

Part 3 – Release of Mortgage

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Part 3 – Release of Mortgage

General Law

[3-0000]

A mortgage that is registered under the *Land Title Act 1994*, *Land Act 1994* or *Water Act 2000* over a lot or an interest operates as a charge on the lot or interest for the debt or liability secured by the mortgage (s. 74 of the *Land Title Act* or s. 341 of the *Land Act*).

Once the debt or liability secured by the mortgage has been satisfied, the mortgagor is entitled to receive a release of the mortgage from the mortgagee.

A release (Form 3 – Release of Mortgage), executed by the mortgagee, may be registered. On registration of the release, the mortgaged lot or interest ceases to be subject to the charge, to the extent shown in the release (s. 81 of the *Land Title Act* or s. 342 of the *Land Act*).

^{2,3}A notice under s. 73(1)(c) of the *Water Act*, which is taken to be a mortgage under the *Land Title Act*, may also be released by a Form 3 – Release of Mortgage.

Full or partial release

[3-0010]

If the mortgagee releases all the property securing the liability under the mortgage from the mortgage, a full release is given. A partial release is given where the release is only in respect of some of the property securing the liability under the mortgage. In such a case, the release will be a total release of that which is specified in Item 2 of the Form 3, but only a partial release of the mortgage as a whole.

The Registrar does not search the register to ensure that a purported full release in fact releases all of the lots or interests secured by the mortgage. The assumption is made that the mortgagee has included all of the lots or interests that are or remain secured by the mortgage. If it is later discovered that further lots or interests remain subject to the mortgage, another release by the mortgagee in respect of those lots or interests remaining must be lodged.

¶[3-0020] deleted

Release where there is more than one mortgagee

[3-0030]

A mortgage of a lot or interest may be given to more than one mortgagee and those mortgagees may hold their respective interests either as joint tenants or as tenants in common.

A mortgage cannot be released by only one of a number of mortgagees as relates to that mortgagee's interest only (s. 81(2) of the *Land Title Act 1994* or s. 342(2) of the *Land Act 1994*).

The survivor/s of joint mortgagees may give a release of the mortgage. In this case a Form 4 – Request to Record Death of the deceased mortgagee/s must be lodged prior to the release.

In the case of the death of the sole or last surviving mortgagee, a Form 5, 5A or 6 – Transmission by Death must precede the release by the personal representative/devisee/legatee (for trustees, see part 51 – Trusts).

If the mortgagees are registered as tenants in common, even if the mortgage itself states that the money is advanced on joint account, it is necessary to transmit the interest in the mortgage to the personal representative of any deceased mortgagee and for the release to be executed by the surviving mortgagees and the personal representative, notwithstanding s. 93(1) of the *Property Law Act 1974*.

Release where there is more than one mortgagor

[3-0040]

A mortgage given by mortgagors who hold as tenants in common can be released as relates only to the interest of one of such mortgagors.

A mortgage given by mortgagors who hold as joint tenants may not be released as relates to the interest of only one of such mortgagors. However, if the joint tenancy is first severed by transfer (see part 1, esp ¶[1-2300]), the mortgage may then be released against the severing mortgagor's interest.

Persons entitled to a release

[3-0050]

A mortgagor has a right to the release of a mortgage upon the satisfaction of the liability secured by the mortgage, and any assignee of the mortgagor's interest in the lot or other interest is also entitled on the same basis to a release of the mortgage.

Where a mortgagor is deceased, this entitlement vests in the person in whom the deceased mortgagor's property is vested under s. 45 of the *Succession Act 1981*, subject to s. 45(7) of the *Succession Act*.

Absent or incapable mortgagee

Section 61 of the *Public Trustee Act 1978*

[3-0060]

Where a mortgage has been paid out, but a discharge cannot be obtained because the mortgagee is:

- absent from Queensland; or
- dead and their estate is unadministered or, in the opinion of the Public Trustee, no person is currently acting in the administration of their estate; or
- a person not known to be alive or dead or a person unable to be found; or
- a company or corporation which has ceased to exist or, in the opinion of the Public Trustee, has ceased to function; or
- in the opinion of the Public Trustee, for any other reason unable or unavailable to give a discharge of the mortgage,

the Public Trustee is empowered to execute a release of the mortgage by virtue of s. 61 of the *Public Trustee Act*. The Public Trustee must be satisfied that there is no other person to do so. The Registrar will look for no other authority to register the release.

Section 101 of the *Property Law Act 1974*

[3-0070]

Where a mortgagee is:

- out of the jurisdiction; or
- cannot be found or is unknown; or
- where it is uncertain who is entitled to receive payment of the money secured by the mortgage,

the person entitled to redeem the mortgage may apply to the Supreme Court under s. 101 of the *Property Law Act* for an order that the amount of the debt be ascertained and paid into the

Court. A certificate of the Registrar of the Court that such payment has been made and that no money remains payable under the mortgage, operates to discharge the mortgage debt (ss. 101(2) and (4) of the Property Law Act). Form 3, with Item 5 suitably modified, is appropriate and no other documentation is required.

Section 601AF of the *Corporations Act 2001* (Cth)

[3-0080]

If the mortgagee is a corporation that has ceased to function or has been de-registered, the Australian Securities and Investment Commission may execute a release of mortgage if satisfied that all money owing has been repaid (s. 601AF of the Corporations Act).

Legislation

[3-1000]

2, ³Application of the *Land Title Act 1994* to the *Water Act 2000*

Under the provisions of the Water Act, the Land Title Act applies to the registration of an interest or dealings for a water allocation on the water allocations register subject to some exceptions.

A relevant interest or dealing may be registered in a way mentioned in the Land Title Act and the Registrar of Water Allocations may exercise a power or perform an obligation of the Registrar of Titles under the Land Title Act:

- (a) as if a reference to the Registrar of Titles were a reference to the Registrar of Water Allocations and
- (b) as if a reference to the freehold land register were a reference to the water allocations register; and
- (c) as if a reference to freehold land or land were a reference to a water allocation; and
- (d) as if a reference to a lot were a reference to a water allocation; and
- (e) with any other necessary changes.

1, ³Reference to the Chief Executive in the *Land Act 1994*

The functions of the Chief Executive under the Land Act relating to the keeping of registers are carried out by the Registrar of Titles under delegation given under s. 393 of that Act.

Practice

Change of name of mortgagee

[3-2000]

If the name of a mortgagee has been changed and the mortgage is being fully released, Item 4 of the Form 3 – Release of Mortgage should include the current name and the former name e.g. ‘XYZ CORPORATION LIMITED ACN 001 311 711 FORMERLY EXIT CORPORATION LIMITED ACN 001 311 711’.

In addition, either:

- evidence of the change of name must be deposited with the Form 3 – Release of Mortgage (e.g. a certified copy of the certificate of registration); or

- reference must be made to the dealing number of a previously registered instrument with which the evidence was deposited (the reference may be provided in item 4 e.g. ‘Certified copy of the certificate of registration [or other evidence] deposited with dealing number [number]’ or in a supplementary letter).

Example – Corporation

4. Mortgagee

XYZ CORPORATION LIMITED ACN 001 311 711 FORMERLY EXIT CORPORATION LIMITED ACN 001 311 711. CERTIFIED COPY OF THE CERTIFICATE OF REGISTRATION DEPOSITED WITH DEALING NUMBER 712345678.

For further information about depositing supporting documentation see [60-1030].

²Releasing collateral mortgages

[3-2010]

Registration of a collateral mortgage is required when additional, unsecured land is added to a mortgaged lot by re-survey (see part 2, esp ¶[2-2080]) or where two or more water allocations have been amalgamated. The collateral mortgage is necessary so that the whole of the new lot is secured by the mortgage.

Collateral mortgages must not be released before the principal mortgage unless the mortgagee has other registered security over the whole of the lot. If a collateral mortgage were to be released prior to the principal mortgage, the mortgagee would no longer be in a position to exercise its rights over the whole of the lot in the event of default.

Forms

General guide to completion of forms

[3-4000]

For general requirements for completion of forms see part 59 – Forms.

A document that is lodged as an electronic conveyancing document must be accompanied by a set of lodgement instructions identifying the nominated Responsible Subscriber and the order in which the documents are to be lodged. The lodgement instructions must be digitally signed by all subscribers to the transaction.

Dealing Number



OFFICE USE ONLY

X If partial release of the mortgage.

Privacy Statement

Collection of information from this form is authorised by legislation and is used to maintain publicly searchable records. For more information see the Department's website.

1. Dealing number of mortgage being released

700012438

Lodger (Name, address, E-mail & phone number)

LEGAL LODGEMENT SERVICES
125 GEORGE STREET
BRISBANE QLD 4001
mail@lls.com.au
(07) 3327 8004

Lodger Code

BE 325

2. Lot on Plan Description

LOT 23 ON RP67324

Title Reference

15973044

3. Mortgagor

Only complete if not releasing the debt for all mortgagors

4. Mortgagee

SUNPAC BANKING CORPORATION ACN 123 456 789

5. Discharge/Execution by Mortgagee

The Mortgagee releases the mortgage as a charge on the land described in item 2.

Witnessing officer must be aware of his/her obligations under section 162 of the Land Title Act 1994

W J Burleigh

WILLIAM JOHN BURLEIGH
JUSTICE OF THE PEACE (C.DEC) #34567

.....
Witnessing Officer (signature, full name & qualification)

15/10/2007

.....
Execution Date

J Bundall

Sunpac Banking Corporation by its
duly constituted attorney James Bundall
under power of attorney 711132724

.....
Mortgagee's Signature

.....
Witnessing Officer (signature, full name & qualification)

/ /
Execution Date

.....
Mortgagee's Signature

(Witnessing officer must be in accordance with Schedule 1 of the Land Title Act 1994 eg Legal Practitioner, JP, C Dec)

Guide to Completion of Form 3

Item 1

[3-4010]

Insert dealing number/s of mortgage/s being released.

Item 2

[3-4020]

^{1, 2}Freehold Description

The description of the relevant lot/s should always read ‘Lot [no.] on [plan reference]’. Plan references must contain the appropriate prefix (e.g. ‘SP’ for a survey plan, ‘RP’ for a registered plan, ‘BUP’ for a building units plan, ‘GTP’ for a group titles plan or the relevant letters for crown plans). The area of the lot/s is not shown.

e.g.	Lot on Plan Description	Title reference
	Lot 27 on RP 204939	11223078

^{2, 3}Water Allocation Description

A water allocation should be identified as ‘Water Allocation’, ‘Allocation’ or ‘WA’. All plans referring to water allocations are administrative plans. Administrative plan is abbreviated to AP as the prefix of the plan identifier.

e.g.	Lot on Plan Description	Title reference
	WA 27 on AP 7900	46012345

^{1, 3}State Tenure Description

The description of the relevant State tenure should always read ‘Lot [no.] on [plan reference]’. Plan references must contain the appropriate prefix (e.g. ‘CP’ for a crown plan).

e.g.	Lot on Plan Description	Title reference
	Lot 27 on CP LIV1234	40567123

Item 3

[3-4030]

Only complete if not releasing the debt for all the mortgagors, e.g. if there are three mortgagors who hold their interests as tenants in common and only two are being released, insert in Item 3, e.g. ‘Interest of John Able Citizen and Mary Constance Citizen only’.

Item 4

[3-4040]

Insert full name of mortgagee. If a mortgage has been registered and then transferred to a new mortgagee, the name appearing in Item 4 should be the name of the transferee and not that of the original mortgagee.

Item 5

[3-4050]

Execution by mortgagee. The witnessing officer must be qualified pursuant to Schedule 1 of the *Land Title Act 1994* or s. 73 of the *Land Regulation 2020*. Form 3 requires the completion of a separate witnessing provision for each signature which is required to be witnessed, even though signatures were made in front of the same witness. Execution by an attorney will require a qualified witness. (For further information, see Part 61 – Witnessing and Execution of Instruments or Documents).

Item 5 (Electronic Form) – The requirements for the execution and certification are contained in the Participation Rules (Queensland) for electronic conveyancing.

¶[3-4060] and ¶[3-6000] deleted

Case Law

***Corozo Pty Ltd v Westpac Banking Corporation (No 2)* [1988] 2 Qd R 481 [3-7000]**

In this case it was held that an unregistered transferee of land subject to a registered mortgage has a right upon payment of the debt to insist upon a release from the mortgagee.

***Re Australia and New Zealand Banking Group Ltd* [1993] 2 Qd R 477 [3-7010]**

This case discussed the previous case and held that an unregistered lessee did not have the right to pay the debt and obtain a release from the mortgagee, because the equitable interest of the lessee was not enforceable against the registered interest of the mortgagee.

***Wayne v Kuszniarz & Anor* [1973] 2 NSWLR 799 [3-7020]**

In this case it was held that an equivalent application to one under s. 101 of the *Property Law Act 1974* could not be made *ex parte*, ie the mortgagee had to be named as a party in such an application.

***Re Piromalli* [1977] 1 NSWLR 39 [3-7030]**

However, in this case it was held that the above regarding the ‘mortgagee as a party’ rule was not of universal application and if no person could reasonably be named as mortgagee, an *ex parte* application could be made.

***Associated Securities Limited v Perry* [1978] Qd R 13 [3-7040]**

This case held that, although a release has the effect of releasing the property from the charge imposed by the mortgage, it does not release the mortgagor from the personal covenants contained in the mortgage. Therefore, if the mortgagor requires a release of the personal covenants, a separate, additional release may need to be prepared and executed by the mortgagee. In this case, the discharge was executed and registered in the mistaken belief that all the money owing had been paid and it was held that the mortgagor was not released from the liability to pay the balance of the mortgage money.

Section 81(3) of the *Land Title Act 1994* is unlikely to change the result in a case such as this, because the section refers to the mortgage being discharged and is silent as to whether the liability for the debt is discharged.

***Groongal Pastoral Company (In Liq) v Falkiner* (1924) 35 CLR 157 [3-7050]**

The High Court held that the wording of the discharge in this case **did** simultaneously discharge any personal obligations of the mortgagor. The reasoning of the Court was based on the fact that under the *Real Property Act 1900* (NSW) the instrument of discharge had effect as a deed.

This case, however, was distinguished in *Associated Securities v Perry* (see ¶[3-7040]), even though the form of discharge was in identical terms, on the basis that under the *Real Property Act 1861* (Qld), the form of discharge did not constitute a deed.

Fees

[3-8000]

Fees payable to the registries are subject to an annual review. Refer to the Titles Fee Calculator available online or see the current:

- ^{1, 2}Land Title Regulation;
- ^{1, 3}Land Regulation; and
- ^{2, 3}Water Regulation.

Cross References and Further Reading

[3-9000]

Part 1 – Transfer

Part 2 – Mortgage (National Mortgage Form)

Queensland Conveyancing Law and Practice, CCH Australia Limited (loose-leaf service)

Duncan and Vann, *Property Law and Practice in Queensland*, Thomson Legal and Regulatory (loose-leaf service)

Duncan, WD and Willmott, L, *Mortgages Law in Australia*, 2nd edn, The Federation Press, 1996

Notes in text

[3-9050]

Note¹ – This numbered section, paragraph or statement does not apply to water allocations.

Note² – This numbered section, paragraph or statement does not apply to State land.

Note³ – This numbered section, paragraph or statement does not apply to freehold land.