Customer Information Bulletin 219

## Land Use Victoria joins Department of Transport and Planning

Following the 2022 State Election, and the Machinery of Government (MoG) changes announced on 5 December 2022, Land Use Victoria joined the Department of Transport and Planning (DTP) on 1 January 2023.

We will continue with business as usual during the transition, and all the services that you rely on will continue as normal, including how you contact us. We will provide updates on any changes, as they become available.

## Mortgage provisions restraining the alienation of land

It is accepted law in Victoria that registered proprietors are free to alienate their land as they wish. The Registrar considers mortgage provisions limiting this right unacceptable except in certain circumstances.

Examples of such restraint on alienation provisions include:

* the Mortgagor must not dispose of, deal with, or part with possession of the land without the Mortgagee’s prior written consent which will not be unreasonably withheld.
* the Mortgagor covenants with the Mortgagee that it/they shall not transfer or assign any of its/their interest in the land and/or further grant any charge, mortgage or other encumbrance on the land without the Mortgagee’s prior written consent.
* the Mortgagor must not dispose of, deal with, or part with possession of the land unless permitted under the terms of an off-Register document (for example a loan agreement).

Following *Hall v Busst (1960) 104 CLR 206*, as affirmed in *Melbourne Property Group Investments (MPGI) Pty Ltd as trustee for MPGI Trust v Knight 43 Martin Street Pty Ltd [2022] VSC 4*, the Registrar will only accept restraint on alienation provisions in a mortgage if the mortgage also includes a provision stating that any restraint on alienation provision may only be exercised by the Mortgagee for a valid collateral purpose.

## Surrender of a forest carbon right – clarification

This article seeks to clarify requirements around how forest carbon rights created under section 26 of the Climate Change Act 2010 and subsequently under section 57 of the Climate Change Act 2017 that are recorded in the Register of land can be surrendered.

Parties seeking to surrender such a right must transfer the right to the current registered proprietor of the freehold or leasehold estates depending on whether the right was created by the freeholder or leaseholder.

If the right was created by the registered proprietor of the freehold estate, a transfer to the current registered proprietor of the freehold will affect a surrender of the right. Similarly, if the right was created by the lessee of a lease, it should be surrendered to the current registered proprietor of that lease i.e. the current lessee.

## Closure of the Permanent Order Book

In the past, parties lodging a significant volume of instruments executed under power of attorney were permitted to deposit a copy of the power with the Registrar. The Registrar would make a corresponding entry in the Permanent Order Book (POB). The parties could then cite the relevant book and page number of the POB when executing instruments under the power without needing to produce the power of attorney.

With 97 percent of instruments now lodged electronically, there is no ability or need to cite a power of attorney instrument or POB reference. While paper transactions continue to require reference to a power of attorney, this has become increasingly rare.

As a result, LUV has closed the POB effective immediately and no new powers of attorney will be accepted for recording. Customers can continue to reference existing powers of attorney recorded in the POB until 30 June 2023.

From 1 July 2023:

* reference to powers of attorney recorded in the POB on instruments will not be accepted and any such instruments will be refused, and
* if any future paper instruments are signed by an attorney, a certified copy of the power of attorney will need to be produced.

## Recording of water agreements and decisions under sections 234, 235 and 244 of the Water Act 1989

Customers are reminded that a number of agreements created under, or decisions made under, the Water Act 1989 must be lodged for recording in the Register. These agreements and decisions for access to land for drainage, water supply or salinity mitigation purposes may be obtained:

• with agreement of a land owner under section 234

• without agreement of a land owner by decision of an Authority under section 235

• with community agreement by a group of land owners under section 244.

These agreements and decisions have no effect until they are recorded in the Register of land in accordance with section 236 or 244(3) of the Water Act.

Agreements and decisions are recorded in the Register as follows:

• when the burdened land is freehold, on the folio(s) of the Register for the burdened land

• when the burdened land is general law land, on the folio(s) of the Register for the burdened land

• when the burdened land is unalienated Crown land, on the folio(s) of the Register for the benefited land.

## Reminders from Registration Branch

## Evidence of duty paid for transfer of lease and sub-lease

The Registrar has an obligation to ensure that duty has been assessed, whether paid or exempt, before an instrument can be registered. The duty assessment and payment (if any) on the transfer of a lease or sub-lease currently cannot be electronically validated.

Customers are reminded that a copy of the Duty Statement from the State Revenue Office must be attached as a supporting document when lodging a transfer of a lease or sub-lease.

## Requests for refunds on re-lodgment of withdrawn instruments

Pursuant to Section 108(9) and (10) of the *Transfer of Land Act 1958*, withdrawn instruments that are subsequently relodged may be eligible for a refund of half of the new lodging fee.

Customers are reminded that a refund will only be considered once the relodgment has been accepted. Not all requests for a refund will be approved.

Refund requests must be sent to advice.enquiries@servictoria.com.au

## Reminders about caveats

A caveator must be able to claim to have a proprietary interest in land, that is an estate (freehold or leasehold) or an interest in land (for example, interest as chargee, mortgagee, grantee of an easement). Caveators and their conveyancer or lawyer must assess whether an estate or interest in land can in fact be claimed before a caveat is submitted for lodgment. All facts and circumstances must be taken into account.

Some claim categories available in caveats in Victoria, for example, Agreement/Contract, Court/Tribunal Orders and Other may or may not give rise to a proprietary interest in land. For example:

* an agreement that contains a specific clause charging the subject land to the caveator could give rise to a caveatable interest
* an agreement in which the parties agree to a caveat being placed on the subject land does not of itself give rise to a caveatable claim
* orders under the *Family Law Act 1975* that vest the subject land in a party or charge the subject land to a party could give rise to a caveatable claim
* other Court or Tribunal orders do not of themselves give rise to a caveatable claim.

***Contact us***

*For location and contact details, please go to* [*www.land.vic.gov.au/contact-us*](http://www.land.vic.gov.au/contact-us)