

Customer Information Bulletin 225

December 2023

# Memorandums of common provisions (MCP) to be incorporated into mortgages

LUV has received feedback from a number of stakeholders on the recent proposal to amend version 8 of the Registrar’s Requirements for Paper Conveyancing Transactions in relation to MCPs to be incorporated into mortgages lodged for registration.

Stakeholders have also provided feedback on the requisitions that have been issued in relation to mortgage related MCPs that have recently been lodged to comply with the Unfair Contract Terms reforms under the *Competition and Consumer Act 2010* and the *Australian Securities and Investments Commission Act 2001*.

LUV recognises the urgency around implementing these changes and apologises for the delay in processing. There was a significant surge in volume which has created a backlog which has caused delays.

A number of these MCPs contain covenants that are problematic. As such, we wish to clarify for all parties that:

1. Under section 74(1) of the *Transfer of Land Act 1958* (TLA), the registered proprietor of any land may mortgage their land. Land is defined in section 4(1) of the TLA and section 38 of the *Interpretation of Legislation Act 1984*. Other property and rights that do not form part of 'land' cannot be the subject of a mortgage under the TLA including personal property and water shares and rights (which have been unbundled from land in Victoria).
2. Under section 74(1) of the TLA, the registered proprietor of any land may mortgage the land. Consequently, only the mortgagor(s) and mortgagee(s) can be a party to a mortgage lodged for registration. Third parties such as guarantors or obligors cannot be bound.
3. Under section 91A and 91B of the TLA, MCPs are retained by the Registrar for incorporation into an instrument lodged for registration. For mortgage MCPs, that instrument is a mortgage and not a ‘cover sheet’, ‘form’ or the ‘national mortgage form’.
4. The Registrar considers that the terms of the mortgage take precedence over any terms and conditions in an MCP incorporated into it. For example, the nationally agreed operative words in a mortgage in the approved form of the national mortgage form should take precedence over any conflicting operative words in an MCP.
5. Mortgages lodged for registration in Victoria are not deeds. Section 40 of the TLA was amended in 2014 to clarify this. Therefore, any use of the term ‘deed’ in reference to a mortgage is inappropriate and invalid.

MCPs must not contravene section 37 of the TLA and therefore should not contain any reference to any specific trust(s), trustee(s) or beneficiary(ies). If a reference to a trust is required, contingent words must be used. An example of contingent wording is: ‘If a party is a trustee, the following clauses apply:’.

Mortgages may only reference a retained Victorian MCP. It is not acceptable to seek to incorporate an MCP that is not yet retained or that is an MCP from another jurisdiction.

A number of MCPs have been requisitioned recently as they contained covenants that raised the concerns identified above, amongst other issues.

Noting the impact of delays in processing, LUV will work with stakeholders to develop a long-term solution that ensures that Victorian requirements are met while trying to assist stakeholders who operate across Australia. This will include a review of definitional terms with the aim that they make sense for Victorian consumers (for example, use of ‘owners corporation’ rather than references to ‘shared schemes’, ‘strata title’ or ‘community title’).

**In the context of the information above, LUV will now proceed with processing requisitioned MCPs. Until a long-term solution is established, covenants that raise the issues identified in items 1 to 5 will not be requisitioned.**

LUV thanks all stakeholders for their patience and feedback about this matter.

Please note that responses to the feedback provided during the consultation on version 9 of the Registrar’s Requirements are in preparation and will be published as soon as possible.

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