

Title Registration Services Customer Information Bulletin

Notices of acquisition

Under the Land Tax Act 1958, every person who acquires land in Victoria must give notice of that acquisition to the Victorian Registrar of Titles as the prescribed person for the receipt of that notice on behalf of the Commissioner of State Revenue. This notice takes the form of the "Notice of Acquisition".

For the purpose of giving that notice, the Registrar requires that a Notice of Acquisition must accompany each dealing presented for registration, in which a person is acquiring land.

In the event that a dealing is not to be lodged immediately following an acquisition of land (eg. Terms Contract), then a Notice of Acquisition must be delivered or mailed to the Registrar of Titles addressed to:

Registrar of Titles
LANDATA®
Marland House
PO Box 500
EAST MELBOURNE VIC 3002

Amendment of dealings by agents

Dealings lodged with Land Registry represent the expression of intention of the parties to them. Any change to the text of those documents after they have been signed creates the prospect that the intention will be changed, or, if the name of a party or the parties is changed, that there will be confusion as to who the correct party is. Accordingly, dealings lodged or presented for lodgement cannot be amended without the written consent of the party/parties or their current practitioner(s), whichever is appropriate.

With the introduction of the Victorian Online Titles System (VOTS)

more dealings are being refused at lodgement. This has resulted in lodging parties/agents attempting to amend refused documents without the appropriate authority. A person who has a role as an agent to lodge dealings on behalf of a party or their current practitioner must demonstrate their authority to amend a document by producing a written direction to perform the specific amendment required. Where a dealing is amended without authority, this office will refuse the dealing for lodgement stating the refusal reason as "*Amended without appropriate authority*".

Patent errors

The Registrar has power under Section 103(1A) of the *Transfer of Land Act 1958* to "correct a patent error in a document lodged for and awaiting registration". Prior to the introduction of VOTS, a lodged document that contained a patent error could be amended by a Registration Officer. Under VOTS, the examination of documents may detect errors prior to lodgement. The Registrar does not have the power to

amend a document before it is lodged (accepted) in VOTS. Where any document presented for lodgement is found to have any error it will be returned to the lodging party together with a Refusal Notice setting out the reason(s) for refusal.

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Department of
Sustainability and
Environment

Title Registration Services
Land Victoria
Marland House
Level 9, 570 Bourke Street
Melbourne VIC 3000

PO Box 500
East Melbourne VIC 3002

Tel (03) 8636 2010
Fax (03) 8636 2250

This newsletter is the first of a new look Customer Information Bulletin updated in line with the Department of Sustainability and Environment's style guide.

The Customer Information Bulletin is printed on recycled stock.

Title Registration Services

Customer Information Bulletin

Caveats claiming an interest under a deceased estate

The interest of a beneficiary of a deceased's estate can only give rise to a caveatable interest if:

1. Probate has been granted and
2. The debts of the estate have been paid and

3. The land forms the subject of a specific devise or is part of the remainder of the estate and is not subject to a trust to sell.

In order to avoid requisitions, the above should be born in mind when drafting a caveat.

You are reminded that compensation may be claimed where a caveat is lodged without reasonable cause (see Section 118 of the *Transfer of Land Act 1958*).

Things to consider when drafting leases

1. All Torrens land is subject to "the interest (but excluding any option to purchase) of a tenant in possession of the land" (see Sub-Section 42(2)(e) of the Transfer of Land Act 1958 ("the Act"). As a result, it is not essential to register leases in Victoria.
2. To be registrable the lease term must exceed three years ie the minimum term is three years and one day (see Section 66 of the Act).
3. The prescribed form for a lease is Form 26, as set out in the Transfer of Land (General) Regulations 1994. As with a Form T1, which is a transfer, the Form 26 is a lease, not simply an application form. Any additional covenants should be set out on approved annexure pages. **Please note that as from 1 January 2004, Land Registry will not accept for lodging a Form 26 with a separately completed lease attached to it.**
4. A Form 26 may be lodged in single copy, in duplicate or in triplicate.
5. Going through the panels on a Form 26:
 - a) Land - you should specify the current title reference. If part of a title is affected, you need to fix the land which is the subject of the lease in a way which enables it to be conclusively located by Land Registry ie using dimensions and bearings, if necessary. If you choose to use a plan, please bear in mind that as all registered or recorded documents are now imaged, hatching or cross-hatching is the best way to denote the leased area.
 - b) Lessor - this should equate with the registered proprietor of the land affected.
 - c) Lessee - the lessee's full name and address should be included.
 - d) Term - as mentioned above the term must be for at least three years and one day.
 - the rule in *Lace v Chantler KB 368 (CA)* establishes that at the date of entering a lease, the exact termination date must either be known or be ascertainable. However, if the maximum extent of the term is fixed, it may be possible to have a lease determinable on an uncertain event happening within the term, for example, "21 years determinable if the tenant ceases to live on the premises" or "90 years if X shall so long live." If the lease expires on an earlier ascertainable date, an application pursuant to either Section 69 or Section 70 of the Act will be required to remove the lease from title.
 - There should be no reference to an option to renew the lease in the definition of the term as, if the option is taken up, a new lease will be created (this new lease may be registrable).
 - e) Commencement Date - this cannot be a future date.
 - f) Rental - at least the initial rental figure should be included.
 - g) Covenants - in most cases reference will be made to annexure pages.
 - the covenants contained in Section 67 of the Act are implied into every lease, unless they are expressly excluded or modified. If you wish to exclude or vary these covenants, you must make your intention clear.
 - h) Date - the lease should be dated.
 - i) Execution - both parties must execute the Form 26 lease and sign all annexure pages. When either party is a company, please remember to print the signatories full names, usual residential addresses and office (for example director or secretary).
6. It is not possible to register a conditional lease. If the covenants contain any conditions precedent or subsequent, both parties will have to either confirm in writing that they consider that the lease is no longer conditional or consent to the deletion of the relevant clause(s), before the lease can be registered.
7. As there can be no confusion in the Register, the lease covenants will be checked to ensure that they do not contradict the information contained in the panels of the Form 26.
8. Please bear in mind that in most cases an amendment to a lease lodged for registration will require the written consent of both parties or their current practitioners. The only exception is where the amendment obviously only affects one party, for example, their execution clause.
9. Once the lease termination date is passed, a lease will be automatically removed from the title when a dealing is either registered or recorded by this office. If there is no such dealing, you will need to make an application pursuant to either Section 32 or Sub-Section 106(c) of the Act to remove the lease from title.

Things to consider when drafting restrictive covenants

To validly create a restrictive covenant at common law, the covenant must:

- a) be negative
- b) relate to the use of the land
- c) have both land which takes the benefit of the covenant and land which is burdened by the covenant
- d) affect benefited and burdened land that is in separate ownership
- e) touch and concern the benefited land
- f) intend that both the burden and the benefit runs with the land
- g) contain operative wording.

A simple test to establish whether you have created a restrictive covenant, as opposed to a positive covenant, is to ask yourself whether the owner of the burdened land can comply with the covenant by doing nothing. If s/he has to do something (for example put up a fence) or expend money doing something (for example pay fees for, say, membership of a gym or residents' association), then you have created a positive covenant.

Unless authorised by statute, positive covenants do not run with the land and are therefore only enforceable between the parties to the original covenant. To ensure that successive registered proprietors are bound by a positive covenant, you will need to devise a

system by which each new proprietor of the burdened land covenants afresh with each new proprietor of the benefited land. Any break in the chain will mean that the covenant ceases to be enforceable. Obviously this has serious consequences.

Land Registry simply records restrictive covenants or restrictions in plans. If a positive covenant were recorded on title, the status of the covenant will not change and neither the benefit nor the burden of the positive covenant will run with the land. You are referred to Sub-Section 88(3) of the Transfer of Land Act 1958.

Nothing discriminatory, ridiculous, illegal or offensive will be recorded. For example, a covenant seeking to ensure that people of a specific race are prevented from being registered as proprietors of certain land is obviously discriminatory and therefore is not recordable. It is also illegal to discriminate on the grounds of gender, religious belief, age, sexual preference, colour, national and ethnic origin, political beliefs, disability, marital status etc. Further, it is accepted law in Victoria that registered proprietors are free to deal with their land as they wish. Any covenant seeking to limit

this right is unacceptable; for example, the owners of the burdened land shall not sell this land until they have built a dwelling house on it. Additionally, this is a positive covenant.

Increasingly covenants refer to documents, even Internet web sites, which are not incorporated into the transfer, plan or agreement creating the restrictive covenant. The sense of this must be questioned. Is it going to be possible to access these documents or web sites in 20 years time? If not, how will it be possible to establish whether or not the covenant has been complied with?

Difficulties may also arise where the consent of someone other than the owner of the benefited land is required. Will it always be possible to find this person? If not, how will it be possible to establish whether or not the covenant has been complied with?

Finally, it is not Land Registry's role to interpret the meaning of a restrictive covenant, including who benefits from it. Ultimately this is something for the Court to decide.

New location for Planning Certificates

Planning Certificates will be in a new location from Monday 22 September 2003.

Formerly in the Department of Infrastructure, Planning Certificates is now part of LANDATA®, in the Department of Sustainability and Environment.

The change means that **from 22 September**, applications can be lodged on Level 10, Marland House, 570 Bourke Street, Melbourne, or posted to:

LANDATA®
Marland House
PO Box 500
EAST MELBOURNE VIC 3002

Cheques for planning certificates should now be made payable to LANDATA®. The fees remain at \$16 for a standard request or \$50 for a priority request.

For more information contact Dina Matta, Manager Planning Certificates, on (03) 9655 8837



Consents by mortgagees to leases, easements or restrictive covenants

If a mortgagee (or annuitant) either:

- a) Consents in writing to a lease, easement or restrictive covenant or
- b) Is a party to a lease, easement or restrictive covenant,

such a lease, easement or restrictive covenant will remain on title where there is a transfer by a mortgagee. Please see Sub-Section 77(4)(a) of the Transfer of Land Act 1958.

It will be taken by Land Registry that the mortgagee has given its consent to a lease, easement or restrictive covenant if:

- 1) The Certificate of Title is produced and
- 2) Some form of consent is given by the mortgagee.

Please note that Land Registry will not examine the terms of the consent.

The lease, easement or restrictive covenant will therefore remain on

title should a transfer by mortgagee be given. The lease, easement or restrictive covenant will remain on title, unless the lease is surrendered or determined or the easement or restrictive covenant is removed by other means.

"Withdrawal" of unrecorded caveats

Where you wish to "withdraw" a Caveat that has been lodged in this Office but has not yet been recorded (for example because there are outstanding requisitions), it is not appropriate to lodge a Withdrawal of Caveat (Approved Form WC). Instead you should write to the Registrar of Titles requesting the Caveat's removal from Land Registry. In so doing you will save your clients a fee, which is currently \$31.00.

Customer Information Bulletin on email

If you'd like to receive the *Customer Information Bulletin* electronically or to unsubscribe, send your request to Nancy Mazza via email nancy.mazza@dse.vic.gov.au, or telephone (03) 8636 2812, or fax (03) 8636 2250.

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