

# **Excision of area from a freeholding lease PUX/901/525**

**SLM/2013/412**

**Version 2.05**

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## Version History

Version	Date	Description/Comments
1	12/04/1998	Endorsed
1.1	01/07/2005	Conversion Project – New WORD/XML template
2	13/12/2007	Updated to reflect Land Act amendments. Endorsed by Scott Spencer, Director-General, Department of Natural Resources and Water
2.1	27/01/2011	Minor updates to reflect departmental name change to DERM
2.2	25/10/2012	Minor updates to reflect departmental name change to DNRM
2.3	19/03/2013	Updated to change government logo
2.04	19/03/2014	Updated to new DNRM template
2.05	22/06/2016	Minor amendment to review and insert text on new template

## Approval

Position	Name	Date
Acting Director, Operations Support - Land	Amanda Kearnan	22/06/2016



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## Purpose

To provide guidelines on a request to excise an area from a freeholding lease for the issue of a priority deed of grant (freehold).

The Policy equally applies to the excision of an area for the issue of a lease (although unlikely).

For clarity, the Policy does not apply to a road action (opening or realignment) instigated by the local government or Department of Transport and Main Roads.

## Rationale

A request may be received from a lessee of a freeholding lease to excise an area for a residence or service station site, as examples, from the freeholding lease for the issue of a priority deed.

A freeholding lease must be used for the purpose of the lease originally converted e.g. if the lease converted was a term lease for residential purposes, the freeholding lease must be used for that purpose; or a grazing homestead freeholding lease (converted from a grazing homestead perpetual lease) must be used for grazing or agriculture, or both.

A subdivision of a lease under the Land Act results in new leases with the same purpose.

Accordingly, if a request is received for an area to be excised from a freeholding lease for a different purpose to the lease, the action may not proceed by way of a subdivision.

If the proposed purpose of the area to be excised is the same as the lease, the subdivision provisions of the Land Act must be applied - if a small area, the provisions of section 176B i.e. whether the proposed subdivision is appropriate taking into account State, regional and local planning strategies and the objects of the Act are unlikely to be satisfied.

[Lease Subdivision Policy PUX/901/528](#) also must be considered - that Policy does not support subdivision of a freeholding lease.

Also, absolute surrender and excision of an area from a freeholding lease for the issue of a deed in priority is not supported as it is considered against the object of the Land Act and the public interest.

The State has sold the "freehold" of the land to the lessee who had elected, in lieu of a single payment, to pay the freehold purchase price on terms by way of an annual instalment i.e. once the lessee has paid the purchase price in full, the lessee is entitled to the issue of a deed of grant i.e. freehold (subject to the conditions of the lease being fulfilled, payment of any other fees e.g. a deed fee, and the registration of any required survey plan).

An excision from the lease is in effect a reconfiguration of a lot, and although the State has sold the

"freehold", a lease under the Land Act is not subject to the provisions of SPA for reconfiguration of a lot.

As such a proposed excision is not subject to SPA, exemptions may apply that may not have applied if the lessee had elected to pay to "freehold" in a single payment and a deed of grant issued.

Any excision, by subdivision or otherwise under the Land Act, of an area from a freeholding lease for a separate lot is therefore not supported, and the lease will need to be paid to freehold and the proposed action proceed as a reconfiguration of a lot application under SPA.

The two exceptions in the public interest are if the excision is only for a small area required for

1. a public purpose by a constructing authority, or a public utility service by a public utility provider, and it is demonstrated that there is no suitable alternative site, or
2. family hardship i.e. if an elderly lessee needs the support of a family member, and a separate lot is a requirement of local government for a further residence to be built.

The excision may be dealt with by way of an absolute surrender and the issue of a priority deed provided all necessary requirements, including of government agencies are satisfied.

As the State has already sold the "freehold" to the lessee, the purchase price for the priority deed is to be Nil with the purchase price of the freeholding lease not to be adjusted - however, as the action is required to proceed by way of an absolute surrender from the lease and issue of a deed over unallocated State land, any requirements of the Office of State Revenue need to be satisfied.

Note: the lessee may own the quarry material on the freeholding lease, and an absolute surrender to the State to enable a priority deed to issue would "vest" the quarry material to the State. As only a small area is being excluded, the lessee is not materially affected.

## Policy

A request for excision of an area from a freeholding lease is unable to or may not proceed by way of a subdivision of a lease under the Land Act.

Further, an absolute surrender and issue of a priority deed for a separate lot is also not supported, as an excision from a freeholding lease may provide exemptions that may not have normally applied if the lessee elected to pay the "freehold" in a single payment.

The proposed excision action therefore should not proceed under the Land Act, and the lease will need to be paid to freehold with any required excision proceeding as a reconfiguration of a lot application under SPA.

### **Exceptions**

The two exceptions are if the excision is for a small area only and that area is required for **a public purpose by a constructing authority, or a public utility service by a public utility provider e.g. a telecommunications site required by a telecommunications carrier (Telstra, Optus etc) or a compressor station auxiliary to a gas pipeline under a public utility easement.**

The constructing authority or public utility provider though is required to demonstrate that there is no suitable alternative site.

Further, there is to be no objection from any other relevant government agency, and any requirements of agencies are to be satisfied, particularly in relation to any vegetation clearing and (if the area is not for the local government) local government requirements.

The area also must have dedicated access or access by way of a registered easement.



The area may then be excised by way of an absolute surrender and issue of a priority deed to the lessee, provided evidence is received by the department that any requirements of the Office of State Revenue have been satisfied regarding the issue of the priority deed to the lessee, and on condition that a covenant be entered into under section 373A of the Land Act to "tie" the freeholding lease and deed i.e. for no separate transfers, with a later release of the covenant only on the lodgement for registration of a transfer of the deed for the small area to the constructing authority/public utility provider.

**Family hardship i.e. if an elderly lessee needs the support of a family member, and a separate lot is a requirement of local government for a further residence to be built.**

The area may be excised by way of an absolute surrender for the issue of a priority deed to the lessee, provided

1. no objections are received from any relevant government agency, and any requirements of agencies are satisfied, particularly in relation to any vegetation clearing and local government requirements and
2. evidence is received by the department that any requirements of the Office of State Revenue have been satisfied regarding the issue of the priority deed to the lessee and
3. the freeholding lease and deed are "tied" by a covenant i.e. no separate transfers \*.

Although the lots are to be "tied", dedicated access to the excised small lot is also required, unless the Department is satisfied that suitable arrangements for access to that lot will always be available.

In both of the above instances, the purchase price of the priority deed to the lessee is to be Nil and the purchase price of the freeholding lease is not to be adjusted.

\*Note: In addition to the consideration that the Department has permitted an excision it would not normally consider, irrespective of any provisions of planning legislation, the Department, in the State interest, does not support "stand alone" smaller lots in a locality where the cadastre would not generally provide for such lots. Accordingly, when the freeholding lease is later paid to freehold, the "tie" is still required and the covenant is not to be released on or after the issue of the deed (for when the lease is paid to freehold).

## **Responsibilities**

State Land Asset Management staff, particularly officers with the appropriate delegations under the *Land Act 1994*.



## Definitions

- Department - Department of Natural Resources and Mines
- Land Act - *Land Act 1994*
- constructing authority has the meaning given by the *Acquisition of Land Act 1967*
- Public purposes means a purpose for which land may be taken under the *Acquisition of Land Act 1967* or a community purpose.
- Public utility provider means-
  - (a) the State or another entity representing the State; or
  - (b) the Commonwealth or another entity representing the Commonwealth; or
  - (c) a local government; or
  - (d) a person authorised by law to provide a public utility service; or
  - (e) a person approved by the Minister as suitable to provide a particular public utility service.

## Legislation

*Land Act 1994* -

Sections 4, 122, 123, 172(4), 199A, 327A and 373A.

Schedule 6 - constructing authority, public purposes and public utility provider are defined

*Sustainable Planning Act 1997*