Department of **Environment and Resource Management**

Covenants providing for no separate transfers Notification No.PUX/952/066 Version 4

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Queensland Government

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Version history

Version	Date	Comment
3	27/08/2004	Endorsed
3.1	30/06/2005	Conversion Project - New WORD/XML template
4	21/11/2008	Reviewed and updated
4.1	10/02/2009	Amended status of Notification from "NRW only" to "Public access"
4.2	10/02/2011	Updated to DERM

Procedure

BACKGROUND

Leases in Strata (Volumetric)

As some leases in strata such as walkways, balconies and underground car parks are physically attached to and used in conjunction with adjoining freehold or leasehold land, it is necessary for the lease and the adjoining land to be held in the same ownership.

See Policies: Land Allocation: Granting Land Volumetrically PUX/901/100 <http://www.derm.qld.gov.au/services_resources/item_details.php?item_id=100439&topic_id=19> ; and

Roads: Permanent and Temporary Closure PUX/901/237 <http://www.derm.qld.gov.au/services_resources/item_details.php?item_id=100446&topic_id=19> .

Note: in some very limited circumstances e.g. an underground car park, a volumetric freehold title may have issued and that freehold also needs to be held in the same ownership of the adjoining land.

Farm Build Up Leases

In farm build up projects such as the (now finalised) South West Strategy or for subdivision or amalgamation of rural lease actions, or for granting additional areas, there is a necessity to tie a lease or leases with other freehold and/or leasehold land in the same ownership.

See Policies: Lease Subdivision PUX/901/528 <http://www.derm.qld.gov.au/services_resources/item_details.php?item_id=100452&topic_id=19> ; and.

- Additional Area Covenants and Conditions PUX/901/529 <http://www.derm.qld.gov.au/services_resources/item_details.php?item_id=100453&topic_id=19>

Other Leases or freehold

There is at times the necessity to tie a lease or freehold with other freehold and/or leasehold land in the same ownership, eg leases below high water (a marina lease) to adjoining land above high water; freehold land to leasehold land (to ensure continued access provisions to the land without dedicated access); when a lease may have been issued in priority for an Occupation Licence that is part of an aggregation; or, in very limited circumstances relating to freeholding leases, for family hardship reasons.

There is no statutory requirement for the above leases to be transferred simultaneously with the tied freehold and/or leasehold land. This may be facilitated by the inclusion of a special condition in a lease specifying that there are no separate transfers allowed and failure to do so would be a breach of the condition and render the lease liable to forfeiture in terms of the *Land Act 1994* . However, such condition of lease may be easily overlooked, and a separate transfer may proceed.

Further, until 30 April 1998 the practice was, at the time of issuing an applicable lease* (refer to definitions), to enter an Administrative Advice (AA) against the title for the land to which the lease was conditionally attached. The AA did not stop the transfer of the tied land but merely informed a potential purchaser that a lease was conditionally attached to that land.

See Policies:

- Criteria and Method for Disposal of Unallocated State Land

<http://www.derm.qld.gov.au/services_resources/item_details.php?item_id=100465&topic_id=19> PUX/901/315;

- Allocation of land in priority in terms of the Land Act 1994 <http://www.derm.qld.gov.au/services_resources/item_details.php?item_id=100463&topic_id=19> PUX/901/316
- Conversion of Leasehold Tenure <http://www.derm.qld.gov.au/services_resources/item_details.php?item_id=100477&topic_id=19> PUX/901/334; and
- Excision of area from a Freeholding Lease <http://www.derm.qld.gov.au/services_resources/item_details.php?item_id=100455&topic_id=19> PUX/901/525.

Road Licences

The Minister may issue a road licence over a temporarily closed road.

If the person holding the licence transfers or sells the land for the benefit of which the road licence is issued (i.e. the adjoining land; or for underground pipes and water channels for irrigation purposes that cross the road, the "attaching" land) the person must -

1. Also transfer the road licence to the new registered owner or lessee of the land; or
2. Surrender the road licence at the time the sale is settled.

Until 30 April 1998 the practice was, at the time of issuing the road licence, to enter an AA against the title for the land to which the road licence attached. The AA did not stop the transfer of the land but merely informed a potential purchaser that a road licence attached to that land. As a result, many freehold/leasehold lots were transferred without a corresponding transfer of the attaching road licences. This has lead to additional administrative actions having to be done by departmental operatives. Depending on circumstances and desired outcomes these additional actions are:

- follow up the transfer (if it is possible to locate licensee); or
- arrange for the surrender of the licence (if it is possible to locate licensee); or
- cancel the licence; and
- issue a new road licence (if still required).

General

Section 97A(3)(c) of the *Land Title Act 1994* and 373(A)(3) of the *Land Act 1994* allow a tie, in the same ownership, of freehold and non-freehold (other than a road for which a person does not hold a road licence) land by means of a covenant. Power also exists in Section 97D of the *Land Title Act 1994* and Section 373D of the *Land Act 1994* to release a covenant.

The registration of an instrument of covenant in terms of sections 97A(3)(c) and 373(A)(3) will legislatively ensure that an applicable lease* or road licence will remain in the same ownership as the land to which they are attached.

Transfers

Section 322 of the *Land Act 1994* sets out the requirements for the transfer of a lease, licence or sublease. The Minister may approve a transfer of a lease, licence or sublease to an eligible person and such approval may be given on conditions the Minister states. This section therefore empowers the Minister to include as a condition of transfer of an applicable lease* or road licence that an instrument of covenant be signed by the delegate of the Minister and the lessee/licensee, tying the applicable lease* or road licence with the land to which the lease or licence is attached. The insertion of such a condition in any Ministerial approvals for the

transfer of an applicable lease* or licence will ensure that, over time, a substantial number of existing leases or licences will be covered by covenants.

Refer to Policy: Transfer of Leases, Licences and Subleases <http://www.derm.qld.gov.au/services_resources/item_details.php?item_id=100454&topic_id=19> PUX/901/521.

REQUIREMENTS

Offers

All offers for the issue of applicable leases* or licences will be conditional on an instrument of covenant being executed and subsequently registered in the Land Registry tying the lease or licence with the land to which the lease or licence is attached.

COVENANTS

Land Registry Form 31 - COVENANT - will be used for this purpose.

Attachment A (Land Registry Form 31 - COVENANT) is an example when a lease/licence is required to be tied to one or more freehold lots.

Attachment B (Land Registry Form 31 - COVENANT) is an example when a lease/licence is required to be tied to one or more leasehold lots.

Note

The Form 31 is prepared by the regional operative and forwarded with the letter of offer for execution by the covenantor and subsequent return to the region with the title (if issued) for the relevant freehold and the other requirements of the offer. Upon return, the form 31 is executed by the delegate of the Minister and lodged by the regional operative for registration in the Land Registry, together with any other necessary documents.

The Form 31 must also be accompanied by the Minister's (authorised delegate's) approval to the lodgement of the covenant. This is by way of Form 18 (General Consent) **Attachment D** .

i.e. both the covenantor (the owner of freehold or lessee/licensee of State owned land) and the covenantee (the State) must execute the covenant instrument (Form 31). If any parcel of land subject to the covenant is leased (or is a licence) from the State, the Minister that administers the *Land Act 1994* must approve the covenant affecting that land (Form 18) - section 373B(1)(d) of the *Land Act 1994* refers.

Also, the actual lot/plan descriptor or title reference of the applicable lease* or road licence may not be known by the regional operative when form 31 is forwarded with the offer letter. In this instance, the operative should insert in pencil in item 2 of the form "lease or road licence to issue as per offer". The actual information can be substituted when known.

Release of Covenant

When any lease or road licence mentioned in the covenant is absolutely surrendered, forfeited (lease) or cancelled (licence) it will be necessary for the covenant to be released. This can be achieved by the Covenantee (the State) executing a Release of Covenant (Land Registry form 33) and lodging it in the Land Registry for registration.

The form will be completed by the department's regional operative, executed by the delegate of the Minister

and lodged by the regional operative in the Land Registry. **If the "attached" land is freehold, and a freehold title has issued, the title is not required to be lodged with the Release.** The Form 33 does not need to be accompanied by the Minister's approval (i.e. a Form 18 General Consent is not required).

Application to Release a Covenant

The delegate must have regard to the relevant Policies, including the Policies referred to above, for any application to release a covenant.

Attachment C (Land Registry Form 33 - RELEASE OF COVENANT) is an example to be used when it is necessary to release a covenant.

Note

No fees (Stamp Duty or Land Registry) are payable on Form 31 - Covenant or Form 33 - Release of Covenant when the Covenantee is the State of Queensland.

Transfers

Ministerial approvals for the transfer of an applicable lease* or road licence will be subject to a condition that the transferee must execute a Land Registry Form 31 - COVENANT tying in the same ownership, the applicable lease* or road licence with the relevant freehold and/or leasehold land and subsequently lodge the form for registration in the Land Registry with other documents required for the transfer of applicable lease* or road licence and the relevant freehold and/or leasehold land.

Note

The regional operative completes the Form 31 (apart from the lodgers name and address), has it executed by the delegate of the Minister and witnessed and forwards it (accompanied by the Minister's Consent to the lodgement of the covenant - Form 18 General Consent) with the Minister's approval to transfer, to the person who made the request for consent.

For witnessing of any Land Registry forms, please refer to WITNESSING OF LAND REGISTRY AND OTHER FORMS NOTIFICATION PUX/952/093.
<http://www.derm.qld.gov.au/services_resources/item_details.php?item_id=100543&topic_id=19>

END OF NOTIFICATION

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State Land Asset Management

Responsibilities

Implementation by all operational staff dealing with the function of issuing leases and road licences in terms of the *Land Act 1994* and giving Minister's approval to transfer such tenures.

Definitions

*Applicable Lease - means those leases which are not "stand alone" eg overhead or under ground walkways which are connected to structures on adjoining lots, balconies, underground car parks used in conjunction with an adjoining lot or lots, farm build up, marina development etc.

References

Land Title Act 1994

Land Act 1994

Legislation

Land Title Act 1994

Land Act 1994

Attachments

Attachment A <attachments/066_attachment_a.pdf>

Attachment B <attachments/066_attachment_b.pdf>

Attachment C <attachments/066_attachment_c.pdf>

Attachment D <attachments/066_attachment_d.pdf>