

# What can solicitors do to reduce mortgage fraud?

**Driver's licenses and passports** The new PEXA electronic conveyancing regime has brought with it, through its model participation rules, a Verification of Identity (VOI) standard that requires a face-to-face interview with the mortgagor and rigid requirements for what identification documents can be relied upon. Some lenders have adopted the practice of nominating the solicitor for the mortgagor to certify the mortgagor's identification. The standard, if followed, offers a safe harbor for lenders and indirectly for those certifying. However the buck stops with the person identifying and in particular with the proper scrutiny of the identification document proffered and the face of the person being identified.

Whether you are certifying the mortgagor's identity for the lender or not solicitors acting for mortgagors should insist on sighting their original driver's license and passport. These documents are hard to forge and both have a photo. Credit cards and Medicare cards are of limited use, all they prove is that a fraudster has access to the registered proprietor's wallet. If your client claims not to have a passport or driver's license you need to be on heightened alert and conduct meaningful enquiries to ensure you are not dealing with an imposter.

If real identification is used by an imposter and you do not detect it you should expect to be found negligent. The case of *Perpetual Trustee Company Ltd v CTC Group* [2012] NSWCA 252 (special leave to appeal dismissed, [2013] HCASL 16) is demonstrative. In that case the lender alleged that the originator did not take reasonable care to identify the mortgagor. The trial judge was sympathetic to the duped originator, finding that even though CTC obtained a photocopy of the mortgagor's passport, the possibility remained that a family member with a resemblance to the mortgagor impersonated him. Thus, the trial judge was not satisfied that there was any breach of duty. However this was overturned by the NSW Court of Appeal. Macfarlan JA (with whom Meagher and Barrett JJA agreed) essentially applied *res ipsa loquitur* ([2012] NSWCA 252, at [26]) commenting:

The primary judge's unchallenged findings were that [the mortgagor] did not sign the application ... If [the officer of CTC] did not make the requisite comparison between the signatory of the application and the original passport photograph, he failed to act with reasonable care ... The fact that the application was submitted despite [the mortgagor] not having signed it, strongly suggests that he did not.

**Internet searches** It is good practice to run an internet search the names of all individuals and companies involved in a mortgage transaction. If the transaction is not run of the mill, for example involves private mortgage finance, this should be supplemented with a search of AustLII. These searches are free and quick to perform and can save you many hours being grilled in the witness box. One of the biggest mortgage frauds in Australian history, described in *R v Jenkins* [2000] VSC 503; *R v Jenkins* [2002] VSCA 224; *Jenkins v R* [2004] HCA 57; *Director of Public Prosecutions v Bulfin* [1998] VSC 261, would not have occurred if some basic searches had been done on the borrower who had a history of questionable property dealings.

**Calm reflection** Beware of urgency. Most frauds are carried out in a rush to increase the chances of success. If a settlement is urgent ask why it is urgent. Then follow up and verify what you have been told. If there is a notice to complete on another property ask to see the notice. Call the solicitor who issued it. The fraudster might be pushing for a quick settlement because he/she is worried your correspondence will be received by the real registered proprietor. Increase the chances of this by sending letters to the security address by express post. The most important thing is that you consider the transaction holistically asking yourself whether everything makes sense and whether there could be some sort of fraud being practiced.

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# Celebrating accomplishment

## Presenting the Society's first 'collaborative' limerick (it's not as easy as it looks!):

There is a smart lawyer from Alice Springs  
Social justice, mentoring and music to society he brings  
Nominated for NT Australian of the Year  
We thought "How great!" and gave a big cheer  
No doubt he'll continue to achieve really good things!

Congratulations Russell Goldflam – Northern Territory  
finalist Australian of the Year 2016.

*Russell Goldflam is the Principal Legal Officer at  
the Northern Territory Legal Aid Commission in Alice  
Springs and is the President of the Criminal  
Lawyers Association of the Northern Territory.*

# Covering conflict & crisis: a dangerous mission

**Renata Sivacolundhu**

International Humanitarian Law Coordinator (WA)  
Australian Red Cross



Peter Cave reporting in Libya, 2011.  
Photo: Wayne McAllister.

