



Australian Banking
Association



CONSULTATION ON DRAFT VERSION 9 OF THE REGISTRAR'S REQUIREMENTS

Land Use Victoria

10 October 2023

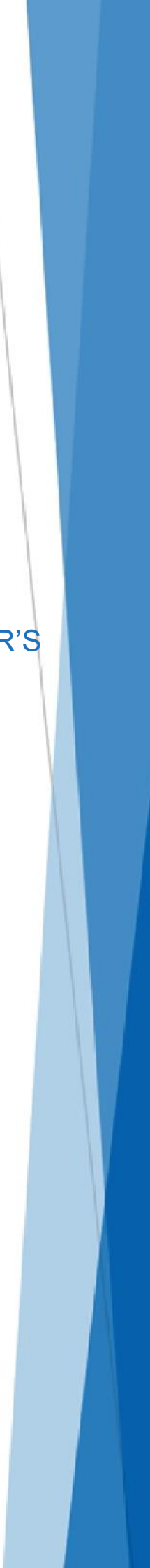




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Key Recommendations

The ABA recommends the following:

1. Land Use Victoria do not proceed with the proposed introduction of section 19 of the Registrar's requirements.
2. Land Use Victoria prioritise national consistency when proposing changes relating to the Registrar's requirements and other matters relating to conveyancing.
3. Land Use Victoria considers the ABA's proposal that a national registry for Memorandum of Common Provisions be implemented in lieu of the proposed changes.

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About the ABA

The Australian Banking Association advocates for a strong, competitive and innovative banking industry that delivers excellent and equitable outcomes for customers. We promote and encourage policies that improve banking services for all Australians, through advocacy, research, policy expertise and thought leadership.

ABA submission to Land Use Victoria

Summary

The Australian Banking Association (**ABA**) welcomes the opportunity to participate in the consultation on the draft version 9 of the Registrar's Requirements (**proposed Registrar's Requirements**) issued by Land Use Victoria (**LUV**).

The ABA has concerns with the proposed Registrar's Requirements and their impact on the Memorandum of Common Provisions (**MCPs**).

We respectfully request that LUV reconsider the adoption of the proposed Registrar's Requirement 19. This change phases out of the use of already registered and long-established MCPs across industry, with little policy justification.

Existing references to external documents are used to assist customers in understanding their rights and obligations under their mortgage agreement and its related agreements, which usually includes being a loan or guarantee agreement. We have concerns that the proposal will create confusion and complexity for customers and banks, with no clear benefit, and impact on enforcement and banks' ability to exercise existing rights.

More broadly, the ABA considers the proposed change to MCP requirements is an example of one of the many changes to conveyancing across Victoria and other jurisdictions that continue to push jurisdictions away from a nationally consistent model to conveyancing, and by extension, eConveyancing.

The practical effect of this is that all participants in the ecosystem continue to experience greater regulatory burden, operational complexity and time taken to process documentation, together with a reduction in efficiency, which ultimately impacts customers.

The ABA maintains committed to a nationally consistent approach to conveyancing and the adoption of best and consistent practice, wherever possible. The ABA notes the rationale for the proposed change is unclear and considers the change will result in national inconsistency and bespoke processes for MCPs in Victoria.

We also note that any changes relating to MCPs will impact on banks' obligations under the recent changes to the unfair contract terms regime under the *Australian Securities and Investments Commission Act 2001* (Cth), which will commence on 9 November 2023.

The ABA therefore requests urgent consideration of this issue to ensure compliance under both schemes.

Impacts to customers.

In the ABA's view, the proposed changes to MCPs will create confusion and complexity for customers, with no clear benefit. The ABA understands the proposed new Registrar's Requirement 19.2 aims to restrict MCPs from containing certain provisions that relate to other documents, such as loan agreements and guarantees, or repeat terms from a loan agreement or guarantee.

Currently, MCPs are typically linked to and used in connection with loan agreements and guarantees. This is because a mortgage usually secures a debt under a credit contract where the obligation to repay the debt arises from. This is also the case with guarantees, where the obligations for guarantors arise under the guarantee, which in some cases, is secured by a mortgage. Banks typically do not enforce a mortgage until there is a default of the obligations under these other documents.

In practice, MCPs are used to assist customer understanding of the terms, conditions, and obligations of a mortgage security granted by a mortgagor to a bank. Cross-referencing these agreements within the MCPs informs customers of how their obligations under the mortgage are linked to the loan agreement and/or guarantee. It also enables customers to better understand how various documents are related and the obligations that arise from each when entering into the agreements.

MCPs can also include references to other documents and terms, such as those relating to the National Credit Code and the ABA Banking Code of Practice (**BCOP**), which are specifically included to alert customers of their rights. For example, a specific requirement under BCOP provides that banks must ensure that customers, including small businesses, receive information that is useful and clear, and in a transparent manner.

Under the changes proposed by LUV, banks would only be able to inform customers of their rights under these documents individually, which would make it more confusing and practically difficult for customers to understand how the agreements and provisions under each interact and relate to one another.

Customers are also likely to be less clear on their obligations across the portfolio of documents, which is contrary to the intent of customer clarity and understanding of banking services, underpinning many of the legislative frameworks governing banking products and services. This change may also result in:

- greater processing errors and delays for mortgages, which would impact customers during both the process of purchasing property and any event of default, and
- hinderance of industry registration of new MCPs within the given timeframe, impacting on their ability to perfect security by registration.

Increasing complexity for customers in this regard is concerning given the nature of the security conferred by a mortgage, and it is unclear what benefit LUV would derive by proceeding with this change.

The ABA notes that banks will be required to develop manual workarounds to their existing systems to implement the proposed change. Temporary manual processes reduce efficiency as compared to an automated process, which may also impact on the timeliness of customer settlements.

Impacts to enforcement and banks' ability to exercise their rights.

We note that a further consequence of removing the link between the mortgage and loan agreement, or guarantee are the potential impacts on a bank's ability to exercise its rights effectively. For example, under the proposed changes, the bank's power of sale would need to be exercised with reference to its rights under the loan agreement and then the mortgage agreement, rather than exercised with reference to either/or. Practically, under the proposed changes, the mortgagee would likely have to enforce their rights under the loan agreement and then under the mortgage agreement, rather than through the collective agreements. This will make it more complex for banks to enforce either agreement with the customer.

The ABA notes the proposed change will require banks to seek legal advice on what are likely to be substantial changes to existing MCPs, introducing a level of uncertainty for banks and customers in an otherwise well-established practice that is adopted by industry and other jurisdictions.

While the ABA understands that LUV's intention is that section 19.3 of the proposed Registrar's Requirements will allow existing MCPs to stay in force, in practice, this is unlikely to occur. Parallel changes to the unfair contract terms (**UCT**) administered by the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission have prompted many banks to undertake a wholesale review of their MCPs across the loan book to ensure they meet the requirements of the law.

Many members are actively working towards registration of these updated MCPs across all jurisdictions in anticipation of the commencement of the amended UCT scheme on 9 November 2023. The potential, and in some cases previous, rejection of these updated MCPs by LUV contradicts the spirit of maintaining existing arrangements, as proposed by LUV, and creates further complexity for banks in continually updating terms that are otherwise consistent and accepted in other jurisdictions.

Impacts to national consistency in conveyancing practice.

The use of existing MCPs is a long standing and well-established practice that is widely adopted across the financial sector and one that continues to be adopted by other jurisdictions.



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The insistence on excluding references to other agreements creates a situation where bespoke MCPs may be required specifically for Victoria. By prescribing unique and specific MCPs for Victoria, LUV will be requiring banks, and any conveyancer or solicitor operating interstate, to design and implement Victorian-centric processes and systems, which will increase implementation and operational cost for all participants in the conveyancing ecosystem who operate in Victoria. This diminishes the value of common or nationally consistent provisions and introduces complexity into otherwise consistent practices.

The ABA maintains committed to a nationally consistent approach to conveyancing and the adoption of best and consistent practice, wherever possible. The proposed change to MCP requirements is an example of one of the many changes to conveyancing across Victoria and other jurisdictions that continue to push jurisdictions away from a nationally consistent model to conveyancing, and by extension, eConveyancing. The practical effect of this is that all participants in the ecosystem continue to experience greater regulatory burden, operational complexity and time taken to process documentation, together with a reduction in efficiency, which affects customers.

The ABA encourages LUV to consider alternative options to any proposed conveyancing changes that are in the spirit of national consistency. For example, LUV could engage with other land title offices and establish a common or national registry to allow MCPs to be prepared and registered once. Such an approach would reduce the burden for land titles offices in administration and management of multiple registries, while making it more efficient for banks to register an MCP a single time, rather than multiple times with each jurisdiction's office.