CAV-02 Caveats - further reading

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1 Verification of Identity

The caveator in an application will be subject to the Verification of Identity process as of 5 June 2018. This process is completed by Australia Post for self-represented parties. Refer to the Australia Post website to complete your verification of identity. For information regarding the Verification of Identity Practice refer to Verification of Identity webpage on the Landgate website.

[1 New paragraph added on 06/08/2018]

1 Entry of a Caveat

Provided a caveat is substantially in a form approved by the Registrar, sufficiently identifies the land sought to be affected and claims an estate or interest in land, entry on the Register is almost automatic. A caveat is effective from the time of its lodgement. A memorandum of a caveat is not entered on the duplicate certificate of title.

The duplicate certificate of title is not required for this transaction type.

Standard lodgement fees are applicable to each form.

2 Improper Entry of Caveat

Under s.138 of the Transfer of Land Act 1893 (TLA), the registered proprietor may summon the caveator to appear before the Supreme Court or a Judge in chambers to show cause why the caveat should not be withdrawn.

Section 140 of the TLA provides that a caveator lodging a caveat without reasonable cause shall be liable to pay such compensation for damage caused as a Judge on a summons in chambers may order.

3 Registrar’s Role
It is not the Registrar’s duty to determine the validity of a claim. The Registrar does not determine whether or not the particular claim made is a caveatable interest or that the evidence offered in support is sufficient to support that claim, or that the nature of the caveator’s claim is appropriate.

The correctness and validity of a caveator’s claim is for the caveator and, in appropriate cases, a Court to decide.

The Registrar’s role is merely to:

- be satisfied that a caveat meets the requirements of form

- ensure that other statutory requirements (e.g. stamp duty) are met

- in appropriate cases, draw attention to perceived defects in the substance of the claim made or of the sufficiency of evidence and of the risks being run by the caveator

and

- give notice of the caveat to the registered proprietor and any judgement creditor named in any property (Seizure and Sale) order registered in respect of the judgment debtor’s saleable interest in such land.

4 Interest in Land Capable of Supporting a Caveat

The grounds upon which a caveat may be lodged are many and complex. Many cases have been argued before the Courts, and much of the law on caveats is based on decisions of the Court rather than laid out in a statute. In such circumstances the law is subject to change as new decisions extend, modify or further explain the grounds on which a caveat may (or may not!) be maintained on the register.

Despite the fact that the interest claimed is not one (yet) decided by the Courts, a caveat that is procedurally correct and expressly sets out the nature of the estate or interest claimed will be accepted by the Registrar. However, caveators will be required to complete a statutory declaration that clearly and concisely states the estate or interest claimed and the facts on which that claim is based. It will then be for the Courts to determine whether or not the particular estate or interest is a caveatable interest in land.

The Registrar will not reject a caveat that complies with the statutory requirement merely because the Registrar considers that the claimed estate or interest is not caveatable or is inadequately described. If there are defects in these areas, then the registered proprietor has a remedy under s.140 of the TLA for damages or compensation from the caveator.

As a general rule, a caveator’s claim should arise through some dealing with the registered proprietor. Where the caveator is not dealing directly with the registered proprietor the caveat must clearly recite the step by step events which tie the caveator to the registered proprietor.

Where the claim arises out of rights under an easement or restrictive covenant, such claim must be made by or through the proprietor of land appurtenant to the land against which the caveat is lodged.

The document by virtue of which a caveat is lodged must normally be signed by the registered proprietor of the land against which the caveat is lodged or by his or their duly appointed representative. However, where such document is a contract of sale, it may be signed by the solicitor or a licensed estate agent on behalf of the vendor. Contracts by a married couple signed
by one party both personally and on behalf of his or her partner, are also acceptable.

5 Traditional Interests that Support a Caveat

To assist caveators the following forms of interests have been accepted by the Courts as caveatable interests and may be used as a guide:

- a purchaser under an agreement for the sale of land
- a person having an option to purchase the land
- the grantee of an easement
- a mortgagee
- an equitable mortgagee
- as chargee
- a lessee of a lease of land
- as beneficial co-owner
- the beneficiary of a trust, against land held by a trustee for the trust
- as trustee in Bankruptcy
- the holder of an unregistered instrument
- a person who is to receive portion of the proceeds of land upon a sale
- a person entitled to an annuity charged on the land
- the grantee of a right to take from the land some natural product of it, such as peat, stone, or timber, or to shoot game thereon, and to take it away for the grantee’s own benefit
- a person having the right to a restrictive covenant running with the land

and

- a claimant who bases his or her claim upon the doctrine of resulting trusts.

In addition, s.6 of the Chattels Securities Act 1987 creates a securable interest over goods attached to land owned by a third party. The interest will support a caveat.

Section 19 of the Imperial Judgments Act 1838 (I and II Victoria) provides for the recording in the Supreme Court of Judgments created in Superior and other Courts, which then, by virtue of s.13 of the same Act, operate as a charge against land.

Other interests have been listed in legal texts such as The Principles of the Australian Land Titles (Torrens) System by Donald Kerr.

Conveyancers are also referred to a very informative paper on caveatable interests, by Mrs S Boyle LLB, called Caveatable Interests, The Common Lore Distinguished which was delivered to the Equity and The Transfer of Land Act seminar held by the Law Society of Western Australia on 22nd June, 1993 and published in the Murdoch Law Review 1993.
Another useful publication is Caveats Against Dealings in Australia and New Zealand by Shannon Lindsay.

6 Interest that may not Support a Caveat

There are some interests that may not constitute a caveatable interest. These types of claims should be addressed and established by a legal professional. The interests listed below may fall into this category:

- Disputes relating to dividing fences is covered by the Dividing Fences Act 1961
- General or Common Debts may be covered by the Civil Judgements Act 2004
- Strata Fees and Levies are a form of Common Debt and may come under the above
- Legal Fees, unless incorporated into the legal contract

Trustees of a Trust or Superannuation fund should consider lodging a Declaration of Trust to indicate and protect that interest.

The interests stated above are governed by other legislations, claims under these Acts may enable other forms of claims or interests to be lodged. An Industry Professional could assist with the interpretation and application of these legislations.

6.1 Double Interest Caveats

A caveat may be lodged where there are different owners over different titles in the same form. The caveator would be required to lodge separate forms for each owner using the same evidence. This form of caveat would only be acceptable if the interest is limited to the same person over the different titles.

For example:

Property 1 is in the name of A

Property 2 is in the names of A & B

The claim is limited to the interest or share of A only

7 Nature of the Caveator’s Claim

A caveator can restrict dealings by a registered proprietor with three types of claim; which are outlined below.

7.1 Absolutely

An absolute caveat bars the registration of any instrument affecting the estate and interest, except a property (seizure and sale) order and as provided in s.142. Parties to a transaction wishing to register an instrument must either negotiate its withdrawal or have it removed by initiating action by
the Registrar under Sections 138 or 138B of the TLA, or action by the Commissioner under s.141A, or action by the Courts under Sections 138 or 138B.

7.2 Until after notice of any intended registration or dealing to be given to the caveator

Caveats in this form are useful for those caveators whose claim will not be defeated by the registration of any change of interest in the land, and who merely wish to be informed of any change in interest occurring on the title. If the change in interest is detrimental to the caveator the caveator may choose to negotiate with the parties or obtain an injunction to prevent the registration of the instrument.

These caveats may be shown in the Limitations, Interests, Encumbrances and Notifications panel, where there is one, of any instrument dealing with the land in the title affected by the caveat. Before an instrument is lodged against land affected by such a caveat, notice must be given to the caveator.

The notice must:

- Be addressed to the caveator, and if more than one caveator, be separately addressed.

- Refer to the caveator, and the caveat number.

- Give the particulars of the instrument(s) to be lodged subject to the caveat by reference to:
  - the nature of the instrument
  - the parties to the instrument
  - the date of the instrument.

and

- State the intention to register the instrument at the expiration of the 14 days’ notice period.

Conveyancers should refer to s.240(4) of the TLA when calculating the expiry date of the notice period.

The documents or instruments may then be lodged with the Registrar at the end of the notice period. Proof of compliance with the above in the form of a statutory declaration setting out the action taken, and annexing a copy of the notice must accompany the dealing. The dealing must be lodged as soon as possible after the expiry of the notice period or the process of serving notice must be repeated.

If the parties to the transaction do not wish to register their instrument subject to the caveators claim they must either negotiate its withdrawal or have it removed by initiating action by the Registrar under s.138 or 138B of the TLA, action by the Commissioner under s.141A, or action in the Courts under s.138 or 138B.

7.3 Unless such instrument be expressed to be subject to the caveator’s claim

Instruments showing the caveat as an interest may be registered.

If the parties to the transaction do not wish to register their instrument subject to the caveators
claim they must either negotiate its withdrawal or have it removed by initiating action by the Registrar under Sections 138 or 138B of the TLA of the, action by the Commissioner under s.141A, or action in the Courts under s.138 or 138B.

It should be noted that while the Registrar of Titles may not question the type of claim made by the caveator, the Courts may do so. In general terms a claim based on an interest in fee simple, such as a purchaser’s caveat, may be absolute, and caveats based on a lesser interest, such as an equitable mortgage, should be made subject to claim.

8 Forms to Use

Caveats under s.137 must be prepared on a form approved by the Registrar. There is a printed form of caveat, designated Caveat form available for this purpose. This form can be used for caveats over freehold or Crown land. The Caveat Improper Dealings form is available for Caveats (Improper Dealings).

Caveats under s.30 against Applications to bring land under the operation of the TLA must be prepared on a form approved by the Registrar. There is a printed form of Caveat, designated Caveat (under s.30 and 223A of the TLA) form, available for this purpose.

Caveats under s.176 against Applications to rectify the boundaries or area and 223A against Applications by Possession must be prepared on a form approved by the Registrar. There is a printed form of Caveat, designated Caveat forbidding land to be brought under the Transfer of Land Act 1893 (Section 30) form, available for this purpose.

Note: Landgate introduced the ability to lodge Caveats electronically in May 2015. Also see policy and procedure guide: DOC-01 Document Preparation.

9 Supporting Documentary Evidence

Caveats lodged in paper must be supported by the documentary evidence that established the caveatable claim. Electronically lodged caveats are subject to Certification by the Subscriber.

Documentary supporting evidence may be in the form of:

- Mortgage Document
- Lease or Sublease or Deed of Extension
- Contract of Sale
- Declaration of Trust or Deed or Superannuation Fund
- Deeds or Contractual Agreements
- In instances where no document/Deed or Contract exists a Statutory Declaration must be used

The supporting documentary evidence should clearly identify the parties, a link to the land being caveated, address the claim and signed by all parties.

If a caveat is lodged which requires the production of a document or agreement, and the document or agreement is not lodged, a requisition will be issued under s.192 of the TLA. Failure to comply with the requisition within the specified timeframe from the date of the requisition can lead to
rejection of the caveat.

Note: Reference to the supporting evidence should be clearly stated by name and date in the relevant panel.

10 Supporting Statutory Declarations

Where the estate or interest has not been created by a document, a statutory declaration will be required setting out the nature of the claim and how it arose in a manner that complies with the requirements of s.137 of the TLA. That is, the declaration must state the nature of the estate or interest claimed and the title thereto.

If no such declaration is lodged with the caveat, a notice will be sent to the caveator requiring production of the declaration.

Failure to comply within seven days from the date of requisition makes the caveat absolutely null and void (s.137 of the TLA).

Declarants are required to state in their statutory declaration:

The nature of the estate or interest claimed is ...

"The title to the estate or interest claimed arises by virtue of ...."

If the declaration provided fails to meet the above requirements, the caveat will, on the expiration of the 7 days set out in the notice, be endorsed null and void without further reference to the lodging party.

Note: Also see policy and procedure guide: DOC-04 Statutory Declarations.

11 Notice to Registered Proprietors

The Registrar is required by s.138 of the TLA to give notice of the lodgement of a caveat to the registered proprietor. If a caveat is lodged against the proprietor of the fee simple or other interest that is encumbered by a PSSO, notice that a caveat has been lodged must also be served on the judgment creditor.

The notice consists of a memorandum containing the essential details of the caveat sent by ordinary mail to the address of the registered proprietor shown in the Register. Notice will also be sent by ordinary mail to any other later address of which the Registrar has knowledge.

Section 31 of the TLA requires the Registrar to notify a person applying to bring land under the TLA that a caveat has been lodged prohibiting the Registrar from proceeding with the application.

Applicants are also notified of caveats lodged against applications under s. 176 and s.223A of the TLA.

12 Change of Address for Service of Notice

The caveator may make application under s.240A of the TLA to change the address or fax number given on a caveat for service of notice. The address for service of notice to the caveator is most
important. Caveators and persons acting on their behalf should ensure that such an address is kept current. Also see policy and procedure guide: ADD-01 Change of Address.

13 Also see

- CAV-01 Caveats - overview
- CAV-03 Caveats - types of
- CAV-04 Caveats - document preparation and lodgement
- CAV-05 Caveats - removal
- Guides for Lodging or Removing a Caveat