

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 or *Water Act* 2000 over a lot or an interest in a lot operates as a charge on the lot or the interest for the debt or liability secured by the mortgage (s 74 of the *Land Title Act* 1994).

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.

An instrument of release (Form 3 – Release of Mortgage), executed by the mortgagee, may be registered. On registration of the instrument of release, the mortgaged lot or interest ceases to be subject to the charge, to the extent shown in the instrument (s 81 of the *Land Title Act* 1994).

A notice under s 101(1)(c) of the *Water Act* 2000, which is taken to be a mortgage under the *Land Title Act* 1994, 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 this case, the release will be a total release of the lot or those lots released and 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.

Mortgage Duty

[3-0020]

There is no need for a release of mortgage to be endorsed with a duty notation.

Release where there is More than One Mortgagee

[3-0030]

A mortgage of a lot or interest in a lot 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).

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 (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]

The 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 is also entitled on the same basis to a release of the mortgage.

As the interest in a lot vests in a deceased mortgagor's personal representative on the granting of probate or letters of administration (s 45 of the *Succession Act 1981*), the personal representative assumes this entitlement.

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* 1978. 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.

²The Registrar may dispense with production of the Certificate of Title or other instrument, where applicable, to enable registration to be effected (s 61(6) of the *Public Trustee Act* 1978).

When executing instruments, a delegate of the Public Trustee need only indicate on the instrument that he/she is a 'delegate'. There is no need for the delegate to provide his/her full name, official designation or any information other than the word 'delegate' adjacent to his/her signature. 'Delegate' can be written, printed, typed, stamped, etc in any way, provided it is present, legible and permanent.

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* 1974 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* 1974). Form 3, with Item 5 suitably modified, is appropriate and no other documentation is required.

²The Certificate of Title, if issued, must be deposited. The Registrar may dispense with production of the Certificate of Title and advertising (s 101(5) of the *Property Law Act* 1974) (see part 17 – Request for Substitute Instrument or to Dispense with Production of Instrument).

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* 2001 (Cth)).

Legislation

[3-1000]

Application of the *Land Title Act* 1994 to the *Water Act* 2000

Under the provisions of ss 150(1) and 151 of the *Water Act* 2000, subject to the exceptions provided in ss 150(2), 151(1) and (5) of the *Water Act* 2000, the *Land Title Act* 1994 applies to the registration of an interest or dealings for a water allocation on the water allocations register.

Under s 151(3) of the *Water Act* 2000 an interest or dealing mentioned in s 150 may be registered in a way mentioned in the *Land Title Act* 1994 and the Registrar of Water Allocations may exercise a power or perform an obligation of the Registrar of Titles under the *Land Title Act* 1994:

- (a) as if a reference to the Registrar of Titles were a reference to the Registrar appointed under Chapter 2 Part 4 Division 6 of the *Water Act 2000*; 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) as if a reference to an indefeasible title were a reference to a title; and
- (f) with any other necessary changes.

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, eg ‘Jane Smith formerly Jane Brown’ (see part 2, esp ¶[2-2000].ff). Evidence of the change must also be deposited (eg a certified copy of the marriage certificate or deed poll or a certified copy of the certificate of registration, if a corporation).

It is not necessary to lodge a Form 14 – Request to Change Name (see part 14, esp ¶[14-2000] to ¶[14-2030]) unless the mortgagee is to remain on the title (eg under a partial release). The Request to Change Name must be accompanied by a declaration and evidence that the new name is the mortgagee’s legal name (eg copy of the marriage certificate, certified by the Registrar-General, where the mortgagee adopts her husband’s surname).

Releasing 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 amalgamation of a water allocation. The collateral mortgage is necessary so that the whole of the new lot is secured by the mortgage.

These 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, esp ¶[59-2000].



Dealing Number

OFFICE USE ONLY

Privacy Statement

Collection of this information is authorised by the Land Title Act 1994 the Land Act 1994 and the Water Act 2000 and is used to maintain the publicly searchable registers in the land registry and the water register. For more information about privacy see the department's website.

X If partial release of the mortgage.
Duty imprint is required if this is a full release.

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
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2. Lot on Plan Description	County	Parish	Title Reference
LOT 23 ON RP67324	STANLEY	OXLEY	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)

J Bundall
Sunpac Banking Corporation by its
duly constituted attorney James Bundall
under power of attorney 711132724
.....
Mortgagee's Signature

15/10/2007
Execution Date

.....
Witnessing Officer (signature, full name & qualification)
(Witnessing officer must be in accordance with Schedule 1
of the Land Title Act 1994 eg Legal Practitioner, JP, C Dec)

/ /
Execution Date

.....
Mortgagee's Signature

Guide to Completion of Form 3

Item 1

[3-4010]

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

Item 2

[3-4020]

²Freehold Description

The description of the relevant lot/s should always read ‘Lot [no.] on [plan reference]’. Plan references must contain the appropriate prefix (eg ‘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.

The entire panel of Item 2 must be completed. All information needed to complete Item 2 will appear on a search of the title.

eg	Lot on Plan Description	County	Parish	Title reference
	Lot 27 on RP 204939	Stanley	South Brisbane	11223078

Water Allocation Description

A water allocation should be identified as ‘Water Allocation’, ‘Allocation’ or ‘WA’. A water allocation has no reference to County or Parish, hence these fields are not completed. All plans referring to water allocations are Administrative Plans. Administrative Plan is abbreviated to AP as the prefix of the plan identifier.

All information needed to complete Item 2 will appear on a search of the water allocation title.

eg	Lot on Plan Description	County	Parish	Title reference
	WA 27 on AP 7900			46012345

Item 3

[3-4030]

Only complete if not releasing the debt for all the mortgagors, eg if there are three mortgagors who hold their interests as tenants in common and only two are being released, insert in Item 3, eg: ‘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*. 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 60, esp ¶[60-0360], ¶[60-0390] and ¶[60-0900]).

¶[3-4060] deleted

¶[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 purchaser 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 Kuszniierz & 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 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. See the current:

- ²*Land Title Regulation 2005* – Schedule 2, item numbers 2(h) and 2(m); and
- *Water Regulation 2002* – Schedule 16, item numbers 11 and 15.

Cross References and Further Reading

[3-9000]

Part 1 – Transfer

Part 2 – Mortgage

Part 4 – Request to Record Death

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

Duncan and Vann, *Property Law and Practice*, Law Book Company Limited (loose-leaf service)

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

Notes in text

[3-9050]

Note ¹ – This numbered section is not applicable to water allocations or the Water Allocations Register.

Note ² – This paragraph or statement is not applicable to water allocations or the Water Allocations Register.