

Part 8 – Surrender of Lease of Freehold or Water Allocation

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Part 8 – Surrender of Lease of Freehold or Water Allocation

General Law

Preliminary

[8-0000]

A registered lease may be –

- wholly; or
- ²partly;

surrendered by operation of law or by registering an instrument of surrender of the lease executed by the lessor and the lessee (s 69(1) of the *Land Title Act* 1994).

²Whilst destruction of the leased building may suspend the lessee’s obligations under the lease until reinstatement (s 105 of the *Property Law Act* 1974), this will not, however, operate as a surrender of the lease.

¶[8-0010] deleted

Surrender by Operation of Law

[8-0020]

A surrender by operation of law occurs when the lessee is granted a new lease from the lessor to commence during the currency of the old lease. The new lease may be for a period which is identical to, longer or shorter than the residue of the old lease.

Surrender by Lessee

[8-0030]

A registered lease may be surrendered by registering an instrument of surrender with the consent of every mortgagee and sub-lessee of the lessee (s 69(2) of the *Land Title Act* 1994). If the head-lease is surrendered, the sub-lease will continue in existence and take the reversion on the head-lease (ss 113 and 115 of the *Property Law Act* 1974).

Merger of Lease

[8-0040]

In instances where the registered owner of a lot acquires the interest in a lease over:

- that lot; or
- a water allocation; or
- ² part of the lot;

there is **not** an automatic merger of the interest in the fee simple or water allocation. A request must be made by the registered owner to merge the interests.

Disclaimer of Lease

[8-0050]

A lease may be disclaimed on the bankruptcy of a lessee (s 70 of the *Land Title Act* 1994).

Surrender by Lessor under Power of Attorney

[8-0060]

If a lessee abandons the premises (in the case of land) or the water allocation and cannot be located to execute the surrender or is otherwise in default under the terms of the lease, the lessor may execute a surrender if there is an enabling power of attorney clause contained in the lease.

²Often, retirement village leases contain a power of attorney where the lessee grants the power in favour of the lessor to surrender the lease where an event occurs that would terminate the lease (eg the death of the surviving lessee).

Unless the power is irrevocable in terms of s 10 of the *Powers of Attorney Act* 1998, a power of attorney cannot be used to execute any document if the power is revoked upon the death or incapacity of the donor lessee.

Re-Entry by Lessor – Determination of Lease

[8-0070]

If the lessor under a registered lease of:

- a lot;
- ²or part of a lot;

re-enters and takes possession under the lease or pursuant to powers implied by s 107 of the *Property Law Act* 1974, the lessor may lodge a request for the Registrar to register the re-entry (s 68(1) of the *Land Title Act* 1994).

Re-Entry by Lessor – for Repudiation

[8-0075]

A lease may be determined for repudiation relying upon a common law right to terminate a contract for breach.

Repudiation can occur where a lessee indicates either by words or conduct that they do not intend to be or do not regard themselves as being bound by any of their obligations under the lease and the lessor accepts the lessee's breach of his or her obligations as a repudiation of the lease. The most common example of repudiation is abandonment of the premises (in the case of land) or the water allocation by the lessee without the express or implied consent of the lessor.

Lease to a Deregistered Company

[8-0080]

²Where a company was dissolved prior to the commencement of the *Companies Act* 1961, all property and rights whatsoever vested in the Crown (s 300 of the *Companies Act* 1931). Therefore if the lessee is a company that was deregistered prior to 1 July 1962, the lease may be surrendered and must be dealt with by the State of Queensland (represented by the Department of Justice and Attorney General). See ¶[8-2040] and part 14 – General Request, esp ¶[14-2300].

Under the Australian Securities and Investments Commission (ASIC), where the lessee is a company no longer in existence, the lessor may re-enter and take possession, as notice of default may be served on the ASIC. If circumstances do not permit the use of this procedure, then as the lease is vested in the ASIC pursuant to s 601AD of the *Corporations Act 2001* (Cth), the ASIC has the power to execute a surrender pursuant to s 601AE of that Act.

Legislation

[8-1000]

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

Form of Surrender

[8-2000]

An instrument of surrender of lease or sub-lease is executed by the lessee and lessor and lodged in a Form 8 – Surrender of Freehold Lease or Sublease. A Form 8 is the appropriate form for the surrender of a water allocation lease. The Form 8 provides for a:

- full; or
- ²partial;

surrender of the lease.

²For a partial surrender, the area surrendered must be capable of precise definition. If the surrendered area is the whole of a lot a plan of survey to identify the surrendered area is not required. Similarly, if the surrendered area is the whole of a building or the whole floor of a building, a sketch plan of the surrendered area is not required. If the surrendered area is not capable of precise definition the following applies:

- If the surrendered area is over part of a lot, the area to be surrendered, or the area to remain in the lease, must be defined by a plan of survey or explanatory format plan lodged to precede the instrument of surrender. The plan must be drawn in accordance with direction 8 or 10 of the Registrar of Titles Directions for the Preparation of Plans.
- If the surrendered area is part of a floor of a building a sketch plan of the area to be surrendered, or the area to remain, should be bound into the surrender document. For the minimum requirements for a sketch plan see Direction 5 of the Registrar of Titles Directions for the Preparation of Plans.

²The Certificate of Title must be deposited, if issued, or a request made to dispense with production.

There is no requirement to deposit copies of the surrendered lease.

The surrender must have a duty notation where the lease commenced before 1 January 2006. Lodgement fees are payable.

The consents of every mortgagee and sub-lessee of the lessee are also required in Form 18 – General Consent.

Disclaimer of Lease

[8-2010]

A lessor may, after a trustee for a bankrupt lessee has disclaimed a lease that is unsaleable or not readily saleable, request to register the disclaimer to give effect to s 133(2) of the *Bankruptcy Act 1966* (Cth).

For further information see part 14 – General Request, esp ¶[14-2260].

Surrender by Lessor under Power of Attorney

[8-2020]

A power of attorney contained in a lease must be registered prior to the lessor executing the surrender.

Lodgement fees are payable.

For further information see part 16 – Power of Attorney, esp ¶[16-2050].

Re-Entry by Lessor – Determination of Lease

[8-2030]

A request to record the re-entry by the lessor is made in Form 14 – General Request. For further information see part 14 – General Request, esp ¶[14-2350].

Re-Entry by Lessor – for Repudiation

[8-2035]

A request to record the re-entry by the lessor for repudiation is made in Form 14 – General Request. For further information see part 14 – General Request, esp ¶[14-2350].

Lease to Deregistered Company

[8-2040]

²Company Deregistered Prior to the *Companies Act 1961*

Pursuant to s 300 of the *Companies Act 1931*, when a company was dissolved, all property and rights whatsoever vested in the company immediately before its dissolution shall be ‘deemed to be *bona vacantia*, and shall accordingly belong to the Crown’.

However, during this period the Crown could not hold freehold land or an interest in freehold land. It was not until the *Queensland Government Land Holding Amendment Act 1992*, which inserted s 15A into the *Real Property Act 1861*, that ‘The Crown in right of the State may, under this Act, acquire, hold and deal with land under the name “Queensland Government”’.

When dealing with a lease where the lessee is a company that was deregistered prior to 1 July 1962, a surrender of lease should be produced. The surrender of such lease (Form 8) must be executed by a person who is authorised to sign on behalf of the State of Queensland (represented by the Department of Justice and Attorney General) and lodged together with the evidence that the company is deregistered, without the necessity of recording the vesting to the State of Queensland on the title.

²The Certificate of Title must be deposited, if issued, or a request made to dispense with production.

Company Deregistered under the Australian Securities and Investments Commission (ASIC)

A surrender (Form 8) of a lease to a company that has been deregistered may be executed by ASIC, and lodged together with the evidence that the company is deregistered, without the necessity of recording the vesting to ASIC on the title.

Merger of Lease

[8-2050]

See Part 14 – General Request, esp ¶[14-2070].

Forms

General Guide to Completion of Forms

[8-4000]

For general requirements for completion of forms see part 59 – Forms, esp ¶[59-2000].

**SURRENDER OF FREEHOLD LEASE
OR SUBLEASE**

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.

1. Dealing number of instrument being surrendered 700145672	Lodger (Name, address, E-mail & phone number) BENTON & WEBB 148 WICKHAM STREET FORTITUDE VALLEY QLD 4006 info@bentonwebb.com (07) 3252 0774	Lodger Code 501
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2. Lot on Plan Description LOT 42 ON RP99332	County MARCH	Parish WEYBA	Title Reference 13431166
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3. Lessor
SUBURBAN SHOPPING CO PTY LTD ACN 685 742 321

4. Lessee
PARKER JAMES SCRIVNER and AQUILLA NEIL SCRIVNER

5. Surrender/Execution

a) Surrender of Freehold Lease/Sublease

***Full Surrender** The lease/sublease in item 1 is surrendered from 30/11/2007.

~~***Partial Surrender** The lease/sublease in item 1 is surrendered from / / .~~

~~*so far as relates to the land in item 2.~~

~~*so far as relates to the part of the leased area.~~

OR

b) ~~Surrender of Land Act Sublease~~

~~*I surrender all my right title and interest in the sublease in item 1 as from / / .~~

* delete if not applicable

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

E E Shield

.....signature

EGERTON ELI SHIELD

P J Scrivner

.....full name

JUSTICE OF THE PEACE (QUALIFIED) #29345

A N Scrivner

.....qualification

28/11/2007

Witnessing Officer

Execution Date

.....
Lessee's Signature

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

6. Acceptance

The Lessor accepts this surrender.

(seal)

or Full name of
company to be shown

J Thomas, Director
JOHN PETER THOMAS

P Dean, Secretary
PAUL IAN DEAN

29/11/2007

Execution Date

.....
Lessor's Signature

Guide to Completion of Form 8

Item 1

[8-4010]

Insert dealing number of lease or sublease being surrendered (eg L778961X).

Item 2

[8-4020]

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

[8-4030]

Insert full name of lessor.

Item 4

[8-4040]

Insert full name of lessee.

Item 5

[8-4050]

Complete where indicated. Delete paragraph, sentence or words that are not applicable and execute as required.

Item 6

[8-4060]

Execute as required.

¶[8-6000] deleted

Case Law

[8-7000]

In the unreported decision of Dowsett J (No 20 of 1994), in the matter of the *Corporations (Queensland) Act 1990* and *Hassell Holdings Pty Ltd*, the court held that a mortgagee exercising power could serve notice of a default by a defunct lessee company on the Australian Securities Commission.

The High Court held in *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 that a repudiation occurs when a party has an intention, either expressly by words or impliedly by conduct, to no longer be bound by the contract or indicates clearly an inability to perform the obligations under the contract (see also, *Shevill v Builders Licensing Board* (1982) 149 CLR 620, *Buchanan v Byrnes* (1906) 3 CLR 70 and *Marshall v Council of the Shire of Snowy River* [1994] NSW Conv R 55-719).

***India Pty Ltd v Florin Pty Ltd & Ors* [2003] SASC 161**

[8-7010]

A lease can be terminated on the application of ordinary principals of contract law and, where this occurs, no notice under s 124 of the *Property Law Act 1974* is required.

In this case the lessee failed to keep the premises open during normal business hours, which was a requirement and an essential term of the lease.

Under the lease, breach of this essential term entitled the lessor at his option to treat the breach as a repudiation by the lessee.

This the lessor did, thus bringing the lease to an end and giving the lessor the right to sue for damages for breach of contract.

Fees

[8-8000]

Fees payable to the registry are subject to an annual review. See the current:

- ²*Land Title Regulation 2005* – Schedule 2, item numbers 2(h), 2(m) and 4; and
- *Water Regulation 2002* – Schedule 16, item numbers 11 and 15.

Cross References and Further Reading

[8-9000]

Part 7 – Lease of Freehold or Water Allocation

Part 14 – General Request

Part 16 – Request to Register Power of Attorney or Revocation of Power of Attorney

Part 18 – General Consent

Duncan and Vann, *Property Law and Practice in Queensland*, Law Book Co (loose-leaf service)

Cassidy and Redfern, *Australian Tenancy Practice and Precedents*, Butterworths (loose-leaf service)

Notes in text

[8-9050]

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.