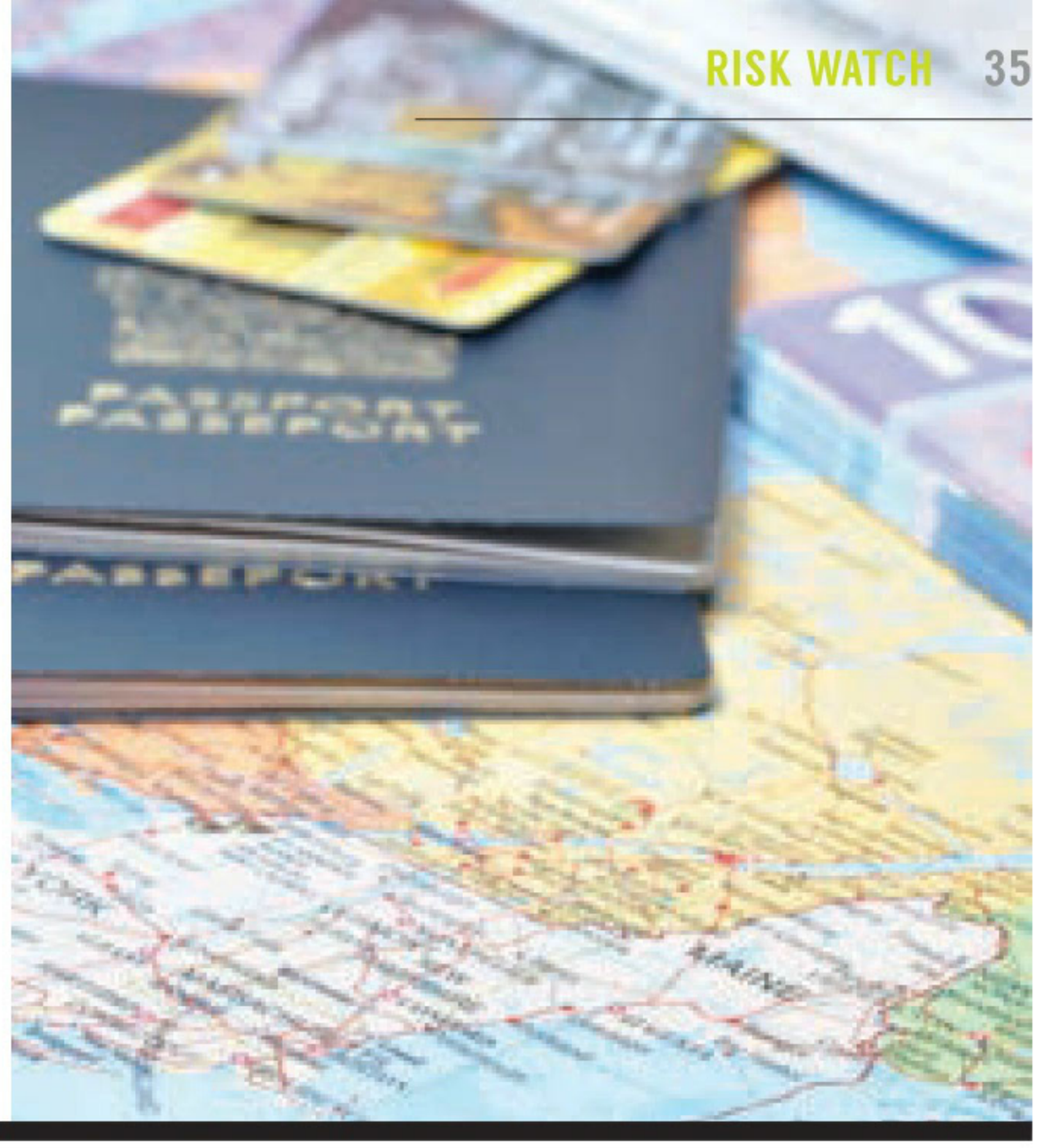

Who's Your Client?

JOHN DOYLE, SENIOR SOLICITOR, & GRANT FEARY, DEPUTY DIRECTOR, LAW CLAIMS

Ascertaining your client's proper identity is now more important than ever

On 4 July 2016 major amendments were made to the *Real Property Act 1886 (SA)* ("**the Act**") as a result of the commencement of the *Real Property (Electronic Conveyancing) Amendment Act 2016 (SA).*

Practitioners need to take reasonable steps to verify the identity of clients in order to avoid claims, as well as comply with common law obligations and the rules governing participation in the electronic conveyancing system (Participation Rules Version 3).

Firms should have clear policies dictating how these requirements are to be satisfied, even when the client is known to the firm.

Practitioners need to be aware that penalties now exist in respect to the following:

a. offences relating to certifying incorrect documents (section 232 of the Act);
b. offences relating to verification of identity requirements (section 232A of the Act); and
c. offences relating to verification of authority (section 232B of the Act).

Policies on verification of identity should be adhered to without exception, as illustrated by the following claim against a practitioner in Victoria:

The firm's client entered into an agreement to borrow money from a private lender. Several months later the lender offered to advance further money and extend the repayment date on the basis the borrower's uncle gave a personal guarantee including a certificate signed by an independent lawyer.

The borrower subsequently attended the practitioner's office and asked the practitioner to provide the certificate. When the borrower produced the guarantee for signing, the practitioner saw it was not in the name of the borrower. The practitioner queried this and the borrower said the name was an alias he sometimes used. The practitioner was aware that the borrower had used other aliases in previous transactions and accepted the explanation.

When the borrower subsequently went bankrupt, the lender sought to enforce the guarantee. The borrower's uncle rightly denied signing the guarantee. Consequently the lender claimed it could not recover the debt as a result of the practitioner witnessing a guarantee not signed by the borrower's uncle.

The practitioner should not have taken the client at his word regarding the name on the guarantee. Instead the practitioner should have required the client to show photo identification or documentary evidence of the use of the alias to ensure the person executing the guarantee was in fact the intended guarantor. The practitioner could also have contacted the lender to verify the identity of the intended guarantor.

This claim is an example of how easy it is for a guarantee to be forged, even where the borrower is known to the practitioner. It illustrates why clear and comprehensive firm protocols for verification of identity are necessary and should not be waived even in the face of pressure from an established client.

(Claims details courtesy of the Legal Practitioner's Liability Committee.)

It illustrates why clear and comprehensive firm protocols for verification of identity are necessary and should not be waived even in the face of pressure from an established client.

NEW WITHHOLDING TAX REGIME: DON'T GET CAUGHT OUT

Some practitioners may have missed Paul Ingram's article in Tax Files in the June 2016 edition of the Bulletin entitled "More than meets the eye – 'The new foreign resident capital gains tax withholding regime'".

The changes brought about by this new regime are of much wider application than might be thought because, although the regime applies to assets owned by relevant foreign residents**,** it is presumed that all vendors are foreign residents unless a clearance certificate is provided to a purchaser at or prior to settlement.

The regime applies to transactions entered into on or after 1 July 2016 and the obligation to withhold and remit funds to the Australian Taxation Office (ATO) rests with the purchaser who must remit 10% of the total consideration for the transaction – where the consideration is greater than $2million – to the ATO in the form of an interim withholding tax payment.

The purchaser may be committing a criminal offence if they fail to remit the withholding tax to the ATO. It is critical therefore that practitioners involved in conveyancing transactions, or share sale transactions where the relevant entity is "*land rich*" urgently familiarise themselves with these new rules – including how to get the necessary clearance certificate - so that they, and their clients, are not "*caught out*". Paul Ingram's article in the June 2016 is an excellent place to start.