

# Protecting your protection: avoiding automatically lapsing caveats in Victoria

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## Summary

The caveat is a vital tool in protecting a trade creditor's position in relation to debtors/guarantors where an interest in land is obtained. Its value can however, be swiftly and irretrievably lost by a failure to act within the rigid timelines set out in the *Transfer of Land Act 1958* (Vic) (the Act) after a "lapsing" notice is issued by the Registrar of Titles. Action must be taken by the date stated in the lapsing notice, (which cannot be less than 30 days after the lapsing notice is posted) to substantiate the caveator's claim and stay registration of any competing dealings. If this doesn't occur and the caveat lapses or is postponed to a competing dealing, the caveator cannot simply seek to renew it.

## Background

A common source of comfort to any trade creditor is a properly registered caveat over a debtor/guarantor's land. The caveat, typically underpinned by an interest in land provided by a charging clause in a credit agreement or application, serves to prevent the registration of dealings on the title without notice to the caveator.

Under the Act, a caveat can however fall away through two essentially administrative processes (in addition to being challenged in Court and as a consequence of a mortgagee's sale). The position is similar in NSW, however in this TurkAlert, we focus on the Victorian statute.

## 1. Application by an interested party

Pursuant to section 89A of the Act any person interested in land affected by a caveat may apply to the Registrar for a notice to be issued to the caveator which will cause the

caveat to lapse on the date listed in the notice (**lapsing notice**) (no less than 30 days from the date of posting of the notice).

To avoid a caveat lapsing or being postponed to a competing dealing, a caveator must provide the Registrar with notice in writing that a Court proceeding to substantiate the caveator's interest in the land is on foot prior to the specified deadline.

## 2. Automatic lapsing after registration of a dealing

Section 90(1) of the Act provides that every caveat (barring some listed exceptions) shall lapse upon the expiration of the date listed in the lapsing notice given to a caveator by the Registrar, which provides notice that a transfer or dealing has been lodged for registration

To protect their interest, a caveator must appear before a Court before the expiration of the date listed in the lapsing notice. The caveator must give such undertaking or security or lodge such sum as the Court considers sufficient to indemnify every person against any damage that may be sustained by reason of any disposition of the property being delayed by a caveator's action to substantiate the basis for its caveat. The Court must order the Registrar to stay registration of the relevant dealing or transfer.

## Strict time-frames

It is important to note that the dates listed in the lapsing notice must be complied with by a caveator and will be strictly interpreted by the Court.

In the matter of *Tawafi v Weil*<sup>1</sup>, the caveator received a lapsing notice under section 90(1) requiring an application to be made and a stay ordered by 31 July 2017. The caveator did not commence a proceeding until 2 August 2017 and was held to be out of time, the result being the lapsing of the caveat.

Justice Vickery additionally held in the matter of *Traditional Values Management Ltd v Crane Distribution*<sup>2</sup> that an actual order for the stay of the Registrar's registration of the competing dealing must be made within the 30 day period, rather than just a proceeding being commenced in that period by a caveator.

The Court's strict interpretation of these deadlines displays the necessity for a caveator to act promptly in taking steps to substantiate their caveat after receipt of a lapsing notice.

The consequences of failing to act in time are severe as a caveat based upon the same interest in land cannot be renewed after it has lapsed.

### Service of a lapsing notice

Additionally, for the purposes of the Act, it is only necessary for the Registrar to actually send the lapsing notice, proof of which the Act indicates is simply the Registrar retaining a copy. The lapsing notice will take full force regardless of whether or not it was actually received by the caveator (*Dimos v Willets*<sup>3</sup>).

Pursuant to the Act, the Registrar remains entitled to proceed with an action even if the notice is returned or not delivered.

In NSW, lapsing notices must be served by the interested party rather than the Registrar.

### Implications

Given the dire consequences of failing to respond to a lapsing notice in time, it is essential caveators promptly commence a proceeding to substantiate their proprietary interest and obtain a copy of registration of the competing dealing immediately upon receipt of a lapsing notice.

As a lapsing notice will be deemed served whether or not it was actually sent or received by a caveator, we also recommend caveators carefully ensure that:

- the address for service listed on their caveat is one that will bring the lapsing notice to their attention; and
- they update the address for service of the caveat with the Land Registry, should there be any change.

We have recently come across a circumstance where it appears a lapsing notice was not received at the address for service in the caveat (another legal firm) and no action was therefore taken by the caveator. The caveat has been postponed to a subsequently obtained and notified second mortgage, which had been registered in priority; with the likely result that the second mortgagee will recover all surplus net proceeds (a material sum) after the first mortgagee is paid from settlement of an existing sale of the property, rather than the caveator.

As such, it can be seen how, what may appear to be an innocuous notice, more often ignored when received than acted upon, can have real and material consequences.

<sup>1</sup>[2017] VSC 643

<sup>2</sup>[2009] VSC 456

<sup>3</sup>2 VR 170

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