 117 of the Real Property Act 1900

Closing date: 21 December 2009



Land and Property
Management Authority



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1. Introduction

The *Real Property and Conveyancing Legislation Amendment Act 2009* introduced two new provisions that are to be included in the *Real Property Act 1900* on a date to be proclaimed. The sections:

- require 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 to be mortgaged (s56C); and
- require that a witness to a land dealing or caveat must have known the person signing the dealing or caveat for more than 12 months or must have taken reasonable steps to ensure the identity of that person (s117).

The reasonable steps that will satisfy the verification requirements of the sections are to be prescribed by regulations. This paper has been prepared to prompt discussion on the appropriate standard of identification that should be required and to consider the types of matters that should be covered by the Regulations.

The requirement to verify identity is an essential safeguard against fraud in conveyancing transactions. It is intended that the Regulations will set a standard for identification verification that will balance the need for an efficient conveyancing and financing industry with the need to manage the risk of fraud or improper dealings in transactions with land.

2. Mortgagee's obligation to verify the identity of the mortgagor

2.1 Background and comparison with the Anti-Money Laundering and Counter-Terrorism Financing Act 2006

The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the AML/CTF legislation) imposes obligations on many lenders, requiring them to carry out a procedure to verify a customer's identity before providing a designated service. However, the objectives of the customer identification obligations of the AML/CTF legislation are not the same as the objectives of s56C of the Real Property Act. The AML/CTF legislation was implemented to meet international standards and to help protect businesses from being misused for money laundering and terrorism financing. Section 56C is intended to reduce the incidence of mortgage fraud. In that context, its objective is not only to verify a customer but to verify that the mortgagor is, or is to become, the registered proprietor of the land that it is to be secured by the mortgage.

It is considered that, for the purposes of the Real Property Act, a key element of the identification regime should be a face to face interview with the mortgagor(s). Rather than merely checking a name, date of birth and address against external verifiable sources, the identity check should be conducted during a face-to-face interview with the mortgagor to ensure that the person who physically executes the mortgage is in fact the person who is, or is to become, the registered proprietor of the relevant land.

There are a number of other aspects of the AML/CTF standards that are not considered to be sufficient for the purpose of verification under s56C. The verification regime established under the AML/CTF legislation is a risk-based scheme that allows reporting entities to set their own

standards in accordance with risk-based systems and controls. The regime allows customer identification information to be verified using document-based procedures or electronic-based procedures. Given the objectives of s56C it is not considered that electronic verification alone would constitute 'reasonable steps' for the purposes of the section.

The AML/CTF provisions set out a procedure for document-based verification which, if followed, would satisfy the reporting entities obligation (known as the 'safe harbour procedure'). The document based safe harbour procedure requires a reporting entity to verify:

1. the customer's name and either the customer's residential address or date of birth from:
 - a. an original or certified copy of a primary photographic identification document; or
 - b. both:
 - i. an original or certified copy of a primary non-photographic identification document; and
 - ii. an original or certified copy of a secondary identification document; and
2. verify that any document produced by the customer has not expired (other than in the case of a passport issued by the Commonwealth that expired within the preceding two years).

These procedures allow identity to be verified using certified copies. If the procedures under s56C are framed to require a face to face interview original documents could be produced and there would be no need for certified copies to be used. It is suggested that identity verification should be based on production of original documents.

Furthermore, under the AML/CTF safe-harbour procedures verification can be made by relying on only one identity document. To guard against mortgage fraud it is considered that more stringent measures be imposed and that more than one form of identity document be required.

2.2 Categories of identification documents

Identification documents can be categorised in accordance with what they can verify about a person. In respect of land transactions the following categories are relevant.

- **Category 1** – Photographic identification documents.
- **Category 2** – Documents providing evidence of address.
- **Category 3** – Additional supporting identification documents.

Ideally, identification should be verified by providing documents from each of the three categories, however, this will not always be possible.

A list of documents that would satisfy each category is set out below.

Category of documentation	Satisfactory documents
Category 1 Photographic identification documents	<ul style="list-style-type: none"> • Australian passport (current or expired within the last two years) • Australian driver's licence • NSW photo card • Overseas passport
Category 2 Documents providing evidence of address	<ul style="list-style-type: none"> • Current rate notice • Utility account • Current bank statement or credit card statement • Tax assessment notice
Category 3 Additional supporting identification documents	<ul style="list-style-type: none"> • State or territory birth certificate • Australian citizenship certificate

2.3 Summary of basic requirements

It is considered that a verification regime sufficient for the purposes of s56C 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
4. original documents to be sighted, rather than certified copies.

3. Proposed draft regulation

Based upon the standard for identification set out above, the Regulation would need to address the following specific matters.

3.1 Where the mortgagor is a natural person

To satisfy the 'reasonable steps' for the purposes of s56C of the Real Property Act the mortgagee would be required to follow one of the following three methods.

Method 1 - The mortgagee must verify 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 the documents must be a photographic identification document from Category 1.

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.

An identification check carried out by a person (the witness) who has witnessed the execution of the mortgage, would not satisfy the proposed

regulations unless the witness was a lawyer acting for the mortgagee or a person appointed under a commercial arrangement with the mortgagee for the purpose of carrying out an identification check as agent for the mortgagee.

Method 2 - 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 comply with Method 1 above. The record must include clear legible copies of the identification documents relied on and must be accompanied by an original letter on the letterhead of the solicitor or licensed conveyancer acting for the mortgagor.

Method 3 - Where, in exceptional circumstances, it is not possible to use either method 1 or 2 (such as where the mortgagor is out of Australia) method 3 may be used. In those circumstances, the mortgagee must:

- (a) receive and adopt a record (the record) of an identification procedure carried out by a person holding a public office or conducting a professional practice or a person of similar standing (the verifying person), for example, a police officer or court officer in a remote part of Australia or a lawyer, notary public or embassy official if outside Australia. The procedure must be carried out during a face-to-face interview with the mortgagor and must comply with method 1 above. The record must include clear, legible copies of the identification documents relied on in the identification procedure, certified by the verifying person as being true copies of the original documents.

AND

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

3.2 Where the mortgagor is an incorporated body

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

For example:

- confirm from a current Australian Securities and Investments Commission search the details of the incorporated body including the registration number, registration status, address of registered office, address of principal place of business and details of current officers; and
- verify, in line with prudent lending practice, that the mortgage was executed for the incorporated body in an authorised manner; and
- conduct an identification check to verify the identity, in accordance with these proposed regulations, of the individual or individuals signing and/or affixing a seal on behalf of the incorporated body.

3.3 More than one mortgagor

Where there is more than one mortgagor, the mortgagee must verify the identity of each person who signs the mortgage. This is required whether or not the mortgagee is entitled, under contractual arrangements with the mortgagors, to deal with one of the mortgagors on behalf of all mortgagors for purposes relating to the mortgage.

3.4 Mortgage executed by natural person as attorney

Where a mortgage is executed by a natural person as attorney under a power of attorney granted by the mortgagor, the mortgagee must:

- confirm from the registered power of attorney the name of the attorney; and
- conduct an identification check to confirm the identity of the person executing the mortgage as attorney in accordance with these proposed regulations; and
- verify that the execution of the mortgage was authorised by the power of attorney.

3.5 Mortgage executed by incorporated body as attorney

Where a mortgage is executed by an incorporated body as attorney under power of attorney granted by the mortgagor, the mortgagee must:

- confirm from the registered power of attorney the details of the attorney; and
- conduct an identification check to confirm the identity of the individual or individuals signing and/or affixing a seal on behalf of the incorporated body as attorney in accordance with these proposed regulations; and
- verify that the execution of the mortgage was authorised by the power of attorney and completed in an authorised manner.

3.6 Identification in loan application process

Where the mortgagee confirms the identity of a person applying for a loan or completing loan application documentation, in accordance with the proposed guidelines, a further full identity check will not be required when the mortgage instrument is executed within a reasonable timeframe, however prudent checks should be undertaken to confirm that the person executing the mortgage is in fact the person the mortgagee has previously identified.

3.7 Prudent lending practice – further checks

In most cases compliance with these proposed regulations would satisfy the 'reasonable steps' requirement under s 56C of the Real Property Act. However mere mechanical compliance with a procedure for identification, without attention to detail or without responding to unexplained discrepancies in information or matters which would arouse suspicion in a reasonable person will not be sufficient.

Further checks must be conducted to verify the identity of the mortgagor in any case where a prudent lender would reasonably be expected to do this.

Examples include cases where:

- a photograph on a document does not show a reasonable likeness to the person being identified/ the person applying for the loan or executing the mortgage
- a document relied on for identification is wholly or partly illegible or appears to have been altered in some way
- there appears to be a discrepancy between information in a document relied on for identification and the name, apparent age or any other information available to the mortgagee about the person who executes the mortgage.

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

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 that the mortgagee has previously identified. This could be done by verification of the signature and contact details of the mortgagor from previous records and taking steps to independently confirm that the transaction is authorised, for example by telephoning the mortgagor. Where there is more than one mortgagor, the mortgagee must take such steps in relation to each mortgagor.

4. Eligible witnesses (s117 Real Property Act)

Section 117, as amended by the *Real Property and Conveyancing Amendment Legislation Act 2009*, will require that any witness to a primary application, dealing or caveat must be an 'eligible witness'. An 'eligible witness' is defined by s117(4) to be:

(4) In this section, eligible witness, in relation to the execution of an application, dealing or caveat, means a person who:

(a) is at least 18 years of age, and

(b) is not a party to the application, dealing or caveat, and

(c) has known the person to whose execution of the application, dealing or caveat the witness is attesting for more than 12 months or has taken reasonable steps to ensure the identity of that person.

The 'reasonable steps' that must be taken where the witness has not known the person executing the document for more than 12 months are to be prescribed by regulation.

It is proposed that the Regulation require the witness to sight two original identification documents, at least one of which should be a primary photographic identification document from Category A, as specified in the list below.

Category of documentation	Satisfactory documents
Category 1 Photographic identification documents	<ul style="list-style-type: none"> • Australian passport (current or expired within the last two years) • Australian driver's licence • NSW photo card • Overseas passport
Category 2 Documents providing evidence of address	<ul style="list-style-type: none"> • Current rate notice • Utility account • Current bank statement or credit card statement • Tax assessment notice
Category 3 Additional supporting identification documents	<ul style="list-style-type: none"> • State or territory birth certificate • Australian citizenship certificate

The witness will not be required to keep a record of the documents sighted to verify identity.

5. Comments

Comments on the proposals in this paper are welcomed and can be made to:

Land and Property Management Authority

Confirmation of Identity Review

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**Submissions should be made by
21 DECEMBER 2009.**

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