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MORTGAGEES AND VERIFYING MORTGAGORS' IDENTITIES – A TIME OF CHANGE

**Susan Forrest, Craig Green,
Victor Asoyo and Liam Hennessy**

I. Introduction

On 18 December 2019, the Australian Registrars National Electronic Conveyancing Council (**ARNECC**) released a consultation draft of version 6 of its Model Participation Rules. It pertains to Mortgagees' "Verification of Identity" (**VOI Draft**) requirements when registering mortgage securities, which are separate to AML / CTF KYC requirements. The VOI Draft - which contains one very noteworthy change - is accessible [here](#).

The VOI Draft came at the end of a year of change for Queensland in 2019, which currently stands apart from the other states in requiring witnesses to mortgage instruments – usually a JP or solicitor - apply the (much stricter) VOI standard. Taken together, it makes for a challenging time for mortgagees in updating their processes.

In this briefing, we provide an overview of the changes regarding witnessing of mortgage securities in Queensland, the key changes proposed under the VOI Draft and offer some practical steps for mortgagees to consider now.



II. Mortgagee vs. witness obligations

All of the states (but not the territories) require mortgagees to take positive steps to verify the identities of mortgagors, commonly through a framework called the "Verification of Identity Standard" (**VOI Standard**)¹ undertaken by specialised "Identity Agents".

The VOI Standard essentially requires:

- a face-to-face interview to be conducted by an Identity Agent with the mortgagor;
- the Identity Agent to be satisfied that the mortgagor bears a "reasonable likeness" to the person depicted in photographs in the identification documents²; and
- the Identity Agent to confirm that the identification documents are current originals (aside from an Australian passport expired in the past 2 years) produced by the mortgagor.

Identity Agents are persons, often a lawyer, or entities:

- holding the required minimum levels of insurance;
- whom the mortgagee engaging them to perform the VOI Standard reasonably believes to be reputable and competent; and

- and who are authorised by the mortgagee to conduct verification of the mortgagees' identity on their behalf.

In addition to identity verification obligations, the VOI Standard requires the mortgagee to verify the mortgagor's *entitlement* to sign the mortgage e.g. through a land title search and to maintain key records. Where it does not, the mortgagee could lose the benefit of its registered mortgage security.

A separate, though similar, obligation is placed on individuals who witness mortgagors' execution of mortgages. Who can act as an authorised witness is governed by a patchwork of state and territory laws which all permit a wider range of individuals to witness documents than those who can qualify as an Identity Agent applying the VOI Standard. With one exception in Queensland (see below), these witnesses are currently not required to go to the lengths that are imposed on mortgagees under the VOI Standard.

¹ Ss. 11A(2), 11B(2) and 185(1)(A) of the *Land Title Act 1994* (Qld); Ss. 56C and 117 of the *NSW Real Property Act 1900* (NSW); S. 87A(1) and (3) of the *Transfer of Land Act 1958* (Vic); S. 23. of the *Electronic Conveyancing Act 2014* (WA); 273A *Real Property Act 1886* (SA).

² Identification documents refers to the "100 points of identification" provisions under the *Financial Transaction Reports Act 1988* (Cth) and the *Financial Transaction Reports Regulations 2019* (Cth) e.g. a public utility record is worth 35 points

III. Queensland takes its own path

Queensland's amendment to the law on 31 May 2019³ conflated the obligations between witnesses to mortgage securities and Identity Agents undertaking verification of identity; the mortgagees' stricter verification requirements are now duplicated onto the witness.⁴ The Land Title Practice Manual (Queensland) of 1 October 2019 (**Manual**) contains very detailed directions in this regard.

The result is that where a Queensland witness does not comply with their legislative duties, this could affect the mortgagee's registration of their security. In addition, the registrar, whether before or after the registration of the mortgage, can ask the witness to produce records of

the steps they took to comply with the law. If the witness is unable to do so, unless they have a reasonable excuse, they face a maximum penalty of up to 20 penalty units (\$2,669).

The risks are made more acute by the fact that the witness is often an independent third party who is arguably less likely to be aware of their obligations, either due to the law's newness or because there is no equivalent law in any other Australian jurisdiction. It is worth noting that Queensland approves interstate persons as witnesses e.g. lawyers and licensed conveyancers who are likely to be even less cognisant of this law.

IV. VOI Draft – a significant change

The VOI Draft contains an important proposed change of which mortgagees in all states need to be aware. At present, the VOI Standard is not mandatory. All that is required is that mortgagees take "*reasonable steps*" to verify mortgagors' identities. The rules provide that the VOI Standard will satisfy this requirement, however, mortgagees can take a different approach if they consider it justified in all the circumstances. Many do as a matter of course.

That will no longer be the case under version 6 of the ARNECC's Model Participation Rules. The proposed change to paragraph 6.5.2 of the Model Participation Rules specifies that reasonable steps can **only be used** if the mortgagee is "*reasonably satisfied that the Verification of Identity Standard cannot be applied*". This will be a big change for some mortgagees, who currently do not apply the VOI Standard or only partially apply it. Particular areas that we think will change are set out below:

- 1. Identity Agents:** mortgagees need to appoint their identity agents in writing (page 7) and direct the agent to use the VOI Standard (paragraph 6.5.5(b)). In our view, this will require mortgagees to develop systems and processes to satisfy themselves that the identity agent is reputable and competent and to record that decision.
- 2. Face-to-face:** the verification of identity process must be conducted in person (Schedule 8, item 2.1). This is also set out in the Manual, which states that there is currently no provision in Queensland for instruments or documents to be witnessed "electronically" or remotely via Skype or other electronic means.
- 3. Identity:** The mortgagors' identity must be verified using prescribed documents (Schedule 8, item 3). For Australian citizens, these documents include an Australian Passport or foreign passport or Australian Evidence of Immigration Status ImmiCard or Australian Migration Status ImmiCard plus Australian drivers' licence or Photo Card plus change of name or marriage certificate if necessary. The minimum document requirements are tabularised on page 57 of the VOI Draft.

Where prescribed documents are unable to be used for whatever reason, the mortgagee may rely on the provision of an Identity Declaration. In short, this involves the Identity Agent undertaking reasonable



³ Natural Resources and Other Legislation Amendment Act 2019 (Qld)

⁴ s. 162 of the Land Title Act 1994 (Qld) and s. 311 of the Land Act 2004 (Qld)

inquiries to satisfy themselves that a third party, the "Identity Declarant", has known the mortgagor for over a year, is not a relative or a party to the transaction and falls within one of several specified categories e.g. lawyer or bank manager. The Identity Declarant then needs to provide a statutory declaration containing prescribed details.

4. **Documentation:** the Identity Agent needs to provide an Identity Agent Certification and copies of the verification documents sighted to the mortgagee (paragraph 6.5.5(d)). Again, we think that mortgagees will need to develop appropriate frameworks to ensure that the right information is being captured; where they do not they run the risk of losing their mortgage security.

V. What to do now?

Submissions on the VOI Draft close on 19 February 2020.

Ahead of the VOI Draft coming into effect, mortgagees need to revisit their process to ensure that they are or soon will be able to comply with the VOI Standard. Queensland mortgagees also need to revisit their mortgage witnessing forms and processes to ensure that witnesses to mortgages are aware of and fulfil their new obligations. Undoubtedly, all these new requirements will add a layer of additional complexity and time to the taking of mortgage securities. By not taking any action, however, mortgagees risk their mortgage security.

We are assisting our clients to refresh their forms and processes. Please let us know if you would like to discuss the new laws with us and how we can potentially help.



Contact Us



SUSAN FORREST

Partner

M: 0413 752 584

E: susan.forrest@gadens.com

Susan has more than 20 years' experience and is one of Queensland's leading litigation and insolvency lawyers.

Her areas of expertise include banking and debt recovery, enforcement of mortgage and other securities, insolvency, secured and unsecured asset recovery and loss minimisation, including farm debt mediation.

Using her extensive advisory and legal risk management experience, Susan advises a number of Australia's largest retail, commercial and agribusiness banking and financial institutions. She acts on the enforcement and collection of secured and unsecured debts and investigates fraud allegations, as well as assisting in responses to AFCA/COSL complaints. Susan also advises on bankruptcies, receiverships, and winding up proceedings.

**CRAIG GREEN****Partner****M: 0412 730 276****E: craig.green@gadens.com**

Craig heads the Banking & Finance Team in Brisbane. With more than 30 years' experience in finance and property transactions, Craig acts primarily for banks and other financial institutions on a range of mainstream commercial, residential and business transactions. In his role he oversees thousands of transactions every month.

With significant experience in the National Consumer Protection Act and the National Credit Code, Craig is regularly invited to deliver seminars on mortgage lending and self-managed super fund lending. He has also previously lectured on mortgage lending law at the Securities Institute of Australia and TAFE.

As Craig acts for a large variety of banks, building societies and other funders as well as major commercial borrowers; he has unrivalled understanding of both sides of large financial transactions.

Craig is a Life Member and Fellow of the Mortgage and Finance Association of Australia, Member of the AICD, and a Notary Public.

**VICTOR ASOYO****Partner****M: 0478 333 396****E: victor.asoyo@gadens.com**

Victor is a Partner in Gadens' Banking & Finance Team with excellent experience in banking and property law.

Victor acts for a variety of private lenders, traditional banking and mid-tier lending clients in the banking sector as well as ASX 100 listed companies providing sound advice across a broad range of financial transactions.

He has advised on client loans in areas touching on property development, construction, pharmacy and other related healthcare services, invoice financing, self-managed super fund lending arrangements and Personal Property Security Act securities and the registration on the Personal Property Security Register.

**LIAM HENNESSY****Director****M: 0491 694 497****E: liam.hennessy@gadens.com**

Liam is a Financial Services specialist at Gadens. He is well-versed with both the UK SMCR and the BEAR. Additionally, he has significant experience in financial services compliance / risk matters, regulatory inquiries and disputes, and has practised in Brisbane, Sydney, Melbourne and London. He is also the primary author of the Australian regulators weekly wrap.

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www.gadens.com

BRISBANE



Level 11, ONE ONE ONE
111 Eagle Street,
Brisbane QLD 4000



61 7 3231 1666



61 7 3229 5850

ADELAIDE



Level 1
333 King William Street,
Adelaide SA 5000



+61 8 8456 2433



+61 8 8456 2499

MELBOURNE



Level 25, Bourke Place
600 Bourke Street
Melbourne VIC 3000



+61 3 9252 2555



+61 3 9252 2500

SYDNEY



Level 20, MLC Centre
19 Martin Place
Sydney NSW 2000



+61 2 9231 4996



+61 2 9163 3000

PERTH



Level 20, The Quadran
1 William Street
Perth WA 6000



+61 8 9288 6000



+61 8 9288 6001