

Verification of Authority

Registrar-General's Verification of Authority Guidelines

Office of the Registrar-General

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of South Australia

These Guidelines are issued under s273B of the *Real Property Act 1886*.

The requirements will be in force from 27 May 2017



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Registrar-General's Verification of Authority Requirements

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1. Definitions

Term	Definition
Conveyancer	Means a person currently registered under the <i>Conveyancers Act 1994 (SA)</i> or a corresponding law of another State, to carry on a business that consists of or involves the preparation of conveyancing instruments for fee or reward.
Conveyancing Transaction	Means a transaction that involves one or more parties and the purpose of which is to — (a) create, transfer, dispose of, mortgage, charge, lease or deal with in any other way an estate or interest in land; or (b) get something registered, noted or recorded in the titles register; or (c) have the registration, note or record of something in the titles register changed, withdrawn or removed.
Legal Practitioner	Means a person currently entitled to practise the profession of law under the <i>Legal Practitioners Act 1981 (SA)</i> or a corresponding law of another State.
National Electronic Conveyancing	An initiative of the Council of Australian Governments (COAG) to provide a single national electronic conveyancing system for use throughout Australia. To be introduced in South Australia when the <i>Electronic Conveyancing National Law (South Australia) Act 2013</i> comes into operation.
Person	Includes an individual or a body politic or corporate.
Representative	Means a Conveyancer or Legal Practitioner acting for a client that is a party to a Conveyancing Transaction.

An expression used in these Requirements that is not defined above has, unless the contrary intention appears, the same meaning as in the *Real Property Act 1886*.

2. Overview

2.1 Summary

The *Real Property Act 1886 (the Real Property Act)* now requires legal practitioners and conveyancers to verify their clients' authority to be a party to the instruments authorised by or under a client authorisation, in accordance with these Guidelines. The Act also now requires mortgagees to verify the authority of mortgagors to enter into mortgages in accordance with these Guidelines. Additionally, prior to registering or recording an instrument executed by a self-represented party, the Registrar-General intends to satisfy himself that the party is authorised to enter into the transaction to which the instrument relates in accordance with these Guidelines.

These Guidelines require that "reasonable steps" are taken to verify authority. Verifying a person's authority in accordance with these Guidelines requires inspection of supporting documents that connect the person to the land which is being conveyed, or which otherwise show their authority to be a party to the instrument. The supporting documents to be inspected will vary depending on the circumstances. To verify authority in accordance with these Guidelines, it will be necessary to take the steps to verify authority that a prudent legal practitioner, conveyancer or mortgagee (as the case

may be) would reasonably be expected to take in the circumstances and in the ordinary course of his or her business.

An expression used in these Guidelines has, unless the contrary intention appears, the same meaning as in the *Real Property Act*.

2.2 Purpose of these Guidelines

The *Real Property Act* requires that the authority of a party to an instrument, to enter into the relevant transaction, is verified.¹

In particular:

- Prior to entering into a mortgage, a mortgagee must verify the authority of the mortgagor to enter into the mortgage, in accordance with these Guidelines;²
- Prior to renewing or extending a mortgage, a mortgagee must verify the mortgagor's authority to enter into the renewal or extension, in accordance with these Guidelines;³ and
- Prior to executing an instrument on behalf of a client, a legal practitioner or conveyancer must verify the authority of their client to be a party to that instrument, in accordance with these Guidelines;⁴ and

Additionally:

- If a party to an instrument is not represented by a legal practitioner or conveyancer, the Registrar-General must not register or record the instrument in the Register Book or the Register of Crown Leases unless the party has satisfied the Registrar-General that he or she is authorised to enter into the transaction to which the instrument relates.⁵ These Guidelines outline the manner in which the Registrar-General intends to satisfy himself that unrepresented parties have the authority to enter into the relevant transaction.

3 When do these Guidelines Apply?

These Requirements apply when a Conveyancing Transaction is lodged with the Lands Titles Office while these Requirements are in force.

These Requirements apply to paper instruments and documents under the *Real Property Act*. However, they are consistent with the verification of authority (right to deal) rules introduced for National Electronic Conveyancing in South Australia.

¹ The *Electronic Conveyancing National Law (South Australia) Act 2013* requires parties to electronic conveyancing transactions to have their authority to enter into the transaction verified in the same manner. See the "Right To Deal" Model Participation Rules Guidance Note at www.arnecc.gov.au

² Section 128A, *Real Property Act 1886*

³ Section 153B, *Real Property Act 1886*

⁴ Section 240F, *Real Property Act 1886*

⁵ Section 273AA, *Real Property Act 1886*

4 Why is Verification of Authority Required?

Verifying the authority of a party, to be a party to the relevant instrument, is considered to be part of the due diligence required of conveyancing professionals. The *Real Property Act* has now been amended to expressly require compliance with this obligation. Failure to comply with the obligation is now an offence.⁶

Verifying a party's authority mitigates the risk of a fraudulent transaction. It gives the other parties to the transaction confidence they are dealing with a person who has the authority to enter into the transaction.

The identity of parties must also be verified in accordance with the "*Registrar-General's Verification of Identity Requirements*".⁷ These Guidelines complement the Verification of Identity Requirements. Prudent conveyancing practice generally entails these two verification procedures being conducted at the same time.

5 Reasonable Steps

To comply with these Guidelines, the legal practitioner, conveyancer or mortgagee must take "reasonable steps" to verify the authority of the party to be a party to the instrument.

The verification will, in each case, require inspection of supporting documents that link the person to the land which is being conveyed.

The supporting documents should therefore name the person whose authority is being verified, identify the land and show that the person has a connection with the land.

6 What are "Reasonable Steps"?

"Reasonable steps" is a commonly used legal concept. In this context, it means taking the steps a prudent legal practitioner, conveyancer or mortgagee (as the case may be) would reasonably be expected to take in the circumstances and in the ordinary course of his or her business.

Whether "reasonable steps" have been taken will be a question of fact depending on the circumstances of the individual case. If necessary, this would be subsequently determined by a Court after considering all of the particular circumstances.

More extensive checks and enquiries should be made where doubt arises (or would arise in the mind of a reasonable and prudent practitioner) in relation to the person's authority to enter into the conveyancing transaction. See points 7 and 8 below for further information.

⁶ See ss128A(1), ss152A(1), ss153B(1), s232B, s240F, *Real Property Act 1886*

⁷ Refer to the Registrar-General's "Verification of Identity Requirements" available at www.sa.gov.au/landservices

7 Some Examples of Verification Documents

The following are examples of documents that may be used to verify a person's authority to enter into common conveyancing transactions:

7.1 Outgoing Party and Mortgagor

For a party that is relinquishing its interest, such as a transferor, or a mortgagor, supporting documentation that may assist in verifying the party's authority could include:

- a current local council or water rates notice for the land;
- current utility bills for the land;
- a current land tax assessment notice for the property;
- loan documentation connecting the party and the land; or
- the mortgage granted by the mortgagor.

Reliance on any one document to verify authority is unlikely to satisfy the requirement to take "reasonable steps".

A Register search should also be undertaken to confirm that the party is named as a registered interest holder for the land.

Legal Practitioners and Registered Conveyancers representing a Caveator should take reasonable steps to verify their client's authority to deal with the land. This is done by determining that a caveatable interest exists and that you believe the claims made by the Caveator are true in substance and in fact.

Caveator (Withdrawal of Caveat)

Legal Practitioners and Registered Conveyancers representing the Caveator named in the Caveat should take reasonable steps to ensure the Caveator is the same person you initially represented. If you did not originally represent the Caveator named in the Caveat, production by the Caveator of supporting documentation for the Caveat could assist in establishing the Caveator's right to deal with the land.

7.2 Incoming Party

For a party gaining an interest in the land in the conveyancing transaction, such as a transferee or a mortgagee, supporting documentation that may assist in verifying authority to deal with the land could include the following:

- the contract of sale for the land; or
- loan documentation connecting the party to the land.

This list is not exhaustive. What constitutes "reasonable steps" will depend on the circumstances.

8 Further Considerations

There are many instances where further consideration will need to be given to determining what steps would be considered “reasonable” in a particular case.

For example:

- Is the transacting party’s name different on the supporting documentation? If so, have they changed their name and can they provide documentation to show this?
- Is the transacting party more than one person (such as joint tenants)? If so, all persons comprising the transacting party should have their authority to enter the transaction verified and their knowledge of the conveyancing transaction confirmed.
- Is the transacting party subject to a trust? If so, is the conveyancing transaction permitted under the trust? Who are the current trustees?
- Is there an insolvency event involving one of the transacting parties? If there is an insolvency event, is the conveyancing transaction permitted under the relevant legislation?
- Is the transacting party a statutory corporation? What is the correct name of the statutory corporation? Is the transaction permitted under the relevant legislation? If the transacting person is acting under delegation, has a delegation been lawfully made allowing them to do so?
- Is the transacting party a successor at law to the registered proprietor? On what basis is it a successor at law - statutory vesting, transfer of business, or another basis?
- Is the transacting party an executor? Is the transaction contemplated by the will?
- Is the transacting party a protected person or acting in the role of guardian of a protected person (for example, under the *Guardianship and Administration Act 1993*)? Is the transaction permitted by any relevant orders and under the relevant legislation?
- Is the transacting person acting under a power of attorney? Does the power of attorney permit the transaction? Is the power of attorney still current or has it been revoked? Has the correct person been identified as attorney? Are attorneys required to act jointly or can they act severally?
- Is the transacting party an incorporated association?⁸ If so, is the transaction permitted under the association’s rules and the relevant legislation? Are you dealing with representatives of the incorporated entity duly authorised to provide instructions? Does the transaction purport to give effect to a court order? Is the transaction authorised by the order?

Further enquiries should be made where doubt arises (or would arise in the mind of a reasonable and prudent practitioner), in relation to the transacting person’s authority to enter into the transaction. For example where you know or ought to know:

- that the documents being produced for verification of authority are not genuine; or

⁸ See the *Associations Incorporation Act 1985*

- that the age of the person whose authority is being verified does not appear to be consistent with the likely age of the transacting party (for example, the purported transferor is too young to have purchased the property at the time it was purchased); or
- of any other circumstance that raises suspicion or should be investigated further.

Circumstances may raise awareness that greater care should be taken in relation to a particular transaction. For example, if the transaction is urgent, or the veracity of instructions is doubtful, or a non-standard mortgage of an unencumbered title is involved, or the transacting party has limited English. Whilst such transactions may be legitimate, it may be necessary to verify the circumstances surrounding the transaction (for example, by checking the reason for urgency or engaging an independent interpreter).

9 Supporting Evidence

The *Real Property Act* requires that documents used by a legal practitioner or conveyancer or a mortgagee for the purpose of verifying authority are retained by the practitioner or mortgagee. Documents used to verify a person's authority to be a party to an instrument must be retained for seven years from the date the instrument is lodged in the Lands Titles Office.⁹

10 Frequently Asked Questions

10.1 How do I know that my client John Smith is the same John Smith that is the registered proprietor on the certificate of title?

You need to take reasonable steps to satisfy yourself. These may include simultaneous verification of identity and verification of authority by obtaining supporting evidence that links John Smith to the land. The supporting evidence may be one or more of the documents referred to under paragraph 7.1 above. You should also make further enquiries where doubt arises or should arise in relation to your instructions and the conveyancing transaction. For example, if the purported transferor is too young to have purchased the property at the time it was purchased. In this case suspicion should arise that they may be John Smith Junior.

10.2 What should I do if I doubt my client has the mental capacity to enter into the transaction?

You should make further enquiries if you doubt that your client has the mental capacity to enter into the transaction. Such enquiries could include obtaining a medical certificate to verify that they have the mental capacity to enter into the transaction.

10.3 I am a practitioner representing an incoming mortgagee, what are my verification of authority obligations?

You must take reasonable steps to verify the authority of your client. This could be done by obtaining loan documentation and any other supporting documentation that shows they are the intended incoming mortgagee for that property.

⁹ See s238A(2), s152A(2), 153B(2),s232B(6), s240F(1)(b), *Real Property Act 1886*

In addition to this, you must take reasonable steps to verify that the mortgagor has the authority to enter into the mortgage. This could be done by obtaining the contract of sale and other related documentation if they are the incoming registered proprietor. If they are the current registered proprietor, documentation connecting them to the land is required. See point 7.1 above for further information.

11 Self-Represented Parties

The *Real Property Act* states that if a party to an instrument is not represented by a legal practitioner or conveyancer, the Registrar-General must not register or record the instrument in the Register Book or the Register of Crown Leases, unless the party has satisfied the Registrar-General that he or she is authorised to enter into the transaction to which the instrument relates.¹⁰

These Guidelines outline the manner in which the Registrar-General intends to satisfy himself that self-represented parties have the authority to enter into the relevant transaction.

In each case, the Registrar-General will require self-represented parties to produce, for inspection, supporting documents that link them to the land being conveyed. The documents set out in point 7 above, are examples of the kind of supporting documents which the Registrar-General may require a party to produce.

The *Real Property Act* also requires a party to an instrument who is not represented by a legal practitioner or registered conveyancer, to retain a copy of any document used to satisfy the Registrar-General of their authority to enter into the transaction. They must retain it for a period of seven years from the date of lodgement of the instrument in the Lands Titles Office.¹¹

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¹⁰ Section 273AA, *Real Property Act 1886*

¹¹ Subsection 273AA(2), *Real Property Act 1886*