



DAVIS LAWYERS

Legal Insights

REGISTRATION OF 2ND MORTGAGES

1. Introduction

A security property may be subject to an existing registered mortgage. Depending on a variety of circumstances, this may mean that where the registered owner of the property wishes to obtain a second loan from a different lender, the 2nd mortgagee may have restrictions on the security available.

2. Requirement for consent or production of title

Below is a table which summarises whether 1st mortgagee's consent is required or can be refused, as a result of a 2nd mortgagee wishing to register their 2nd mortgage.

State	Consent required?
QLD	No – Under section 80(2) of the <i>Property Law Act 1974</i> (Qld), a mortgagee which holds the title deed must produce it to enable the registration of a subsequent mortgage.
NT	No – unless a physical Certificate of Title is issued, in which case the first mortgagee must produce the title at the Land Titles Office to allow registration.
WA	No – consent of the first mortgagee is not required to register a second mortgage.
TAS	No – unless a physical Certificate of Title is issued, in which case the first mortgagee must produce the title at the Land Titles Office and provide a production receipt slip to allow registration.
SA	No – consent of the first mortgagee is not required to register a second mortgage.
VIC	Yes – a first mortgagee in Victoria must produce the title deed or provide the appropriate administrative notice to the Registrar to allow registration of a subsequent mortgage under section 86 of the <i>Transfer of Land Act 1958</i> (Qld). In Victoria consent must also be sought for registration of a release of mortgage.
NSW	Yes – a first mortgagee may refuse to produce title or to consent to registration in New South Wales. In that case, the subsequent mortgagee will remain as an equitable mortgagee and their mortgage will not be registered. In that case, the 2 nd lender's interest will be protected by a caveat, which does not lapse

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unless a person with an interest in the land serves a lapsing notice. The 2nd lender's rights as an equitable mortgagee are not as extensive as a registered mortgagee and there are limitations on exercising power of sale and entering possession.

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3. Consent process

The consent request process is initiated with a written request to the 1st mortgagee. Usually, a copy of the mortgage or proposed terms is provided with the request. It is often the case that a first mortgagee will consent to a subsequent mortgage only on the basis that a deed of priority is entered between the two mortgagees and consent fees are paid to them, and in some cases, their lawyer as well.

In all States, apart from Tasmania and Northern Territory, the second mortgage can be registered online via PEXA. In NSW and Victoria where consent is required, a first mortgagee will need to join the PEXA workspace and prepare a CORD (controller or the right to deal) holder consent or nomination to allow electronic lodgement of the second mortgage.

4. Impact of Prior Mortgage

There may be disincentives to registering a second mortgage such as possible additional costs and legal fees to you and/or the mortgagor, potential obligations on you and the mortgagor to sign a deed of priority and the consent process may often be time consuming (up to 2 weeks) meaning that mortgage registration is delayed.

However, other implications result from non-registration of a 2nd mortgage. Some of these include:

No power of sale	Unless the credit provider has a registered mortgage, the credit provider under an equitable mortgage has no Statutory right to sell the property as mortgagee exercising power of sale. It is therefore necessary to seek a Court Order from the Supreme Court for a Judicial order for Sale.
No right to enter possession	A credit provider may not enter possession of a property under an equitable mortgage. Rather, the Court application for a judicial sale Order will need to also seek orders for delivery up of vacant possession of the property to enable the sale to proceed.
Delay	A delay in seeking consent from the first mortgagee could result in difficulties later. For example, the prior registered mortgagee has a right to not consent (eg., in NSW), then the mortgagee may not agree to registration at a later time. Further, if there is a delay in registration of the mortgage, and a later caveat is lodged by some other party, this later caveat will prevent registration of the prior equitable mortgage.
Breach of prior mortgages	The first registered mortgage will most likely contain a provision that the granting of further liabilities on the properties was a breach of those mortgages. A breach of the prior mortgages could result in those mortgages being called upon. However, negative pledges may not be enforceable (especially in Queensland).
Quantum of prior mortgages	Enquiries should be sought prior to the advance to obtain confirmation as to the amount of the prior mortgages. This is for the obvious reason that the value of the security is dependant, inter alia, on the amount owing under the first mortgage, or other prior mortgages.
Notice to Registered Mortgagee / Tacking	Consideration should be given to giving specific notice to the first mortgagee about the interest of the second mortgagee. If the first mortgagee is on notice as to a subsequent mortgagee's interest, then such further advances by a 1 st mortgagee may well not have priority over advances by the 2 nd mortgagees. Until the 1 st mortgagee is actually aware of

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	<p>the 2nd mortgagee's interest, the chances are that the 1st mortgagee will have prior for all advances it makes.</p> <p>A first mortgage, once it becomes aware that a second mortgage has also been granted, is limited in its ability to make further advances to the mortgagor and claim the repayment of those advances in priority to the moneys due under the second mortgage. The ability to claim first priority for such further advances is known as "tacking".</p> <p>In Victoria, Queensland and Tasmania, the law pertaining to tacking is set by statute. In those states, tacking of further advances after notice of a second mortgage and without the consent of that second mortgagee is only permitted if the terms of the first mortgage require such advances to be made or if the further advance money is used to improve the value of the property. In the other Australian jurisdictions, the ability to tack is determined by case law. It is similar to the statutory regime of the other States, but the requirement in the first mortgage to make further advances will be insufficient to permit tacking unless the further advances are for the purpose of improving the security property (as would occur, for example, in the case of a construction loan).</p>
Insurance	<p>If there is a payout by an insurance company, an equitable mortgagee may struggle to have its interest recognised.</p>

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