MTG-01 Mortgages

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A Mortgage document is subject to the Verification of Identity Practice issued jointly by the Western Australian Registrar of Titles and Commissioner of Titles. Please refer to the VOI webpage.

1 Mortgage Forms

1.1 General

Section 105(1) of the TLA provides that "...the proprietor of any land under the operation of this Act may mortgage the same...."

A mortgage under TLA operates as a charge against the land and not as a transfer, and a mortgagee has an interest in the land and not an estate in it.

The contractual part of the document consists of the covenants between the mortgagee and mortgagor and it is here that there is freedom between the parties to determine their several rights and liabilities. Generally, the Registrar is not concerned with the covenants beyond ensuring that any balance in the covenants is filled and that the pages are numbered consecutively.

However, the terms of the mortgage cannot be in conflict with the provisions of the Act, and care must be taken by conveyancers to ensure that the statutory rights of the mortgagee, especially as regards to default and notice, are not removed. Mortgages containing such clauses will not be registered.

The National Mortgage Form (NMF) in paper form was introduced throughout Australia in May 2017. An electronic version of the NMF is available on the Landgate website and in the PEXA Electronic Lodgement Network Operator environment.

From 1 January 2018 all mortgages must be lodged using the NMF.

Banks, Financial Institutions and any other party lodging a large volume of mortgages in a standard
form are requested to lodge the contractual details as a Memorandum of Common Provisions at Landgate. Please note that the National Mortgage Form (NMF) has a 4,000-character limit and so may not accommodate contractual details within the Terms & Conditions part of the NMF, therefore a Memorandum of Common Provisions may be necessary.

Each new mortgage could then be completed as a short form containing the operative part and conveyancing detail, and a reference to the memorialised contractual details.

Amendments to the contractual details can only be made by inclusion in the short form mortgage or by registering a new memorandum of common provisions.

The parties may modify any of the implied covenants in any mortgage. The implied covenants (s.113 of the TLA) are:

- to repay the principal sum
- to pay interest on that sum in the manner provided
- to repair and keep in repair buildings on the land

and

- at reasonable times, to permit inspection of the mortgaged premises by the mortgagee.

The form requires that only the mortgagor is to sign the mortgage in the presence of an adult witness who is not a party to the document, but there are occasions where the mortgagee must also sign. Where any alteration, to the detriment of the mortgagee, is made to a mortgage the mortgagee is required to initial the alteration and sign the mortgage in the presence of a witness. Two specific instances would be:

- where the principal sum is reduced
- the interest rate lowered.

1.2 Electronic Lodgement of Mortgages introduced

Landgate introduced the ability to lodge mortgages electronically in June 2014.

1.3 Electronic Lodgement of Stand Alone Mortgages effective 1 August 2016

Industry bodies were notified of Landgate’s intention to introduce changes to the lodgement process for mortgages which will affect mortgagees, conveyancers, lawyers and lodging agents commencing 1 August 2016.

What is Changing

All stand-alone residential mortgages (mortgages to which the National Credit Code applies) must be lodged through an Electronic Lodgement Network (ELN) such as Property Exchange Australia (PEXA), if the mortgagee is an authorised deposit-taking institution (ADI). This requirement would not apply if the ELN is unavailable for one business day.
Landgate’s definition of a stand-alone mortgage is:

"any mortgage that is not lodged with a transfer of land, mortgage or any other document for the same Certificate of Title".

Why these Changes are being introduced

The changes introduced will enhance efficiencies within an electronic conveyancing ecosystem. Landgate supports the Council of Australian Governments (COAG) initiative of a ‘National Digital Seamless Economy’. As a member of the Australian Registrars National Electronic Conveyancing Council (ARNECC), Landgate is aligned with other Australian jurisdictions in supporting the accelerated take-up of electronic conveyancing because it provides a more secure and robust environment for all transactions.

A significant national consultation process including bodies such as ARNECC, the Australian Bankers Association and the Customer Owned Banking Association, has been led by Land Victoria. This consultation revealed a national appetite for digital transformation within a 2016 timeframe. To maintain consistency and continuity for reform, Landgate is aligning with the Land Victoria approach (leveraging the consultation scope) with an implementation date of 1 August 2016.

Preparing for the Change

Landgate recommends that all ADIs, their conveyancers, lawyers or lodging agents apply as soon as is practical to become registered users of the PEXA system. Please refer to www.pexa.com.au for details.

For further information, please contact Landgate’s Customer Service team on +61 (0)8 9273 7373 or email customerservice@landgate.wa.gov.au.

2 Mortgages under the National Credit Code

The National Consumer Credit Protection Act 2009 (the Act) came fully into operation on 1 January 2011. Section 3 of the Act enacts the National Credit Code (the Code). The Code is contained in Schedule 1 to the Act.

Application of the Code

Section 3 of the Schedule of the Code defines credit.

Section 4 of the Schedule defines the meaning of credit contract as "a contract under which credit is or may be provided ...".

Section 5 sets out the applicability of the Code. It applies to the provisions of credit and sets out the circumstances relevant to applicability. This includes mortgages registered under the TLA.

Under s.5 of the Schedule of the Code, the Code applies to credit contracts if, when the contract is entered into or is proposed to be entered into:

- The debtor is a natural person or a strata corporation.
- The credit is wholly or predominantly:
  - for personal, domestic or household
or
- to purchase, renovate or improve residential property for investment purposes

or

- to refinance credit that has been approved wholly or predominantly to purchase, renovate or improve residential property for investment purposes.

A charge is or may be made for providing the credit.

The credit provider is in the business of providing credit or even where the credit provider provides credit as part of or incidental to any other business of the credit provider.

The application of the Code to mortgages is specifically dealt with by s.7 of the Schedule.

Section 7(1) provides that the Code applies to a mortgage if:

- it secures obligations under a credit contract or a related guarantee

and

- the mortgagor is a natural person or a strata corporation.

3 Tenancy of the Mortgagees

Following the enactment of the Property Law Act 1969, there are two dates to consider in dealing with the interest of mortgagees:

3.1 Before 1 August 1969

Where no tenancy is expressed between the mortgagees in a mortgage lodged for registration prior to August, 1969 and the money is not stated to be advanced in particular shares, then such mortgagees were presumed to have advanced the moneys as tenants in common.

Where mortgagees are expressed to be tenants in common or provided the mortgage money is expressed in shares no problem arises.

Where there is a joint account clause stating that the mortgagees have advanced the money on a joint account both in equity and at law, then there is a joint tenancy and the right of survivorship is available to a survivor.

3.2 After 1 August 1969

Where no tenancy is expressed between the mortgagees in a mortgage lodged after 1 August, 1969 the Property Law Act 1969, (s.67), provides that, unless a contrary intention is expressed, the mortgagees are presumed to be joint tenants with the attendant right of survivorship. A definition of the term mortgagee in a mortgage in a manner which indicates that survivorship is not contemplated is accepted as an expression of a contrary intention.

Where there is an expressed tenancy in common or where the mortgage money is provided by the
mortgagees proportionately or in express amounts, then there is a tenancy in common.

The tenancy between the mortgagees is not so important while the mortgagees are alive and available to give a discharge, but difficulties, caused by poor drafting of mortgages, often arise on the death of a mortgagee, i.e., in determining whether a transmission or a survivorship application is required.

4 Up Stamping a Mortgage

Many mortgages contained provisions permitting an increase in the amount advanced to the mortgagor. The mortgage secured the amount protected by the payment of stamp duty at the time of registration.

Any further advances in excess of that amount were deemed to be a new and separate instrument of security and were protected by resubmitting a duplicate of the registered mortgage to the Office of State Revenue (Stamp Duties Division) for payment of the additional duty. (Or, for those corporations so authorised, updating the duty using the procedures set out in Sec. 112V of the Stamp Act). In accordance with s.83(7) of the Stamp Act, the payment of additional stamp duty on the duplicate mortgage has the same effect as if the original registered mortgage held at Landgate was up stamped.

The practice was known as Up Stamping a mortgage. Although the payment of the additional stamp duty maintains the duplicate mortgage as a valid and enforceable security document for the new, increased amount, the mortgage registered in the Titles Register remained unchanged (i.e., showing the stated principal sum). The common law rules of equity decide the circumstances in which the increased amount will have the same priority as the first mortgage against any later mortgages. (The rule of Hopkinson v Rolt).

5 Also see

- **DOC-01 Document Preparation**.

- **MTG-02 Mortgages - variations**

- **MTG-03 Mortgages - document preparation**