CAV-05 Caveats - removal

Version 5 - 30/08/2018

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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 By Withdrawal

A caveat may be withdrawn by lodgement of a Withdrawal of Caveat form. Landgate introduced the ability to lodge a Withdrawal of Caveat electronically in May 2015.

The removal of a caveat under this process is made by the caveator and signed by the caveator, unless being lodged electronically.

Where a caveat has been lodged by a purchaser pursuant to a sale of land on terms and a transfer of the same land to the caveator is being lodged, it is permissible for the solicitor lodging the transfer to sign the withdrawal on behalf of the caveator, provided the transfer and withdrawal of caveat are lodged together.

Each caveat being removed is subject to standard lodgement fees. (See also: DOC-01 Document Preparation.)

1.1 Death of a Caveator

Where there are two or more caveators, it is the responsibility of the surviving caveator to establish how the interest or claim was held, i.e. jointly or in shares.
Where the interest was held jointly the surviving caveator may complete the withdrawal form and provide the appropriate evidence similar to a Survivorship Application (See also: DEC-02 Survivorship).

In the event of a Sole Caveator, the Executor(s)/Administrator(s) of the decease caveator may apply for the removal of the caveat using a withdrawal of caveat form. The Executor(s)/Administrator(s) would need to provide the appropriate evidence similar to a Transmission Application. (See DEC-03 Transmission Applications).

1.2 Removal of Registrar’s Caveats (NEW)

A Registrar’s Caveat is rarely removed prior to a transaction being presented for lodgement/registration. The transaction is generally lodged subject to the caveat and where the transaction is consistent with the purpose of the caveat, the caveat is removed by the Registrar of Titles to allow the transaction to proceed.

A person seeking the withdrawal of a Registrar’s Caveat needs to satisfy the Registrar of Titles that the withdrawal of such a caveat will not allow the rights protected by the caveat to be defeated.

Where the caveat has been lodged to protect interests under a trust, see POA-05 Declarations of Trust (Section 55 of the TLA) - Removal Options.

Where the caveat has been lodged to protect an incapable person identified in a State Administrative Tribunal Order (SAT), the caveat will be lifted upon the lodgement of a valid Transfer (bona fide sale) (see Transfer by Attorney Under EPA or by Administrator Under Board Order) or an application by survivorship or transmission.

Where the caveat has been lodged to protect a persons’ right to reside on land contained in a Will, the caveat may be lifted where a request in writing is received that is either accompanied:

- by a sworn statutory declaration by the person holding the right declaring their interest has ceased or they relinquish the interest, or

- Notice of death of the interest holder

Note: Registrar’s Caveats protecting a trust will be removed and re-applied where a Transfer is simply transferring to a new Trustee.

2 By Lapse under Section 138 of the TLA (14 Days’ Notice)

On the presentation for registration of an instrument and on written request signed by:

- a party to the instrument

- a solicitor for the party to the instrument or, if a firm of solicitors, a member of that firm

- a licensed settlement agent, on the letterhead of his or her firm

- a licensed estate agent on the letterhead of his or her firm

or

- the senior security officer of a bank on a bank letterhead;
and on payment of the prescribed fee, fourteen days’ notice will be sent by the Registrar to the caveator at the address or the number for a facsimile machine for service of notice given in the caveat. The notice will require the caveator to take action in Court to substantiate his or her claim, failing which the caveat will lapse and the instrument will be registered.

It should be noted that a caveat lapses only to the extent necessary to permit the registration of the instrument under which the notice was sent. In the case of a paper title, a transfer of one lot out of several in the title results in the lapse of a caveat as to that one lot only.

Notice may not be sent on caveats lodged by the Registrar or caveats lodged by a beneficiary under a will or trust.

3 Caveat (Improper Dealings)

In order to remove a Caveat (Improper Dealings) all the registered proprietor(s) must present themselves in person at the same time at Landgate’s Midland office and satisfy as a minimum the requirements of a 100-point check using original documents (copies are not allowed). Only the registered proprietor(s) of the property can remove the Caveat in person. A Withdrawal of Caveat (Improper Dealings) can only be lodged at the time of witnessing.

A Power of Attorney cannot be used to withdraw the Caveat.

Due to the operation of law the Caveat (Improper Dealings) will not prevent the following, including but not limited to:

- Mortgagee exercising a power of sale would be able to use s.138B of the Transfer of Land Act 1893 (TLA) as the application is not being signed by the registered proprietor(s).

- Sale of the property by a Local Government for non-payment of rates.

- Sale by the Sheriff under a Property (Seizure and Sale) Order.

- In the case of deceased owner(s) Survivorship and Transmission.

and

- Sale under the Criminal Confiscation Act 2000.

4 By Taking or Acquisition

Any caveat lodged over land taken under the Land Administration Act 1997 (LAA) or compulsorily acquired by the Commonwealth under the LAA, is automatically removed. The caveator’s claim is converted into a right to claim for compensation.

5 By Order of the Court

On the motion of the registered proprietor, a Judge or the Court may make an order removing a caveat from the register. On receipt of an office copy of the order with an application form and the payment of the required fee, the caveat is removed from the title.
6 By Sale for Rates

With the exception of caveats by the Commissioner for State Taxation, which must be withdrawn, all caveats are automatically removed on the exercise by a Local Government of its power to sell land for non-payment of rates under the Local Government Act, 1995.

7 By Sale under a Property (Seizure and Sale) Order

Where a transfer is registered giving effect to a sale by the Sheriff under a Property (Seizure and Sale) Order, any caveat lodged subsequent to the Property (Seizure and Sale) Order and without the consent of the Sheriff is automatically removed.

A caveat lodged specifically to prevent the sale will delay registration until withdrawn, removed or lapsed.

8 Section 138B of the TLA (21 Days’ Notice)

The registered proprietor(s) of the land in respect of which a caveat is lodged, or the judgment creditor named in a property (seizure and sale) order registered in respect of the judgment debtor’s saleable interest in such land, may make application for the removal of a caveat under s.138B of the TLA. This section requires the caveator to take legal action and obtain a Supreme Court Order substantiating the estate or interest claimed in the caveat within 21 days of the service of notice.

An application under s.138B of the TLA cannot be lodged on the following types of caveat:

- Caveats lodged under Sections 30, 176 or 223A of the TLA.
- Caveats under any other written law which specifically provides for the lodgement of a caveat.
- Caveats lodged by virtue of a Court Order.
- Caveats protecting beneficiaries under a will or settlement.
- Caveats lodged by or on behalf, or with the consent of the Minister for Lands.
- Caveats lodged under any Commonwealth Act.
- Caveats lodged by the Registrar of Titles.

The application must be made on a Form AW describing the land affected, the number of the caveat required to be removed and requesting that 21 days’ notice be sent to the caveator under s.138B of the TLA.

All of the registered proprietors affected by the caveat must be shown as applicants in the application and they must all execute the application in the presence of a witness. If the applicant is a corporation, the application must be formally executed in accordance with the Constitution for that corporation.

No evidence in support of the application is necessary.

Upon lodgement and examination of the application, the caveator is served (at the address shown
in the caveat) with a notice requiring that the caveator, within 21 days, obtain from the Supreme Court an order extending the operation of the caveat.

If the caveator fails to obtain a Court Order extending the caveat within the 21 days’ notice period, the caveat will lapse and an entry will be made in the Register removing the caveat.

If a withdrawal of caveat is lodged after the 21 days’ notice has been sent, but before the lapse date shown in the notice has expired, the notice period is terminated and the proprietor can deal with the land immediately.

The caveator will not be able to re-lodge a caveat that has been removed under s.138B of the TLA by virtue of

- the lapsing of the caveat, by either the expiration of the 21 days or as a result of legal action

or

- upon the withdrawal of the caveat by the caveator upon receiving the notice from the Registrar;

unless the caveator has leave of the Court or the consent of the registered proprietor.

If the caveator obtains from the Supreme Court an order extending the operation of the caveat, a copy of the order must be served on the Registrar of Titles within the 21-day period.

Note: The removal of caveats under this s.138B of the TLA is separate and distinct from the processes under Sections 137, 138 and 141A. Once Landgate has sent the 21-day notice or notices under s.138B of the TLA, it is not possible for the applicant to withdraw the application from registration. This type of application is limited to only one caveat (per application) and it must refer to all the land in the caveat.

8.1 Application Lodged by Mortgagee

The application should be made in the name of the registered proprietor of the land affected by the caveat, but signed by the mortgagee under its power to dispose of ownership pursuant to s.108 of the TLA. It is also acceptable to show the Applicant as the mortgagee on behalf of the registered proprietor of the land as mortgagee in possession.¹

The application is to be accompanied by a statutory declaration stating that:

- default under the mortgage has occurred

- default notices have been sent to the mortgagor (indicating when they were sent)

- default period provided in the mortgage has expired

and

- default still continues at the time of the lodging of the application.

Where such an application is lodged, a copy of the notice sent to the caveator will also be sent to the registered proprietor.

¹ [Guide updated on 30/08/2018 to insert new sentence]
8.2 Application Lodged by Judgement Creditor

The application is made in the name of the judgement creditor as shown in the property (seizure and sale) order (PSSO), making reference to the registration document number of the PSSO. The property (seizure and sale) order must be registered and in force in respect of the judgements debtor’s saleable interest in the land.

A statutory declaration is not required to be supplied in support of the application, unless there are facts to be clarified.

Where such an application is lodged, a copy of the notice sent to the caveator will also be sent to the registered proprietor.²

² [Guide updated on 30/08/2018 to add Section 8.2]

9 Section 141A of the TLA

Note: An application under s.141A of the TLA will not be considered where the same outcome can be achieved by making an application under s.138B of the TLA.³

A registered proprietor or any person claiming an interest in the land may make application for the removal of a caveat on the grounds that the estate or interest of the caveator has ceased to exist.

The application must be made on a blank application form describing the land affected, the number of the caveat required to be removed and requesting that 14 days’ notice be sent to the caveator under s.141A of the TLA.

Evidence must be supplied by way of statutory declaration setting out the facts by which the registered proprietor claims that the interest of the caveator has ceased. Any documentary evidence produced must be annexed to the declaration.

As each case is treated strictly on its merits, no guidance as to the evidence required can be given. This type of relief is rarely given where a purchaser’s caveat is concerned.

Where the Commissioner is satisfied that the caveator’s claim has ceased to exist, the caveator is given, at the address or the number for a facsimile machine shown in the caveat for service of notice, 14 days in which to withdraw the caveat or commence proceedings in Court to substantiate his claim.

After the 14 days have expired without any action by the caveator, a second notice is sent to the caveator advising that the caveat has ceased to affect the land.

The Commissioner then directs that an entry be made in the Register removing the caveat from the title.

Should the caveator take action to protect his or her claim he or she must join as parties the Registrar, or an Assistant Registrar, by name, and the registered proprietor, and any other person affected by the caveat.

Once the caveator has commenced proceedings to substantiate the claim the caveat will remain on the title pending the resolution of the Court Action. If successful, the caveat will remain on the title and the application will be withdrawn or rejected, with a partial refund of fees.
It should be noted that an application to remove a caveat using the provisions of s.141A of the TLA will not succeed if the applicant contends that the caveator’s claim was non-existent in the first place.

A mortgagee who wishes to lodge a transfer to exercise a power of sale, and is prevented from doing so by a caveat lodged subsequent to the mortgage, may in certain circumstances successfully apply under this section.

³ [Guide updated on 30/08/2018 to move Note to top of Section 9]