

12 October 2023

Registrar of Titles
Land Use Victoria
Department of Transport and Planning
GPO Box 527
Melbourne VIC 3001

By email: luv.consultation@delwp.vic.gov.au

Dear Registrar

Consultation on draft version 9 of the Registrar's Requirements for paper conveyancing transactions

1. This submission has been prepared on behalf of the Financial Services Committee of the Business Law Section of the Law Council of Australia (the **Committee**) in response to the consultation on draft version 9 of the Registrar's Requirements for paper conveyancing transactions, which was released for consultation in July 2023.
2. I note that the draft submission has been reviewed by the Law Institute of Victoria (**LIV**) and the Victorian Bar. It is understood that the LIV may provide further views regarding this consultation in due course.
3. The Committee thanks the Registrar for the opportunity to provide constructive feedback.

Scope of submission

4. The Committee's submission relates only to proposed new Registrar's Requirement 19 (the **Draft Requirement**). The Draft Requirement provides:

'19.1 This requirement takes effect on 1 February 2024.

19.2 Subject to Registrar's Requirement 19.3, an Instrument of mortgage to be Lodged under sections 74(1) or 74(1A) of the TLA must not include provisions (terms, conditions, clauses, covenants however described) that relate to other documents such as loan agreements and guarantees, or repeat terms from the loan agreement or guarantee.

19.3 Registrar's Requirements 19.2 does not apply to a mortgage granted by the mortgagor on or before 31 January 2024 and for which an Instrument of mortgage is to be lodged under section 74(1A) of the TLA.'

5. The Summary of proposed changes published in relation to the Draft Requirement includes the following explanation about this proposed requirement:

‘Any mortgage or MCP lodged to be incorporated into a mortgage, must not include provisions (terms, conditions, clauses, covenants however described) that relate to other documents such as loan agreements and guarantees, or repeat terms from a loan agreement or guarantee.

Only matters directly related to the mortgage should be included in a mortgage lodged for registration or an MCP lodged for retention.’

The power of the Registrar to make the relevant determination

6. The Registrar’s power to determine requirements for paper conveyancing transactions is derived from subsection 106A(1) of the *Transfer of Land Act 1958* (Vic) (the **Act**). That subsection provides:

‘The Registrar may from time to time determine requirements for paper conveyancing transactions, which may include the following—’,

and then lists a number of matters which requirements may cover. The Committee notes that the content of mortgages and MCPs (or of instruments generally) does *not* appear on that list.

7. While the use of the word ‘includes’ indicates that the list is not intended to be exhaustive, the Committee notes that:

- (a) the requirements must relate to ‘conveyancing transactions’. That term is defined as follows:

“conveyancing transaction” means a transaction that involves one or more parties and the purpose of which is--

- (a) to create, transfer, dispose of, mortgage, charge, lease or deal with in any other way an estate or interest in land, or
- (b) to get something registered, noted or recorded in the titles register, or
- (c) to get the registration, note or record of something in the titles register changed, withdrawn or removed.’¹;
- (b) this definition focusses upon the *transaction* and, while the Registrar has other powers in relation to the *form* of instruments,² those other powers do not extend to the content of instruments (save for that part of the content that forms part of the approved form); and
- (c) the matters listed in subsection 106A(1) of the Act all relate to matters relevant to the *registration* of instruments—verification of identity, retention of documents, certifications, types of instruments that must be lodged using an

¹ Section 4(1) of the Act, by reference to the definition in section 3(1) of the *Electronic Conveyancing National Law* (Vic).

² Section 121(1) of the Act.

electronic lodgement network, who may lodge instruments and client authorisation. None of those matters relates to the *content* of instruments.

8. The Committee therefore considers that the proper interpretation of the power of the Registrar under subsection 106A(1) of the Act is that:
 - (a) it is limited to determining requirements relevant to the registration of instruments for the purposes of conveyancing transactions; and
 - (b) it does not give the Registrar the power to determine requirements for the content of instruments that are to be registered. In particular, the subsection does not give the Registrar the power to determine requirements for the terms and conditions that are included in mortgages and memoranda of common provisions of mortgages (**MCPs**).
9. The Committee accordingly submits that the proposed determination in the Draft Requirement is *ultra vires*.

The Draft Requirement itself

10. The Committee notes that:
 - (a) the Registrar must register a mortgage that is in the approved form;³ and
 - (b) the Registrar may only refuse to register a mortgage if, in the opinion of the Registrar, it is not in the approved form, is incomplete, contains errors or is not completed correctly.⁴
11. The Committee further notes that:
 - (a) the Registrar must register an MCP if it is lodged in an approved form;⁵
 - (b) the approved form for an MCP does not extend to the content of the provisions that are to be incorporated in instruments subsequently lodged; and
 - (c) there is nothing in section 91A(1) of the Act that imposes any limitation on the provisions that may be included in an MCP.
12. Therefore, the Committee submits that the Draft Requirement is inconsistent with the Registrar's obligations under the Act.

³ Section 74(1) of the Act.

⁴ Section 440(1)(a) of the Act.

⁵ Section 91A(1) and (2) of the Act.

13. The Committee also submits that the Draft Requirement is misconceived. In practice, the vast majority of mortgages lodged for registration relate to secure loans made to the mortgagor by the mortgagee, or the obligations of the mortgagor under a guarantee which relates to a loan made by the mortgagee to another. As the mortgage relates to, and secures, the obligations of the mortgagor under the loan agreement or guarantee, the Committee considers that it is therefore reasonable and appropriate that mortgages and MCPs typically include terms that relate to such loan agreements and guarantees.
14. For example:
 - (a) the liability that is secured by the mortgage is typically defined by reference to the liability of the mortgagor to the mortgagee under an 'agreement covered by this mortgage' (or a similar phrase), which is then defined by reference to those other documents; and
 - (b) events of default under the mortgage typically include events of default under an agreement covered by the mortgage.
15. The Committee further notes that mortgages and MCPs also often include provisions that repeat terms that are in secured loan agreements or guarantees so as to ensure that the mortgagee can rely upon the doctrine of indefeasibility in circumstances where the secured loan agreement or guarantee may be void (e.g., because it has been forged). In such cases the lender can rely on its indefeasible rights under the mortgage, notwithstanding that they cannot rely upon the terms in the loan agreement or guarantee.
16. Members of the Committee have observed that these have been the practices of lenders for decades and all Australian land titles registries, including the Victorian registry, have historically accepted such mortgages and MCPs for registration. The Committee is not aware of any other land title registry proposing to impose requirements similar to those proposed in Victoria.
17. The Committee further submits that the Draft Requirement is worded in such a way that, were it to be applied, there would be great uncertainty about what the Registrar will, or will not, accept for registration. For example, the meanings of the phrases 'provisions ... that relate to other documents' and 'repeat terms from' are open to a number of different interpretations.
18. The Committee notes that lenders, including banks (authorised deposit-taking institutions) which operate throughout Australia, have drafted their standard form documents (loan agreement, guarantees, mortgages and MCPs) on the basis of the practices described above. Lenders have also been able to rely with confidence upon an expectation that, provided a mortgage or MCP is in an approved form, it will be registered.
19. The Committee considers that, if the Draft Requirement were imposed:
 - (a) it would be necessary for such lenders to make substantial changes to their documents, at least in relation to those used in Victoria;
 - (b) it would be necessary for lenders to register one form of MCP in Victoria for use only in relation to mortgages over land in Victoria, and another form for use in every other jurisdiction in Australia;

- (c) it would complicate lenders' processes, such as processes for ensuring that the correct version of an MCP is provided to mortgagors;
 - (d) lenders, particularly those lenders operating throughout Australia, would therefore incur substantial additional costs, both in the implementation phase and then on an ongoing basis. The Committee considers that the incurring of those additional costs would serve no reasonable purpose; and
 - (e) there would be unnecessary uncertainty about whether the Registrar in Victoria will register any particular mortgage or MCP until it is lodged, which would be a very undesirable outcome.
20. The Committee considers that it is possible that, if the Draft Requirement were to be introduced, these outcomes may have a negative impact upon the willingness of some lenders to lend on the security of land in Victoria, at least for a period immediately following its commencement.
21. The Committee also submits that the operation of the transitional provisions in the Draft Requirement is not sufficiently clear. For example, if a mortgage is executed and lodged after 1 February, but refers to an MCP registered before 1 February, and the Registrar considers that the MCP doesn't comply with paragraph 19.2, will the Registrar register the mortgage?
22. Finally, it is not clear to the Committee whether the Draft Requirement is driven by a particular view as the extent to which a forged but indefeasible mortgage should be taken to be practically effective as security because a payment covenant is incorporated in it. The Committee notes that the practical effectiveness or otherwise of such a mortgage as security could have implications under section 110 of the Act (governing a person's entitlement to an indemnity from the fund administered by the Registrar in particular circumstances).
23. The Committee acknowledges that matters of policy relating to land are very much a matter for each jurisdiction to manage itself. However, for the reasons given above, the Committee submits that there should be a generally consistent approach throughout Australia on the permissibility of provisions that repeat terms which are in secured loan agreements or guarantees so as to ensure that the mortgagee can rely upon the doctrine of indefeasibility.
24. For the reasons set out above, the Committee submits that the Draft Requirement should not be implemented.

Use of terms in MCPs

25. While it is not directly relevant to the Draft Requirement, some members of the Committee have been informed of instances in which the Registrar has recently requisitioned MCPs which have been lodged for registration, on the basis of matters such as:
 - (a) the inclusion of a negative pledge in a mortgage;
 - (b) references to interests in personal property that are collateral to interests granted under the mortgage; or
 - (c) the use of the terms 'you' and 'us' in the MCP rather than 'mortgagor' and 'mortgagee' throughout.
26. The Committee wishes to raise the matter in this submission as it appears that this is also a development which suggests that the Registrar considers that the Registrar has a right to influence the content of MCPs, not just their form. For the reasons set out above in relation to the Draft Requirement, the Committee respectfully submits that the Registrar has no such right.
27. If the Registrar continues to requisition MCPs on this basis, then the Committee envisages that even more extensive changes will need to be made to MCPs lodged in Victoria, and the 'Victorian version' of an MCP will be even more different to the corresponding MCP used by a lender in all other Australian jurisdictions.
28. The Committee notes that, when the terms 'you' and 'us' are used in an MCP, they are typically defined by reference to the mortgagor and the mortgagee identified in a mortgage form which incorporates the terms of the MCP by reference. The Committee considers that the meaning of those terms is clear.
29. The Committee further notes that:
 - (a) it is now well known that most consumers find it much easier to understand loan and mortgage documents when terms like 'you' and 'us' are used rather than terms like 'lender', borrower, 'mortgagor' and 'mortgagee'. As the Registrar would be aware, for many years now, lenders have been encouraged to adopt more 'plain English' drafting; and
 - (b) most lenders are subject to requirements of the law and codes of practice which impose relevant obligations on them—e.g., section 184(1) of the National Credit Code requires that various documents, including mortgages, be 'clearly expressed'.

30. If the Registrar has any questions or would like to further discuss any matters raised in this submission with the Committee, please do not hesitate to contact the Chair of the Committee, Pip Bell (pbell@pmclegal-australia.com).

Yours faithfully

A handwritten signature in black ink, appearing to read 'P. Argy', with a long, sweeping flourish extending to the right.

Philip Argy
Chairman
Business Law Section