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From 11 October 2021 Second Mortgages will no longer require First Mortgagee consent for registration in NSW

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First mortgagee consent currently required in NSW

Currently in New South Wales, if a lender wishes to register a second (or subsequent) mortgage on title it must obtain the consent of the first mortgagee on title. If a mortgage is not registered, the lender/mortgagee will only have an unregistered or "equitable" mortgage. In that case a lender will often lodge a caveat on the security property to protect their interest under the equitable mortgage.

A caveat does not afford the same level of protection as a registered mortgage as the lender will remain at risk of the borrower having granted other "equitable" mortgages which, in certain circumstances, will take priority. Also, a caveat does not provide the same enforcement rights as a registered mortgage does. In particular, the statutory right to sell the property to recover moneys due only applies to registered mortgages.

The position is the same in Victoria but different in Queensland, where the first mortgagee's consent is not required to register a second or subsequent mortgage.

New changes coming in in NSW

From 11 October 2021, all Certificates of Title will be abolished as will the control of the right to deal (CoRD) framework in NSW. This means all property dealings will have to be lodged electronically in NSW.

This also means mortgagee consent will not be required for subsequent mortgages.

In NSW, a mortgage will still be able to prohibit the mortgagor from granting subsequent mortgages, as a contractual matter (ie. in a "negative pledge" clause). This is different to Queensland, where contractual restrictions prohibiting second mortgages are void.

After 11 October 2021, the parties will be able to upload a consent to mortgage in the PEXA workspace if they wish to do so but there will be no obligation to do so and a mortgage will be able to be registered without it. There is no prescribed form for such a consent and it can take the form of a written consent on letterhead.

Considerations for second mortgagees / mezzanine lenders / caveat lenders

After 11 October 2021, lenders who offer second mortgage, mezzanine or caveat facilities should consider registering their second mortgage, if their mortgage terms permit them to do so. A registered mortgage will give these lenders certainty that there are not other "equitable" mortgages out there that may take priority. It will also provide them with broader enforcement powers than they would have if they only had an unregistered mortgage with a caveat lodged on title.

In any case, even if a lender prefers to lodge a caveat rather than registering their mortgage, they should ensure the caveat is lodged promptly after the finance is advanced and the unregistered mortgage is granted, as any registered mortgage will trump a caveatable interest regardless of the dates of those interests and even if the lender that registers its mortgage knows about the unregistered mortgage.

Lenders should also be aware that not every equitable mortgage can be registered. Documentation must comply with the requirements of NSW Land Registry Services and strict verification of identity (VOI) standards must be adhered to in respect of all parties signing the mortgage. The mortgage must also be lodged by a member of the electronic conveyancing platform PEXA (usually a lawyer or conveyancer) who will have to ensure that the documentation requirements and VOI standards are adhered to.

Tacking in the context of mortgages

One thing that will not be changing is the rule against tacking. It is advisable that a second mortgagee notifies the first mortgagee of a second or subsequent mortgage and the amount that it secures in writing, whether or not that second or subsequent mortgage is to be registered. Until the first mortgagee is made aware that a second mortgage has been granted over the property, any further advances that the first mortgagee makes take priority over the amounts owing to the second mortgagee. Once the first mortgagee has notice of another mortgage (and it has to be actual notice, registration of the mortgage will not be sufficient) any further advances by the first mortgagee will rank in priority after the amount owed to the second mortgagee. This is known as "the rule against tacking"

This is one of the reasons why first mortgagees generally require second mortgagees to enter into a deed of priority, in order to give the first mortgagee first priority for a certain amount.

If you would like advice about anything in this article, please contact [Miles Anderson](#) on 02 8235 1244, [Elouise Monck](#) on 02 8235 1253 or your usual ClarkeKann contact.

