

# Mortgage Execution in South Australia

## On paper – signed by mortgagor

Mortgage lodged with the Lands Titles Office in paper where both the mortgagor and mortgagee execute must have the following mortgage execution requirements.

### Mortgagor Execution

#### Natural Person

If the mortgagor is a natural person who is signing in his or her own right, he or she must sign his or her usual signature in the place indicated on the form.

#### Power of Attorney

The mortgagor may execute the mortgage by his, her or its attorney, provided that the power of attorney authorises such action and has been deposited in the Lands Titles Registration Office.

The execution clause states 'Executed on behalf of <name of mortgagor> under power of attorney <number of power of attorney document>'. If the power of attorney has not been deposited prior to the execution of the transfer, it will not be possible to refer to the instrument's Lands Titles Office number in the execution. In this case, the power must be lodged contemporaneously with the transfer, mortgage or other instrument. If the power is to be lodged with the other dealings no number is required to be included. If the power of attorney is in favour of whoever is the occupant for the time being of a specified position, the execution should also state that position or capacity.

#### Company

If the mortgagor is a body corporate, its execution must comply with any formalities prescribed by the statute under which it is incorporated and (if relevant) its constitution.

Execution in accordance with the Corporations Act s127:

- Multi-member company:
  - Affix the seal and the affixing is witnessed by 2 directors of the company; or a director and a company secretary of the company; or
  - Execute without using a common seal if the document is signed by 2 directors of the company; or a director and a company secretary of the company.
- Sole Person company:
  - Affix the seal and the affixing is witnessed by the person who is the sole director and secretary; or
  - Execute without using a common seal if the document is signed by the person who is the sole director and secretary.

Execution not in accordance with the Corporations Act s127:

- Sole Person company with no secretary:
  - Affix the seal and the affixing is witnessed by the person who is the sole director; or
  - Execute without using a common seal if the document is signed by the person who is the sole director.

It is noted that a proprietary company is no longer required to have a secretary, therefore the ability to execute as above needs to be available. However, this execution does not comply with section 127 and therefore as strict compliance is not possible the assumptions of sections 128 and 129 may not be available. Because the company's execution does not literally comply with s 127(2) and the assumption of due execution may not be available, the Registrar-General requires the mortgage to be endorsed or accompanied by a certification that (1) the company is a proprietary company, (2) the company does not have a secretary and (3) that the director is exercising the power conferred by s 198E(1) of the Corporations Act 2001 (Cth).

- Company (multi-member or sole member company) executing by:
  - Affix the seal and the affixing is witnessed by the person who is the sole director; or
  - Execute without using a common seal if the document is signed by the person who is the sole director

The certifying party must provide a certification that the execution is in accordance with the company's constitution or provide a copy of the constitution (or any other relevant documentation) which authorised the particular method of execution.

### **Association**

Requirements for Associations vary (as it depends what is in accordance with the rules of the association) but office practice is to check:

- Affix seal and affixing of seal is witnessed by a person solely who states they are a public officer; or
- Affix seal and affixing of the seal is witnessed by two people who state their title.

Also if it is an incorporated body under its own Act the execution would need to abide by the specifications stated within that Act.

### **Mortgagee Execution**

The mortgagee must execute by providing the following required certifications for the mortgage:

- The Certifier, or the Certifier is reasonably satisfied that the mortgagee it represents has taken reasonable steps to verify the identity of the mortgagor.
- The Certifier has retained the evidence supporting this Registry Instrument or Document.
- The Certifier has taken reasonable steps to ensure that this Registry Instrument or Document is correct and compliant with relevant legislation and any Prescribed Requirement.

The person signing on behalf of the mortgagee in relation to the certifications must be an Australian Legal Practitioner, Licensed Conveyancer or employee of the mortgagee with personal knowledge of the matters he or she is certifying to.

Where the person signing on behalf of the mortgagee is an Australian Legal Practitioner or Licensed Conveyancer the following additional certifications apply:

- The Certifier has taken reasonable steps to verify the identity of the mortgagee.
- The Certifier holds a properly completed Client Authorisation

## **On paper – signed by mortgagee only (with certifications)**

Any inapplicable certification statement(s) must be deleted.

Certification statements must be made by a prescribed person, being one of the following:

- (b) A legal practitioner
- (c) A registered conveyancer
- (d) If the applicant is not represented by a legal practitioner or registered conveyancer – the applicant (i.e. self-represented party)
- (e) If a party to an instrument is not represented by a legal practitioner or registered conveyancer – that party (i.e. self-represented party)
- (f) If a provision of the *Real Property Act 1886* requires or permits some other person to provide certification under section 273 – that person (e.g. an employee of a body corporate that is a mortgagee)

All certifications apply where the Prescribed Person is a registered conveyancer or legal practitioner.

The first two listed certifications do not apply where the Prescribed Person is the mortgagee (or an employee of a body corporate that is a mortgagee).

The Registrar-General's Verification of Identity and Verification of Authority requirements must always be complied with.

Penalties of up to \$10,000 or 2 years imprisonment apply, where a prescribed person provides a false certification under section 273(1) of the *Real Property Act 1886*.