

Confirmation of Identity of Mortgagor by Mortgagee

[2-2005]

~~The following practice guidelines pursuant to s 11A(3) of the *Land Title Act* 1994 and s 288A(3) of the *Land Act* 1994 refer to obligations imposed on many mortgagees by the *Financial Transactions Reports Act* 1988 (Cth) and the *Financial Transactions Reports Regulations* 1990 (Cth). New Commonwealth legislation, namely the *Anti-Money Laundering and Counter-Terrorism Financing Act* 2006, has now come into force. The practice guidelines are being reviewed in view of changes to Commonwealth law relevant to the verification of identity of mortgagors.~~

~~Revised practice guidelines for s 11A(3) of the *Land Title Act* 1994 and s 288A(3) of the *Land Act* 1994 will be published separately and from the time of publication will replace the current practice guidelines and form part of this Manual. Until that time, the existing practice guidelines shall continue to the extent that they may reasonably apply in any particular circumstances.~~

Section 11A of the *Land Title Act* 1994 and s 288A of the *Land Act* 1994 place an onus on **ALL** mortgagees to ~~adopt appropriate due diligence practices~~ confirm the identity of mortgagors prior to lodging any mortgage for registration. The provisions under s 11A of the *Land Title Act* 1994 and s 288A of the *Land Act* 1994 apply to **ALL** mortgages lodged for registration in Queensland, whether or not the mortgagee has any other business relationship with the mortgagor.

A mortgagee intending to take a mortgage over freehold land, a water allocation or an interest in a State tenure as security for a debt or liability, must, prior to lodging a mortgage for registration, take 'reasonable steps' to ensure that the person who ~~executed the mortgage as mortgagor~~ is the mortgagor under the instrument is identical with the person who is, or who is about to become, the registered owner of the lot or holder of the interest being mortgaged.

Under s 11A (3) of the *Land Title Act* 1994 and s 288A (3) of the *Land Act* 1994, a mortgagee takes 'reasonable steps' if they comply with the practices included in this Manual. One way in which a mortgagee will take 'reasonable steps' is if they identify the person who is the mortgagor under the instrument (Person Being Identified) using the Verification of Identity Standard outlined in Part 60 [60-2000] and ensure the Person Being Identified is identical with the person who is, or who is about to become, the registered owner of the lot or holder of the interest being mortgaged.

~~In essence, these practices reflect the '100 points of identification' provisions under Commonwealth legislation governing certain financial transactions, namely, the *Financial Transaction Reports Act* 1988 (FTRA) and the *Financial Transaction Reports Regulations* 1990 (FTRR).~~

Accordingly for the purposes of complying with s 11A(3) of the *Land Title Act* 1994 and s 288A(3) of the *Land Act* 1994 a mortgagee can either:

- (a) identify the person who is the mortgagor under the instrument (Person Being Identified) using the Verification of Identity Standard outlined in Part 60 [60-2000] and ensure the Person Being Identified is identical with the person who is, or who is about to become, the registered owner of the lot or holder of the interest being mortgaged.
- (b) ensure that the person who is the mortgagor under the instrument is identical with the person who is, or who is about to become, the registered owner of the lot or holder of the interest being mortgaged, in some other way that constitutes the taking of reasonable steps.

~~These practice guidelines are provided pursuant to s 11A(3) of the *Land Title Act* 1994 and s 288A(3) of the *Land Act* 1994. However, this section does not limit the provisions of s 11A(2)~~

of the *Land Title Act 1994* or s 288A(2) of the *Land Act 1994*. It is neither feasible nor practical to attempt to publish an exhaustive list of practices and examples that would cover every possible scenario. To help provide context, a limited number of examples are provided for illustration purposes. It should be noted that these guidelines **do not** prescribe the **only** ways of taking ‘reasonable steps’ under s 11A(2) of the *Land Title Act 1994* or s 288A(2) of the *Land Act 1994*.

Mortgagee is Cash Dealer under FTRA

For mortgages where the original mortgagee has an obligation as a ‘cash dealer’ under FTRA to identify the mortgagor as a ‘signatory’ in relation to an account, the mortgagee’s compliance with those obligations satisfies ‘reasonable steps’ for the purposes of s 11A(2) of the *Land Title Act 1994* or s 288A(2) of the *Land Act 1994*. Where the original mortgagee has no obligation under FTRA to identify a mortgagor (e.g. where the intended mortgagor is a guarantor but not a ‘signatory’ to an account under FTRA), the guidelines under the paragraph headed ‘*Mortgagee not Cash Dealer under FTRA*’ apply.

Mortgagee not Cash Dealer under FTRA

For any mortgage that does not come within the terms of the above paragraph headed ‘*Mortgagee is Cash Dealer under FTRA*’, the following guidelines apply:

Where the mortgagor is a natural person

As a general rule, to satisfy ‘reasonable steps’, the original mortgagee must verify the identity of the mortgagor in the same way required under FTRA and FTRR as if the original mortgagee were a ‘cash dealer’ and the mortgagor were required to be identified as a ‘signatory’ in relation to an account with the cash dealer. The verification of identity must be in accordance with Method Two as set out in ‘Australian Transaction Reports and Analysis Centre (AUSTRAC) Guideline No. 3’ which is published on the internet at www.austrac.gov.au/files/guideline_3_archived.pdf

Method One—identification reference—**does not** constitute ‘reasonable steps’ under these guidelines for the purposes of s 11A(2) of the *Land Title Act 1994* or s 288A(2) of the *Land Act 1994* in such cases. The acceptable method requires, at the very minimum, a ‘100 points of identification’ check using primary and secondary identification documents. For example—

- birth certificate, certificate of citizenship, current passport—70 points each
- driver licence—40 points
- confirmation from a current employer—35 points
- electoral roll, the record of a public utility, credit cards—25 points each

The inclusion of at least one item of identification that includes both a photograph and signature of the mortgagor is preferred.

Where the mortgagor is an incorporated body

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

- confirm from a current company search the details of the company 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 company in an authorised manner.~~

Identification in loan application process

~~Where the mortgagee conducts an appropriate verification of the mortgagor's identity during the loan application phase, a further identity check may not be required when the mortgage is executed within a reasonable timeframe. These practice guidelines allow a degree of flexibility to accommodate certain practices sometimes followed by prudent lenders. For example—~~

~~*Mortgagors A and B apply for a loan from ZZ Pty Ltd to purchase a property. The introducer of the loan, C, carries out an appropriate '100 point' verification of the identity of both A and B as agent for ZZ Pty Ltd and records the steps taken, including details of A's and B's driver licences and other documents used to verify their identities. ZZ Pty Ltd receives and adopts C's record of the steps taken. ZZ Pty Ltd forwards mortgage documents to the solicitor for A and B for signing. Within a reasonable timeframe of C's verification of the identities of A and B, the mortgage documents are executed by A and B and returned from the solicitor to ZZ Pty Ltd. Moneys are advanced and ZZ Pty Ltd lodges the mortgage for registration.*~~

Prudent lending practice – further checks

It is considered that in most cases, compliance with the Verification of Identity Standard ~~these guidelines~~ would satisfy the 'reasonable steps' requirement under s 11A(2) of the *Land Title Act* 1994 or s 288A(2) of the *Land Act* 1994 provided that, from the steps taken, a prudent lender would be satisfied that the person who executes the mortgage is, or is about to become, the registered owner or holder of the interest to be mortgaged.

However, it is important to note that mere mechanical compliance with the- Verification of Identity Standard ~~'100 point check' for identification~~, without attention to detail, is not sufficient. Accordingly, paragraph 9 of the Verification of Identity standard requires a mortgagee to undertake further steps to verify the identity of the Person Being Identified where they ought reasonably know that:

- (a) any identity Document produced by the Person Being Identified is not genuine; or
- (b) any photograph on an identity Document produced by the Person Being Identified is not a reasonable likeness of the Person Being Identified; or
- (c) the Person Being Identified does not appear to be the Person to which the identity Document(s) relate;

or it would otherwise be reasonable to do so.

~~For example, there may be cases where a prudent lender would consider it~~ Specific circumstances where it may otherwise be considered ~~reasonable to conduct further checks, such as in cases where~~ undertake further steps, may include the following –

- the person who executes the mortgage has, in any document or record relied on to identify that person, a name that is not exactly the same as the name of the current registered owner or holder of the interest, or transferee on a transfer to be lodged prior to the mortgage; or
- the person who executes the mortgage appears not to be of the same gender as the current registered owner or holder of the relevant interest, as indicated by the name of the registered

owner or holder of the interest or by any other information reasonably available to the mortgagee; or

- the person who executes the mortgage appears to be younger than the current registered owner or holder of the interest, as indicated by the date that the person became registered on title or by any other information reasonably available to the mortgagee;¹
- the mortgage is executed under a power of attorney. Where the mortgage is executed under a power of attorney the mortgagee should take reasonable steps to ensure the power of attorney is genuine.

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 is not necessary for the mortgagee to conduct another ‘100 points’ or similar verification of identity. However, the mortgagee **must** ensure the person taking out the mortgage is one and the same person as the existing customer that the mortgagee has previously identified and dealt with through the normal course of business, for example, by verification of the signature and contact details of the mortgagor, confirmation of income statements, etc. For the purposes of these practice guidelines, an ‘existing customer’ is either a person who is a ‘signatory’ to an account held with a mortgagee that is a ‘cash dealer’ under FTRA where the mortgagee has complied with any obligation under FTRA to verify the identity of that person; or a person whose identity the mortgagee has previously confirmed in accordance with prudent lending practice. In any such case, the mortgagee should retain appropriate records.

Further general guidelines—

Practice guidelines do not prescribe the only ‘reasonable steps’

A mortgagee is considered to take ‘reasonable steps’ if they comply with these guidelines. However, this is not to the exclusion of other measures that may also constitute ‘reasonable steps’. It is important to re-iterate that these guidelines **do not** prescribe the **only** ways of taking ‘reasonable steps’.

For example—

Where *mortgagor X*, owing to disability or because they reside in a remote part of Australia, is unable to attend at an office of the mortgagee (or their representative) during the loan application or approval process—the mortgagee **receives and adopts** from the Justice of the Peace or other qualified witness who witnessed the execution of the mortgage instrument, a certificate confirming *mortgagor X*’s identity was verified by ‘100 point check’ and a record of the driver licence or other photographic identification and other primary or secondary identification documents used for the verification—it is considered the mortgagee takes ‘reasonable steps’ for the purposes of s 11A(2) of the *Land Title Act 1994* or s 288A(2) of the *Land Act 1994*.

Execution under power of attorney

Mortgage executed by natural person as attorney

Where a mortgage is executed by a natural person as attorney under power of attorney granted by the mortgagor, the mortgagee takes ‘reasonable steps’ under the Act if it complies with the following—

- confirms from the registered power of attorney the name and address of the attorney; and

- ~~identifies the person executing the mortgage as attorney in accordance with these guidelines; and~~
- ~~verifies, in line with prudent lending practice, that the execution of the mortgage was authorised by the power of attorney.~~

~~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 takes ‘reasonable steps’ under the Act if it complies with the following—~~

- ~~confirms from the registered power of attorney the details of the attorney; and~~
- ~~identifies the incorporated body executing the mortgage as attorney in accordance with these guidelines; and~~
- ~~verifies, in line with prudent lending practice, that the execution of the mortgage was authorised by the power of attorney and completed in an authorised manner.~~

Record keeping – approved form

Under s 11A(4) of the *Land Title Act* 1994 and s 288A(4) of the *Land Act* 1994 a mortgagee must keep the following for 7 years after the instrument is registered:

- (a) in the approved form, a written record of the steps taken under s 11A (2) of the *Land Title Act* 1994 and s 288A(2) of the *Land Act* 1994; or
- (b) originals or copies of the documents and other evidence provided to or otherwise obtained by the mortgagee in complying with s 11A (2) of the *Land Title Act* 1994 and s 288A(2) of the *Land Act* 1994.

The term ‘approved form’ in s 11A(4)(a) of the *Land Title Act* 1994 or s 288A(4)(a) of the *Land Act* 1994, means a record kept ~~either in a form that satisfies the requirements of FTRR and FTRA or in any other form~~ that properly identifies the mortgage transaction and clearly details the steps taken by the mortgagee under s 11A of the *Land Title Act* 1994 or s 288A of the *Land Act* 1994. The record does not form part of, and must not accompany, an instrument or document lodged for registration.

Section 11A(6) of the *Land Title Act* 1994 or s 288A(6) of the *Land Act* 1994 authorises the production of the records, which may contain personal information, only when such a request is made by the Registrar. It is anticipated that production of records would be required in, but not limited to, circumstances where the Registrar is investigating a particular allegation or other matter.