

Notice

To Lodging Parties

29 June 2016 No 189

New Conveyancing Requirements

The *Real Property (Electronic Conveyancing) Amendment Act 2016* (the Act) will commence on **Monday 4 July 2016**. The commencement of the Act will introduce significant changes to the existing conveyancing requirements in South Australia.

The changes introduced by the Act are summarised below. A copy of the Act can be obtained at www.legislation.sa.gov.au.

1. Removal of Duplicate Certificates of Title and Tenants Copies of Crown Lease

All Duplicate Certificates of Title (Duplicate Titles) and Tenants copies of Crown Lease (Crown Leases) will be invalid from Monday 4 July 2016.

From this date:

- the Lands Titles Office (LTO) will no longer issue Duplicate Titles and Crown Leases;
- Duplicate Titles and Crown Leases will not need to be lodged in the LTO; and
- Duplicate Titles that are lodged in the LTO will be securely destroyed.

1.1 Confirmation of Registration Notice

With the removal of Duplicate Titles and Crown Leases, a new Confirmation of Registration Notice will be generated upon the registration/recording of all instruments. This notice will be sent to the email address linked to the Agent Code for both the lodging and correcting parties (where they are different).

A sample of the new Confirmation of Registration Notice can be found [here](#).

2. Verification of Identity

Version 3 of the [Registrar-General's Verification of Identity Requirements](#) will come into effect from 4 July 2016.

The Verification of Identity (VOI) Requirements have been updated to reflect the introduction of Client Authorisations and broaden the scope of transactions, including a number of Division documents (see Category A and Category B documents listing under item 7 in this notice).

Non-represented lessees in a Lease are exempt from the need to provide any certifications under s273 of the *Real Property Act 1886* which negates the need to undertake (a formal) Verification of Identity.

The Act defines "instrument" to include any document capable of registration in the LTO, or that can be recorded in the Register Book. To clarify - although Version 3 of the Verification of Identity Requirements refers to "instruments" – Verification of Identity need only be undertaken for instruments which are intended to be lodged in the LTO.

Land Services

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3. Verification of Authority

The [Registrar-General's Verification of Authority Guidelines](#) will come into effect from 4 July 2016.

Legal practitioners and conveyancers will be required to take reasonable steps to verify their client's authority to be a party to the instrument(s) authorised by or under a Client Authorisation.

The Guidelines complement the Verification of Identity Requirements, and prudent conveyancing practice generally entails these two verification procedures being conducted at the same time.

Documents which could be used to verify authority may include:

- current local council or water rates notices 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;
- the mortgage granted by the Mortgagor;
- the contract of sale for the land.

This list is not exhaustive and what constitutes "reasonable steps" will be dependent on the circumstances.

Non-represented lessees in a lease are exempt from the need to provide any certifications under s273 of the Act which negates the need to undertake (a formal) Verification of Authority.

4. Client Authorisation

The Act inserts a new Part 20A into the *Real Property Act 1886* which introduces Client Authorisations. A Client Authorisation authorises a practitioner to execute a specific instrument, a batch of instruments, or instruments for a specified period of time on behalf of their client.

A Client Authorisation is required when a legal practitioner or registered conveyancer acts for a client in most conveyancing transactions. However, the use of a Client Authorisation for Caveats and Priority Notices is **optional**.

A Client Authorisation is **not** required for the following instruments relating to applications:

- for title by possession to land;
- for land division and applications for amalgamation of titles; and
- under the Community Titles Act 1996 and Strata Titles Act 1988.

A party to a Client Authorisation may terminate the authorisation by advising the other party in writing that it is no longer valid. Where a person dies after executing a Client Authorisation, the Client Authorisation is still valid for the instruments authorised by Client Authorisation and the instruments may still be registered or recorded.

5. Priority Notices

Priority Notices were introduced on 27 April 2015. However, now that Duplicate Titles have been abolished they play a more important role in protecting the integrity of the Register Book and the interests of parties to conveyancing transactions. In addition to protecting the priority of instruments, they also provide early warning of an impending transaction.

Priority Notices can be lodged for any instrument(s). Although not mandatory, lodging a Priority to protect a client's interest is prudent practice for conveyancing practitioners.

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6. Retention of Evidence

The Act requires evidence showing an instrument has been lawfully executed to be retained for a minimum period of 7 years from the date the instrument is lodged in the LTO (see item 8 of this notice for Mortgage requirements). This evidence includes the Client Authorisation, and any documents used for Verification of Identity and Verification of Authority.

Additionally, some evidentiary documents which previously needed to be lodged in the LTO with instruments are now instead to be retained by practitioners. Practitioners will certify the instrument to show they have retained the documents.

Evidentiary documents which no longer need to be lodged in the LTO, with the exception of non-represented parties/applicants, as well as evidence which must continue to be produced, are listed below. Other determinations will be made on a case by case basis:

| Evidence Not Required for Production to the LTO | |
|---|---|
| Transfer | ASIC evidence of Liquidator / Receiver on behalf of a company |
| Transfer | ASIC extract for company name change |
| Transfer | Guardianship Order / Approval to sell or purchase |
| Transfer | Court Order under <i>Aged and Infirm Persons' Property Act 1940</i> |
| Transfer | Letter from medical practitioner re: incapacity of a Donor |
| Transfer | Statutory Declaration (i.e. change/correction of name) |
| Bankruptcy | Bankruptcy Certificate / Sequestration Order |
| Application to Note Death | Death Certificate |
| Change of Name | Marriage Certificate etc. |
| Evidence Required for Production to the LTO | |
| Full and temporary withdrawals | Consent of certifying party |
| Full and temporary withdrawals (division applications or plans) | Consent of certifying party including a statement that the applicant and all affected parties have consented to the amendments. |
| Lease | Consents by Mortgagee |
| Surrender of Lease | Consents by Mortgagees / Encumbrancees |
| Re-Entry of Lease | Notices / Letters / Order of Court |
| Variation of Order of Priority | Consents by Mortgagor and parties with intervening interest |
| Crown Lease dealings | Ministerial Consents |
| Cessation of Lien | Court Records or Order of Court or any other evidence or letters that may be required |
| Appointment of New Trustee(s) | Trust Deeds / Probate or any other evidence or letters that may be required |
| Court Order / Warrant of Sale / Warrant of Enforcement | Charging, Restraining or other types of Orders / Warrants |
| Instruments permitted by a permissive Caveat providing Caveator has given written consent | Consent by Caveator |

7. Certifications

Instruments will no longer be executed by the parties. Instead, practitioners will execute instruments on behalf of their clients. Practitioners will execute instruments by making a certification under s273 of the *Real Property Act 1886*.

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The Registrar-General must not register an instrument unless the prescribed person has provided certifications (with some exceptions, for example those prescribed by Regulation 12 of the *Real Property Regulations 2009*) in regards to:

- Verification of Identity;
- Client Authorisation;
- Evidence retention; and
- Correctness and compliance of the instrument with relevant legislation and any Prescribed Requirements.

The “prescribed person” means a legal practitioner, registered conveyancer or the applicant / party to the instrument (where not represented by a legal practitioner or conveyancer).

The new Section 96 introduced by the Act requires the Transferor and the Transferee to execute instruments, where land is being transferred or a right-of-way or other easement is being created or transferred. Therefore a Transfer instrument will need to be certified by both parties. Under Part 11 of the Act, dual certification will also apply to Leases and Surrenders of Lease, except when the lessees are non-represented.

A number of Division documents will now also require certifications. The table below summarises the certifications required for division applications under the *Real Property Act 1886*:

| Category A – Division Documents which require ALL of the above certifications: | |
|---|---|
| -Grant of Easement (TG) | -Extinguishment/Variation of Easement (VE) |
| Category B – Division Documents which require THREE certifications (exempt from Client Authorisation): | |
| -Amendment of SP (A7) | -Deposit Plan of Community Division (ACT) |
| -Amendment of Deposited CP (AP3) | -Amendment of Deposited CP (AP4) |
| -Amendment of Deposited CP (AP5) | -Amendment to Lot Entitlements (AP2CP) |
| -Amendment of Deposited SP (AP6) | -Amendment to Unit Entitlements (AP2SP) |
| -Amalgamation of Allotments (RTA) | -Amalgamation of SP (A8) |
| -Amalgamation of CP's (SM2) | -Cancellation of SP (CS1) |
| -Cancellation of CP (CS2) | -Deposit of Plan of Division (RTC) |
| Category C – Division Documents which require NO certifications: | |
| -Deposit of Plan of Division (RTU) | -Termination of Development Contract (TD) |
| -Lodgement of Resolution (LR) | -Deposit of Plan of Division & Issue of New CT's (RTD) |
| -Unit Entitlement Sheet | -Lodgement for Filing Under Community Tiles Act (LF1 & LF2) |
| -Lot Entitlement Sheet | -ALL Individual Consent Forms |

8. Mortgages

The Act allows the Registrar-General to register a Mortgage which is executed solely by the Mortgagee. In addition to the certifications listed in Item 7 of this notice, the Mortgagee (or their representative practitioner) must certify that that the Mortgagor:

- has verified the identity of the Mortgagor;
- holds a Mortgage granted by the Mortgagor on the same terms as the Registry Instrument.

The Mortgage form (form M1A) which includes a Mortgagor’s execution, if properly executed, can be considered by the Mortgagee to represent a Mortgage on “the same terms” as that lodged for registration.

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The Mortgage “on the same terms” and the evidence showing compliance with the Verification of Identity and Verification of Authority Requirements must be retained by the Mortgagee until the Mortgage is fully discharged. This obligation passes to the Transferee on the Transfer of a Mortgage.

8.1 Second Mortgagee - Consents

Traditionally where a second Mortgage was lodged over a property, consent was sought from the first Mortgagee and the Duplicate Title presented. From the Registrar-General’s perspective, given the Duplicate Title is no longer required to be produced and instruments are always subject to prior registered interests, the consent of the first Mortgagee is not required to register a second Mortgage.

8.2 Indefeasibility

The Act amends s69 of the *Real Property Act 1886*. If a Mortgage is fraudulently executed and the Mortgagee failed to comply with Verification of Identity and Verification of Authority Requirements, the Mortgagee’s interest under the Mortgage will not be indefeasible. The Registrar-General has the power to cancel registration of the Mortgage in these circumstances.

The Registrar-General also has the power to cancel registration of a Mortgage if the Mortgagee lodged a Mortgage executed solely by the Mortgagee, but is unable to produce the corresponding Mortgage executed by the Mortgagor.

9. Discharge of Mortgage

Discharges of Mortgage must be lodged in the LTO by the Mortgagee.

Post the transition period, only Discharges of Mortgage which pre-date 4 November 2016 can be lodged in the LTO by the Mortgagor.

10. Caveats

The Act expressly allows a registered proprietor to Caveat their own property. This clarification of the law was made following a number of Registered Proprietors lodging Caveats to protect their land against potential fraudulent activity.

Instruments lodged after a permissive Caveat will automatically be subject to the Caveator’s claim. This is reflected in the removal of the encumbrance panel from LTO forms.

The Act allows the Registrar-General to prescribe instruments which can be registered or recorded in the face of a Caveat (unless the Caveat specifically forbids the registration or recording of that particular instrument – see regulation 13C of the *Real Property Regulations 2009*).

The Act also gives the Registrar-General power to enter a Caveat under Section 220(g) when it is in the public interest to do so.

11. Lodging in Duplicate and Triplicate

The Act amends Section 55 of the *Real Property Act 1886* by removing the ability to lodge Mortgages and Encumbrances in duplicate and Leases in duplicate or triplicate.

Instruments should be lodged in the LTO in single copy only. Duplicate and triplicate copies of instruments will be returned to the lodging party unnumbered.

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12. Offences and Penalties

The Act introduces new offences for false certification, fraudulent use of a digital signature, fraudulent alteration of a Client Authorisation, and the execution of an instrument on behalf of another person without a properly completed Client Authorisation.

Penalties generally have also been increased to align with more contemporary fines and prison sentences for offences under the Act.

13. LTO Forms

All LTO forms have been updated to reflect the new requirements. The revised forms can be found at www.sa.gov.au/landservices/LTOForms.

As instruments are always subject to prior registered interests, the Encumbrance panel has been removed from all LTO forms.

Personal declarations, with some exceptions (for example Appointments of New Trustee(s) and Applications to Note Re-entry of Lease), have also been removed from instruments as the causality can be stated in the application. The relevant certifications duly made by the authorised person removes the need for a declaration.



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