

Land Use Victoria is committed to open, accountable and responsive decision-making, informed by effective communication and consultation between Land Use Victoria and its key stakeholders.

This short Consultation Paper outlines a proposed change to how restrictive covenants and restrictions are created in transfers and plans. It is proposed to include the change in the next version of the Registrar's requirements for paper conveyancing transactions and for the change to take effect on 1 October 2017. It is proposed that it will apply to transfers signed on or after 1 October 2017 and plans originally certified on or after 1 October 2017.

Stakeholders are invited to make written submissions to Land Use Victoria by 31 January 2017 (details of how to make a submission can be found below). Subject to that feedback, the Registrar may arrange a meeting with stakeholders to further discuss the proposal and feedback received.

Call for submissions

Land Use Victoria invites your written comments on this Consultation Paper.

How to make a submission

Submissions should be emailed to policy.lv@delwp.vic.gov.au

There is no particular format that submissions need to follow. You may wish to address the consultation questions listed in this paper.

The closing date for submissions is **31 January 2017**.

Use of submissions

Unless requested not to, Land Use Victoria will treat all submissions received as public documents. Land Use Victoria reserves the right to make submissions (in part or in full) available to other parties and the general public.



Consultation on the Registrar of Titles' proposal on creating restrictive covenants in transfers and restrictions

What is proposed?

The Registrar of Titles (the Registrar) proposes to change the way in which restrictive covenants and restrictions respectively are lodged for recording in a transfer of land under the *Transfer of Land Act 1958* (TLA) or a plan under the *Subdivision Act 1988* (Subdivision Act). In most cases it is proposed that from 1 October 2017 restrictive covenants and restrictions must be included in a Memorandum of Common Provisions (MCP) recorded under section 91A TLA.

MCPs are already frequently used by property developers and their representatives to record restrictive covenants and restrictions relating to siting, form and design of developments, as well as specific limitations on the use of individual land parcels.

In summary, the proposal is that:

- For a transfer signed on or after 1 October 2017, apart from the operative words and the affected land, the provisions of any restrictive covenant must be in a MCP. The approved form of transfer will include new fields to be completed in the panel relating to the creation of a restrictive covenant - see below.
- Any restriction to be included in a plan under the Subdivision Act originally certified on or after 1 October 2017 must contain a reference to a planning permit, or be in a MCP (recorded under the TLA), or be a short-form restriction. The notation relating to the creation of restriction will include specified information to be completed on the plan sheets - see below.
- The proposed changes will be included in the next version of the Registrar's requirements for paper conveyancing transactions, to be determined by the Registrar under section 106A of the TLA.

Rationale for the proposal

The Registrar has received initial feedback on the proposal contained in Customer Information Bulletin 159 August 2016. The purpose of this Consultation Paper is to provide more detail of the proposed changes and seek further comment from Land Use Victoria's stakeholders.

The benefits of the proposed change include:

- processing efficiencies for customers because a MCP will be examined up-front by Land Use Victoria, which will catch any issues before a plan or transfer is lodged – customers will only need to review the details of the restrictive covenant/restriction once
- minimising errors, which are often made when the full text of a restrictive covenant is included in a transfer, typically due to transcribing errors or omission of some of the terms of the restrictive covenant – correcting the errors is complex and may require an application to a court
- easy searching of one MCP instead of multiple transfer documents
- improved processing and recording at Land Use Victoria because the restrictive covenant's details only need to be examined once rather than numerous times when they are included in a transfer.

How it will work

Transfers under the TLA

The details of any restrictive covenants to be created must be contained in a MCP referenced by number in the transfer. Standard operative wording and details of the burdened land and benefited land will be required to be set out in a panel in the transfer. The proposed format is:

The registered proprietors of the burdened land covenant with the registered proprietors of the benefited land as set out in the restrictive covenant with the intent that the burden of the restrictive covenant runs with and binds the burdened land and the benefit of the restrictive covenant is annexed to and runs with the benefited land.

Burdened land: - the Land

Benefited land: [set out]

Restrictive covenant: MCP [set out MCP number]

Expiry date: [set out]

Note: the provisions of sections 78 and 79 of the *Property Law Act 1958* mean that successor in law of the registered proprietors of both the benefited and burdened land do not need to be set out.

Note: a separate form of transfer will be retained for the creation and/or reservation of easements.

Examples of proposed format

Example 1. - restrictive covenant created by two adjoining owners

The registered proprietors of the burdened land covenant with the registered proprietors of the benefited land as set out in the restrictive covenant with the intent that the burden of the restrictive covenant runs with and binds the burdened land and the benefit of the restrictive covenant is annexed to and runs with the benefited land.

Burdened land: the Land

Benefited land: Volume 11755 Folio 994

Restrictive covenant: MCP AA4990

Expiry date: 1 December 2026

Example 2. - restrictive covenant created to burden and benefit multiple lots in a subdivision

The registered proprietors of the burdened land covenant with the registered proprietors of the benefited land as set out in the restrictive covenant with the intent that the burden of the restrictive covenant runs with and binds the burdened land and the benefit of the restrictive covenant is annexed to and runs with the benefited land.

Burdened land: the Land

Benefited land: see MCP AA4980

Restrictive covenant: MCP AA4980

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Expiry date: 1 December 2026

Note: The Registrar recommends that example 2 restrictive covenants are included in the plan of subdivision rather than each transfer. The benefited land, burdened land and the restrictive covenant are more easily accessed because the plan can be searched rather than each individual transfer.

Plans under the Subdivision Act

As mentioned above there will be three options for plans, where the restriction can:

1. contain a reference to a planning permit or
2. be in a MCP (recorded under the TLA) or
3. be a short-form restriction.

Standard operative wording, and details of the burdened land and benefited land, will be required to be set out in the plan.

The Registrar recognises that there may be instances where a restriction is only a single purpose restriction and could be in short form e.g. to not build with a floor level lower than (specified height) or to limit any building to a single storey.

The proposed format is:

The registered proprietors of the burdened land covenant with the registered proprietors of the benefited land as set out in the restriction with the intent that the burden of the restriction runs with and binds the burdened land and the benefit of the restriction is annexed to and runs with the benefited land.

Burdened land: - [set out]

Benefited land: [set out]

Restriction (one of): The burdened land cannot be used except in accordance with Planning Permit [set out reference.] or

The burdened land cannot be used except in accordance with the provisions recorded in MCP [set out MCP number.] or

Set out the details of the restriction up to a maximum of 450 characters.

Expiry date: [set out]

Examples of proposed format

Example 1. - the burdened land cannot be used except in accordance with Planning Permit

The registered proprietors of the burdened land covenant with the registered proprietors of the benefited land as set out in the restriction with the intent that the burden of the restriction runs with and binds the burdened land and the benefit of the restriction is annexed to and runs with the benefited land.

Burdened land: Lots 4303-4314, 432, 4325 to 4333

Benefited land: Lots 4303-4314, 432, 4325 to 4333

Restriction: The burdened land cannot be used except in accordance with Planning Permit XYZ.

Expiry date: 1 December 2026

Example 2. - the burdened land cannot be used except in accordance with the provisions recorded in MCP

The registered proprietors of the burdened land covenant with the registered proprietors of the benefited land as set out in the restriction with the intent that the burden of the restriction runs with and binds the burdened land and the benefit of the restriction is annexed to and runs with the benefited land.

Burdened land: Lots 4303-4314, 432, 4325 to 4333

Benefited land: Lots 4303-4314, 432, 4325 to 4333

Restriction: The burdened land cannot be used except in accordance with the provisions recorded in MCP AA4980.

Expiry date: 1 December 2026

Example 3. – short form restriction

The registered proprietors of the burdened land covenant with the registered proprietors of the benefited land as set out in the restriction with the intent that the burden of the restriction runs with and binds the burdened land and the benefit of the restriction is annexed to and runs with the benefited land.

Burdened land: Lots 4303-4314, 432, 4325 to 4333

Benefited land: Lots 4303-4314, 432, 4325 to 4333

Restriction: Not more than a single dwelling shall be built on each lot described under the burdened land.

Expiry date: 1 December 2026

Expiry Dates

The Registrar understands that individual restrictive covenants or restrictions within an overall creation of restrictive covenant or restriction may have differing expiry dates. The date that should be included under 'Expiry Date' should be the last possible expiry date. In the future the Registrar anticipates automatically removing expired restrictive covenants and restrictions once this date is past.

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Variation or removal of restrictive covenants and restrictions

There appears to be some confusion as to how restrictive covenants and restrictions referencing a MCP can be varied or removed. Use of a MCP will not change the way any recorded restrictive covenant or restriction is varied or removed. A MCP is simply a document containing provisions that can be incorporated by reference into instruments and plans subsequently lodged at Land Use Victoria. A MCP does not itself create a restrictive covenant or a restriction. A MCP cannot be varied or removed after it is recorded. Any variation or removal of a restrictive covenant or a restriction continues to be either:

- under the Subdivision Act - by a plan under that Act, including following a planning scheme or planning permit; or
- under section 88 of the TLA – by agreement of all of the registered proprietors of the land to be affected by the covenant and the relevant mortgagees or following a court order under section 84 of the *Property Law Act 1958*.

Questions

1: Recognising the new requirements may represent a change in practice for you, will you be able to adopt these requirements?

2: If not, please explain in detail:

- a) the scenarios you envisage where the requirements cannot be met; and
- b) any suggested adjustments to the requirements.

3. Do you believe that any transitional arrangements above those suggested are necessary? If yes, please detail.

Contact us

For location and contact details, refer to www.delwp.vic.gov.au/property>Contact us.



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