

Circular

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New obligations on mortgagees and witnesses to commence on 1 November 2011

Land and Property Information, a division of the Department of Finance and Services is officially registered in the Australian Business Register and also registered for GST. Its ABN is 84 104 377 806.

The *Real Property Amendment Regulation 2011* was approved on 10 June 2011. It supports identity verification requirements set out in new sections 56C and 117(4) of the *Real Property Act 1900* made by the *Real Property and Conveyancing Legislation Amendment Act 2009*.

These sections of the Act and the amended regulations will take effect from 1 November 2011. Also commencing on 1 November 2011 will be section 111A of the *Conveyancing Act 1919*, which concerns mortgagee sales.

Mortgagee obligation to confirm the identity of borrowers

Section 56C of the *Real Property Act 1900* will require banks and other lending institutions to take reasonable steps to ensure that any borrower is, or will become, the registered proprietor of the land to be mortgaged.

The reasonable steps required are set out in Part 3A of the Regulation. They are essentially the same as those required under the Commonwealth Anti-Money Laundering and Counter-Terrorism Financing Act 2006 ('AML/CTF Act'). Mortgagees who meet their obligations under the AML/CTF Act will also meet the requirements under section 56C and will not have to make any changes to their procedures to comply.

Those mortgagees who are not obligated, or who otherwise do not meet their obligations under the AML/CTF Act, will be required to adjust their practices to incorporate the reasonable steps set out in Part 3A of the Regulation.

Failure to comply with section 56C may result in a mortgagee losing their registered interest if the mortgage is found to be fraudulent.

Mortgagee obligations in relation to the exercise of power of sale

Under the new section 111A of the *Conveyancing Act 1919*, a mortgagee (or chargee) of land must take reasonable care in exercising their power of sale to ensure that the land is sold for not less than its market value, or if this is not possible, for the best price that may reasonably be obtained in the circumstances.

A person who suffers loss or damage as a result of the failure to comply with section 111A will have a remedy in damages against the mortgagee (or chargee) exercising the power of sale.

Obligations of witnesses

Section 117(4) of the *Real Property Act 1900* will require a witness to a land dealing or caveat to have known the person signing the dealing or caveat for more than 12 months. If the witness has not known the person for that length of time, they must take reasonable steps to confirm the identity of that person.

The above obligation does not apply if the witness and person signing the land dealing have known each other for 12 months or more. In such a case, a person can witness the signature of that person without having to verify their identity.

A person who is asked to witness a signature to a land dealing must sight an original primary identification document containing a photograph of the person (such as a drivers licence or passport), or originals of two non-photographic identification documents (such as a birth certificate and Medicare card) that confirm the identity of the person signing the land dealing. A complete list of acceptable primary photographic, primary non-photographic and secondary identification documents can be found in the list of definitions at Clause 3 of the Regulation.

Failure to comply may result in fines of up to \$2200.

Purpose of amendments

The requirement to verify identity is an essential safeguard against fraud in conveyancing transactions. The regulatory changes outlined above are intended to 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.

Commencement of new requirements

The new requirements set out in this circular will not commence until 1 November 2011 to ensure that mortgagees and others have sufficient time to prepare for the changes.

Further information

LPI will issue a fact sheet setting out practical requirements associated with these changes later in 2011.

In the meantime see the *Real Property Amendment Regulation 2011* at www.legislation.nsw.gov.au for details of the reasonable steps required to confirm identity and a list of acceptable identification documents.

The *Real Property and Conveyancing Legislation Amendment Act 2009* can also be accessed at www.legislation.nsw.gov.au.

General inquiries may be made in person at the Client Service Counter, ground floor, Land and Property Information, Queens Square, Sydney, by telephone to 1300 052 637, fax to 02 9221 4405 or by email to GeneralEnquiry@lpma.nsw.gov.au.

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