TFR-05 Transfer of Mortgage, Charge or Lease

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1 Overview

There are special forms printed for these purposes. A Transfer of Mortgage Charge or Freehold Lease form is used where freehold land is affected. A Transfer Lease form is used where Crown land is affected.

While the whole, or a share of the interest of a mortgage, charge or lease may be transferred, all of the land secured by the instrument must be included in the transfer. A transfer reciting only one of two or more properties secured will not be registered as such a transfer would create uncertainty as to repayments due under the instrument, and the circumstances that would constitute default.

In general, encumbrances registered against the title of the mortgagor, chargor or lessor do not prevent dealings by the mortgagee, chargee or lessee. Encumbrances lodged against the mortgage, charge or lease (i.e. against the mortgagee, chargee or lessee) must be either removed or shown as encumbrances on the transfer. In some cases, the consent of the person or corporation that lodged the encumbrance must be endorsed on the form in addition to the noting of the encumbrance.

In the case of freehold land, production of the duplicate certificate of title (if any) is desirable but will not be insisted upon for these transfers.

Fees are payable on each interest being transferred.

Click on the following link for a list of the current search and lodgement fees.

2 Transfer of Mortgage
It is desirable that the tenancy between the transferees be expressed, as in the absence of an expressed tenancy a joint tenancy is presumed.

Where the consideration for the transfer is a Deed of Defeasance, i.e. a mortgage of a mortgage, the consideration panel should not recite the deed but simply state:

"the transferee being entitled in equity to become the registered proprietor of the mortgage"

The same consideration should be used when the mortgage is being retransferred to the original mortgagee. This form of consideration should also be used where the transfer of mortgage is for the purpose of security. The Transfer of Land Act 1893 (TLA) does not contain provisions permitting the registration of a sub-mortgage.

3 Transfer of Charge

A transfer of charge (or annuity) has the effect of passing the responsibility for the payment of the annuity to the transferee during the lifetime of the transferor or for the balance of the term of the annuity. On the death of the transferor or the end of the term, the annuity ceases. The charge remains an encumbrance until discharged or removed by application even though its term has expired or the annuitant is dead (see CHA-01 Charges and Removals).

4 Transfer of Lease

A transfer of lease can be lodged for both Freehold Leases and Crown Leases.

The provisions of a lease may or may not allow the transferring of the interest to another. A lease that is to be transferred must be current. Transfers of lease lodged after the initial lease term but during a lease option period can be accepted for registration without an extension of lease being required. However, it is recommended that the extension for the option period(s) be lodged to show continuous occupation of the leases area.

A transfer of Freehold lease should be for all the land contained in the lease, increasing or decreasing of the leased land should be addressed in either a partial surrender or a new lease.

There is no requirement for the duplicate lease to be provided for a transfer of a lease.

For an example of how to fill out the document, see LTRPM Form Examples - Example 24.

Note: A transfer of a lease and a transfer of freehold land are not to be included in the same form.

4.1 Duty

Where the transfer of lease document indicates a monetary consideration has been paid, the transfer must be submitted to the Office of State Revenue for duty assessment and endorsement. Please see LOD-03 Fees and Transfer Duty.

Where no duty has been provided for the document and the Consideration panel refers to a deed that may contain a consideration, a copy of the deed will need to be provided to determine if a monetary consideration has been paid.
4.2 Consents

4.2.1 Lessor's Consent

The registered lease may contain provisions which affect the rights of a lessee to assign or otherwise dispose of his or her interest and/or possession of the leased premises. These provisions may result in a requirement that a transfer of lease would not be registrable without the consent of the lessor.

It is preferable that the consent be endorsed on the transfer of lease, but other forms of consent may be accepted by the Registrar, so long as the intention of the lessor to consent to the transfer presented was clear.

If the terms of a lease demand the unqualified consent of the lessor to any assignment, a transfer of the lease without consent will not be registered. If the terms of the lease require a qualified consent (e.g. subject to the proposed new lessee being acceptable to the lessor, the transfer of lease should be accompanied by proof of that consent.

A requisition will issue if the consent is not present, to give the transferee an opportunity to obtain it, but the transfer may still be registered at the lodging parties request, without it. In such cases the parties to the transaction still have the option of taking Court action to have the assignment approved on the grounds of the withholding of the consent was unreasonable.

4.2.2 Minister's Consent

For transactions over Crown land, unless the Crown land is vested for purposes of another Act, consent of the Minister for Lands will be required under section 18 of the LAA (see Paragraph 12.1.7 LT RPM). Transactions over a Pastoral Lease additionally require s.134 of the LAA consent.

4.3 Execution

The Transferor(s) and the Transferee(s) must both sign the Transfer form. Standard execution requirements apply, please see the document signing guides SIG-01 to SIG-13 inclusive.

Note: The execution page of the Transfer of Lease form should be signed/executed by the Transferor(s) and the Transferee(s). Whilst referring to the page number containing the original signatures contained within the deed of assignment has become common practice, it is not recommended.

4.4 Variations

A transfer of Crown lease may contain variations to the terms and conditions of the lease, however any variations cannot alter the lease area or lease term (duration).

The TLA does not specifically provide for variation to the terms and conditions of the lease in a transfer of Freehold lease.

5 Transfers to and from the State of Western Australia
5.1 Transfer and Surrender of Fee Simple Land to the State of Western Australia

Land alienated from the Crown in fee simple, may be surrendered to the State. Upon surrender the land becomes unallocated Crown land and may be dealt with by the State under the Land Administration Act 1997 (LAA).

The appropriate means is by amended transfer Transfer of Land form or Transfer of Land with Additional Pages. A transfer to the State of Western Australia of fee simple land requires acceptance by the Minister for Lands on behalf of the State.

The normal transfer form is used with the inclusion of the words "and surrenders" into the operative clause of the transfer, which would then read:

"...hereby transfers and surrenders to the transferee...."

Where the freehold land is subject to encumbrances, approval from the Minister for Lands must be obtained prior to the land being surrendered to the State.

The duplicate title (if any) must be produced with the transfer and surrender. Where the duplicate title has been lost, action under s.74 of the TLA can be taken to dispense with its production.

5.2 Leasehold Land

A Crown Lease granted under the Land Act 1933 or a lease of Crown land granted under the LAA may be surrendered to the State of Western Australia. Please refer to LEA-03 Leases of Land - removal.

5.3 Transfer of Crown Land to Fee Simple Land

The general power to dispose of a fee simple interest in Crown land under the Land Act 1933 was by way of a Crown grant by the Governor. The LAA simplified the process whereby a person may now purchase a fee simple interest in Crown land by entering into a contract of sale by offer and acceptance for its purchase and then registering a transfer that conveys that fee simple interest into freehold.

Before any transfer to freehold can be registered, a Crown Land Title (CLT) must exist. Where the existing Crown title is a Qualified Crown Land Title (QCLT), an application document with a supporting statement as to interests must be lodged by the Department of Planning, Lands and Heritage to enable the Crown title to be converted from a QCLT to a CLT.

The deposited plan that supports the CLT must also be suitable to allow a transfer to freehold. The deposited plan or CLT must not state that it is Subject to Survey and no portions of land should previously have been excluded from the lot.

To transfer to freehold, a standard Transfer of land form or a Transfer of land with additional pages form can be used. On registration, the Crown title Volume and Folio number is replaced with a freehold title Volume and Folio number. The lot and deposited plan numbers remain the same.

Where the State of Western Australia is transferring a fee simple interest to a current lessee of Crown land, the transfer of land document must include a request for the lease to be merged and extinguished. The request to merge and extinguish the lease should be endorsed on the
Transfer form itself and be signed by the lessee or the lessee’s agent. Suitable words for the request are:

"the transferee requests that Lease H987654 be merged and extinguished in the fee simple on this transfer".

Unlike the merger of freehold leases, the merger of a lease of Crown land may be effected while the lease is encumbered or subject to a caveat. Any encumbrances on the lease that have not been removed will be carried forward to the certificate of title.

This process will only apply where the entire lease is being converted to freehold. Where only part of the lease is to be transferred into freehold, a partial surrender of the lease must precede the transfer of land document.

Crown land may also be transferred into the fee simple subject to conditions in accordance with s.75 of the LAA. This land is known as conditional tenure land (see CRW-01 Crown Land - General).

6 Also See

- LEA-01 Leases of Land
- TFR-01 Transfers - Common Scenarios
- TFR-03 Transfers by or to an Executor/Administrator
- TFR-04 Transfer - Land of Deregistered Company