

Land Victoria Customer Information Bulletin

Edition 145 October 2014

Transfer of Land Act amendments

The *Transfer of Land Act 1958* (the Act) has been amended by the *Transfer of Land (Amendment) Act 2014* (the amending Act), which commenced operation on 24 September 2014.

The amendments:

- facilitate efficiencies in the conveyancing process by enabling the adoption of the same requirements for paper conveyancing as electronic conveyancing
- enable the phasing out of paper Certificates of Title
- facilitate nationally consistent conveyancing practices by enabling the Registrar of Titles (Registrar) to establish requirements for paper conveyancing which, as far as practicable, are consistent with those in other jurisdictions
- improve the efficiency and equity of the compensation fund
- make other minor changes to the Act to improve its effectiveness

Customers are encouraged to read the amending Act to fully understand the new provisions.

A number of process and practice changes will impact Land Victoria customers. These are detailed below.

Note: all section references are to the *Transfer of Land Act 1958* unless otherwise stated.

Significant changes

Mortgages – verification of identity

Section 87A(1) requires a mortgagee to take 'reasonable steps' to verify the authority and identity of the mortgagor. These provisions have been in operation from the above commencement date.

Section 87A(2) provides that, if a mortgagee takes steps consistent with the requirements made by the Registrar of Titles (Registrar) under section 106A (for paper mortgages) OR complies with the requirements in the Electronic Conveyancing Participation Rules (for electronic

mortgages), the mortgagee will be deemed to have taken 'reasonable steps'. Registrar's requirements under section 106A will not be published until next year but, insofar as those requirements will relate to verification of identity (VOI) and authority, they will be the same as requirements in the Electronic Conveyancing Participation Rules, adapted where necessary for paper instruments.

In addition, section 87B imposes VOI requirements in respect of variations of mortgage and transfers of mortgage.

If the person who is, or is to become, the registered proprietor of the land did not grant the mortgage and 'reasonable steps' were not taken – refer section 87A(3) – the mortgage may be removed from the Register – refer sections 87A(5) and 87B(4). Similar provisions apply to variation of mortgage and transfer of mortgage – refer section 87B.

Mortgages – consent of mortgagee

The various provisions of the Act requiring production of consent from mortgagees have been modified by the amending Act.

The requirement to provide to the Registrar a mortgagee's consent to the creation, variation or surrender of a lease or the creation or variation of a covenant or easement has been removed. Again, these provisions are in operation from the commencement date. This change does not, of course, affect any obligation on a mortgagor under the mortgage to obtain the consent of a mortgagee to the creation, variation or surrender (as the case may be). New section 87C reinforces this.

New sections 88A and 88B provide a mechanism, similar to the section 89A process for the removal of a caveat, for a mortgagee, when exercising power of sale under the mortgage, to apply to the Registrar for the removal of an encumbrance to which the mortgagee did not consent in writing. 'Encumbrance' in this context means a lease, covenant or easement or the variation of a lease, covenant or easement. An application by a mortgagee, when exercising a power of sale, can be made also for the reinstatement of a lease that was surrendered without the mortgagee's consent.

The Registrar will require evidence of the written consent of the mortgagee by serving notice on the party with the benefit of:

- the easement or variation of easement; or
- the covenant or variation of covenant; or
- the lease, variation of lease or surrender of lease.

If no or insufficient evidence is produced, the relevant encumbrance or variation (as the case may be) will be removed (or lease reinstated, in the case of a surrender) by the Registrar.

Mortgages – amount that may be claimed for fraudulent mortgage

When a mortgage is fraudulent (i.e. not granted by the proprietor of the land) but the mortgagee took reasonable steps to verify the identity and authority of the mortgagor, the mortgage will not be void.

However, when a fraudulent mortgage is not void, the amount that may be claimed or retained (as appropriate, see below) is now limited to a maximum of the principal plus interest at the Bank Accepted Bills rate (as defined in the *Taxation (Interest on Overpayments) Act 1986*. The new provision applies to the following:

- the amount claimed by the innocent registered proprietor from the compensation fund – refer to section 110(4);
- the amount claimed by the mortgagee from the innocent registered proprietor for a discharge of mortgage – refer to section 87D;
- the amount retained by the mortgagee from the proceeds of a mortgagee sale – refer to section 87E.

This limitation is in addition to the existing limitations under sections 110(4)(a) and (b).

Priority notices

New Division 1B in Part V (sections 91C to 91J) provides a scheme for the lodgement and recording of priority notices, and the management of dealings lodged against a folio affected by a priority notice during the life of the notice.

A priority notice is a notification of intended dealings in land. Once a priority notice is recorded, it has the effect of preventing any dealing being registered for 60 days (with certain exceptions) over the subject folio pending the lodgement of the intended dealings; the priority notice may also be withdrawn. If any dealing other than the intended dealings is lodged for registration (not recording), it will be held unregistered pending either the lodgement of the intended dealings or the expiration of the priority notice. If the intended dealings are lodged during the life of the notice, they will be registered prior to any earlier lodged dealing. Once the intended dealings have been registered, any other unregistered dealing will be registered, if possible.

Priority notices will not prevent the processing of an instrument lodged for recording; for example, a caveat, a section 173 agreement, a statutory charge.

Priority notices will be an 'electronic only' lodgement. Functionality within the PEXA and VOTS systems needs to be built to allow priority notices to be lodged and recorded. That functionality is not expected to be available until the third quarter 2015. Further information about priority notices will be provided in future editions of the Customer Information Bulletin.

Elimination of paper Certificates of Title

The Registrar may, by notification in the *Victoria Government Gazette*, declare Certificates of Title or classes of Certificates of Title to be void and of no effect – see new section 27BAA.

The existence of paper Certificates of Title is incompatible with an electronic conveyancing system. The new provision facilitates the phasing out of paper Certificates of Title. It is intended that phasing out will be progressive over a few years. Further information about phasing out of Certificates of Title will be provided in future editions of the Customer Information Bulletin.

Registrar's requirements for paper conveyancing

New section 106A authorises the Registrar to determine requirements for paper conveyancing. This power complements the power the Registrar already holds to set requirements for electronic conveyancing. The matters that can be the subject of requirements determined under section 106A include:

- verification of authority and identity
- supporting document retention
- client authorisations
- classes of instruments that must be lodged electronically
- classes of persons that can lodge specified classes of instruments
- classes of mortgagee able to provide certifications.

The Registrar's requirements under section 106A are yet to be made and are expected to come into effect from July 2015. Further information about Registrar's requirements will be provided in future editions of the Customer Information Bulletin.

Certifications

A conveyancer or lawyer who represents a party in a conveyancing transaction will be required to sign the transaction documents on behalf of their client and provide the Registrar with certifications that apply to VOI, client authorisation, retention of supporting evidence and correctness of an instrument. The certifications that apply to mortgagees and their representatives in electronic

conveyancing will similarly apply to paper. The introduction of certifications depends upon approved forms being amended to incorporate execution and certification by the conveyancer or lawyer and on the making of Registrar's requirements under section 106A. Certification requirements are expected to commence in the second half of 2015. Further information about certifications will be provided in future editions of the Customer Information Bulletin.

Verification of identity – paper conveyancing

A conveyancer or lawyer will be required to take 'reasonable steps' to verify the identity and authority of their client. If a conveyancer or lawyer complies with the Registrar's requirements under section 106A, the conveyancer or lawyer will be deemed to have taken 'reasonable steps'. The conveyancer or lawyer can adopt other processes that constitute taking reasonable steps. Registrar's requirements, insofar as they will relate to VOI, will be the same as requirements in the Electronic Conveyancing Participation Rules, adapted where necessary for paper instruments.

The introduction of mandatory VOI for paper conveyancing transactions (except mortgages, which are already in operation) depends on the making of Registrar's requirements under section 106A, but is expected to come into effect on 1 July 2015. Further information about VOI will be provided in future editions of the Customer Information Bulletin.

Client authorisations

New Divisions 2A and 2B in Part V (Sections 91K – 91M) facilitate the introduction of client authorisations. The introduction is dependent on the making of Registrar's requirements under section 106A that are expected to commence in the second half of 2015.

When a conveyancer or lawyer represents a party in a conveyancing transaction, the conveyancer or lawyer and the client will be required to enter into a client authorisation, by which the client will authorise the conveyancer or lawyer to represent the client in the conveyancing transaction. The representative will be authorised to sign and lodge instruments and other documents on behalf of their client. Further information about client authorisations will be provided in future editions of the Customer Information Bulletin.

Other changes

Certificates of Title

New section 27(11A) allows the Registrar to accept a certification that a Certificate of Title has been destroyed rather than requiring production of the Certificate of Title. This change will facilitate the conversion of a paper Certificate of Title to an electronic format.

Section 27B(7B) has been substituted. Under the new provision, the Registrar need not produce a Certificate of Title if he is satisfied that not doing so is appropriate. This provision will facilitate the phasing out of Certificates of Title. Sections 27B(7C) and (7D) have been added. These provisions will assist in the transition period when paper Certificates of Title are being phased out.

Section 86 has been amended to clarify the obligation of a first mortgagee, when requested to produce a Certificate of Title to the Registrar or when no Certificate of Title exists, to provide an administrative notice.

Miscellaneous

- Section 27E that dealt with submission of documents to facilitate registration has been repealed. Section 104, which deals with the same matters, has been amended to clarify the powers of the Registrar to require the production of documents.
- Section 91(2A) has been amended to simplify the processing of transfers by mortgagees. The concluding words of the section have been repealed to clarify that a caveat lodged subsequent to the mortgage that claims an interest by virtue of a mortgage, charge or other security document will not impede the registration of the transfer and will lapse on registration of the transfer by the mortgagee.
- Minor technical amendments have been made to a number of sections, mainly the removal of superfluous words. Definitions have also been added to facilitate the operation of the new provisions.

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Authorised by the Victorian Government
Land Victoria

Department of Transport, Planning and Local Infrastructure, October 2014

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ISSN 1441-1504 PP 349181/01650

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