TFR-08 Transfer by Mortgagee/Debenture Holder/Annuitant (Chargee) exercising Power of Sale

Version 2.1 - 01/08/2018

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1 Transfer by Mortgagee Exercising Power of Sale

This document is subject to the Verification of Identity Practice issued jointly by the Western Australian Registrar of Titles and Commissioner of Titles. Please refer to the [VOI webpage](#).

Transfer *Form Transfer of Land by Mortgagee (Power of Sale)* (see [LT RPM Model Form Examples - Example 24](#)) is a special form printed for this purpose. The mortgagee may exercise the power to sell, where the mortgagor defaults in payment of the principal sum or the observance of the covenants of the mortgage. The sale may be the whole or part of the land, by public auction or private treaty, with power in the mortgagee to subdivide and/or create easements. A mortgagee’s power to sell arises as a consequence of an expressed or implied right to do so by virtue of:

- of the TLA, where the mortgagor has defaulted in payment of the principal sum and/or interest or has defaulted in the performance or observance of any covenant, express or implied, in a mortgage that has been registered under the Transfer of Land Act 1893 (TLA).

A condition precedent to a valid exercise by a mortgagee of the power to sell is the service of a notice on the mortgagor. This notice must clearly specify the default complained of and provide the mortgagor with an opportunity to remedy the default within the specified time of one month as required by s.108 of the TLA, or such other period as may be provided for in the mortgage.

The TLA also provides for a second form of notice to be served on the mortgagor in relation to on demand mortgages. There are two distinctly specific types of on demand mortgages:

- where the mortgage requires monies to be payable within a specific period. Failure to pay the monies within that period converts the mortgage into a demand mortgage where monies then become payable on demand; and

- where the mortgage is a demand mortgage in the first instance and monies are payable on demand. In such a case, the mortgage usually requires that, if the mortgagor pays within a specific period, the mortgagee will refrain from issuing a demand notice calling up the principal sum and any interest outstanding. Alternatively, a demand mortgage may contain provisions requiring no repayment of either principal or interest until demand is made.

In both cases, s.107 of the TLA provides that a demand in writing pursuant to the mortgage requiring all monies to be paid immediately, is equivalent to a notice in writing. The legal position is as follows:

Where:

- a notice of default (issued pursuant to s.106 of the TLA for a fixed-term mortgage which provides for a specific period before default has occurred), or a written demand (issued pursuant to a s.107 demand mortgage which requires that the principal and interest owing by the mortgagor are payable immediately) and

- the mortgagor has failed to pay the sum demanded or rectify the default specified;

either

- after the end of the period specified under s.106 (being one month or such other period
specifying in the mortgage), or

- after the demand has been made under s.107

    then:

- the mortgagee is entitled to exercise the power to sell under s.108 of the TLA.

It must also be noted that, although many demand mortgages call for payment immediately or forthwith, in practice a period of at least one day must be allowed before a mortgagee exercises its power of sale.

This period of at least one day need not be specified in the notice. However, to enable the Registrar of Titles to be satisfied that s.106 and 107 of the TLA have been complied with, the Registrar requires that a minimum period of at least one day elapses before a mortgagee exercises its power of sale pursuant to the demand notice.

The required notice may be served:

- by personal delivery on the mortgagor(s);

- by registered post sent to the address of the mortgagor(s) in the Register. It is Office practice to accept a later address if it is included in the mortgage (as part of the Register). Where there is more than one mortgagor, separate notices to each must be sent. (Irving v Commissioner of Titles 1963 W.A.L.R. 67). Where the mortgagor is a corporation in liquidation, service of the default notice may be made on the Liquidator at the registered office of the Liquidator;

- by registered post sent to the current address of the mortgagor(s);

- by sending it to a facsimile number specified to the mortgagee by the mortgagor(s) in writing as being an address for the service of notices issued under this section; or

- by leaving the notice on some conspicuous part of the mortgaged premises.

Note: If the mortgagor is a defunct company registered under the Corporations Act 2001, the default notice must be sent to the Australian Securities and Investment Commission (ASIC). Section 601AD of the above-mentioned Act states that a company ceases to exist on de-registration and all of the company’s property assets vest in ASIC.

When the mortgagee’s transfer is lodged, it must be supported by a statutory declaration providing proof to the Registrar that the sale has occurred in strict compliance both with the terms of the mortgage, and the provisions of the TLA.

The statutory declaration is best made by the registered mortgagee, but may be made by the mortgagee’s solicitor or agent who must then declare his or her means of knowledge for the statements made in the declaration to the satisfaction of the Registrar.

If the mortgage is granted to a number of mortgagees, the statutory declaration must be made by each of the mortgagees. If the mortgage is made to a bank or a corporate body, the statutory declaration must be made by a responsible officer for and on behalf of that bank or corporate body, who must declare that proper authority exists to make the statutory declaration on behalf of the bank or corporate body and that the declarant has a proper means of knowledge.

The statutory declaration must state:

- The identity, authority and means of knowledge of the declarant.
- That a default (clearly specified in the notice or demand in writing) under the terms of mortgage has occurred, i.e.

- default in the payment of principal or interest (or both) and the date of default; and/or

- failure to perform or observe the mortgagor’s covenants in the mortgage setting out the default complained of and the date of default.

- That, in accordance with the terms of the mortgage, notice to remedy the default or demand to repay the monies secured was made on (date) and the default complained of has continued for one month or such other period specified in accordance s.106 of the TLA after the service of a notice of the default.

- That the notice stated that, unless the default was remedied within the time referred to above, the mortgagee may exercise the mortgagee’s power of sale.

- That the default complained of continued up to and including the date of sale. (The date of sale is defined as the date on which an unconditional and binding contract for sale came into effect).

- That the default notice or demand in writing had been properly served in accordance with s.106 of the TLA by .................... (insert the specific mode of service used, as authorised under s.106).

- That the mortgage is not affected by the National Consumer Credit Protection Act 2009 or the Consumer Credit Code.

It should be clear from the statutory declaration that the notice to the mortgagor clearly sets out the nature of the obligation imposed by the mortgage and the consequences of not complying with these obligations.

If the statutory declaration does not clearly include the above, evidence supporting that statutory declaration will be requested. This evidence may include copies of the demand in writing or default notice and evidence of service in accordance with s.106 of the TLA.

It is not necessary to produce any other proof as to the manner in which the statutory notice is given, but care should be taken to ensure that proper procedures are carried out and the evidence preserved. Where an application is made for an Order for Foreclosure, strict proof of service of notice is a necessary part of the application.

Where the defaulting mortgagor is one of two or more joint tenants, the exercise of the power of sale of the mortgagee would sever the joint tenancy and result in the issue of a separate title for the transferee for the share of the former proprietor converted to a tenancy in common with the remaining tenant(s).

The mortgagee may not be the purchaser in pursuance of a power of sale. The right to buy in at auction afforded by the TLA is only designed to protect the mortgagee at auction sales where the sale price might be too low to cover the mortgage debt. Should the mortgagee be unable to sell the land by public auction and default continues for six months, the mortgagee is entitled to apply to the Commissioner for an Order for Foreclosure. It is recommended that a mortgagee’s sale be by public auction and, if that sale is unsuccessful, the auctioneer’s certificate be obtained at that time.

Note: Where a mortgage has been registered under the TLA, the use of the power of attorney provisions in the mortgage by the mortgagee to appoint an attorney (when default has occurred) to sell the land is discouraged. The Registrar of Titles will only register a transfer by a mortgagee exercising a power of sale in strict accordance with the processes of the TLA. If the mortgagee’s power of sale is in relation to a mortgage under the National Credit Code, see paragraph 1.1
1.1 Effect on Encumbrances

The effect of registration of a transfer by way of a mortgagee’s sale is to remove any encumbrance notified on the certificate of title to the land sold which was lodged after the mortgage under which the power of sale was exercised.

The following are exceptions to the above general rule:

- absolute Caveats (subject to claim caveats will run with the land unless removed)

- memorials lodged pursuant to certain statutory provisions prohibiting dealing with the estate and interest of the registered proprietor. See Chapter 11 of the Land Titles Registration practice manual for a detailed list of Statutes;

- Property (Seizure and Sale) Order (PSSO) that is still current is removed as an encumbrance where the written consent of the Sheriff is obtained and filed with the transfer. Expired PSSOs should be removed by way of an Application to Register a Discharge of a Property (Seizure and Sale) Order form.

- leases and easements to which the mortgagee has given an unqualified consent (s.110); and

- notice of intention to take under the LAA.

Caveats must be withdrawn, or removed pursuant to Sections 138, 138B or 141A of the TLA.

Memorials must be withdrawn or the consent in writing of the body lodging the memorial obtained as an endorsement on the document itself. Where a consent is obtained, the memorial must be noted as an encumbrance. The leases and easement referred to above must be noted as encumbrances in common with encumbrances lodged prior to the mortgage under which the power of sale was exercised.

Where a second mortgage is effecting the sale by Mortgagee, the first mortgage should be discharged as it will not be automatically removed as it precedes the other.

The consent of the taking authority or its delegate is required in cases where the land is encumbered by a Notice of Intention to Take. Where the mortgagee sells parts of the mortgaged land and registers transfers at different times, a statutory declaration containing statements similar to those set out above must be produced with each transfer.

Note: Only one mortgage can effect the sale by a Mortgagee and it should be the current mortgage that has been defaulted. Where a previous mortgage was granted by the same Bank, but was since paid out, a discharge of mortgage should be provided to remove the mortgage.

1.2 Double Interest Mortgages

Where mortgagees sell land on the authority of a double interest mortgage (see paragraph 2.6.10 of the Land Titles Registration practice manual), separate transfers for each interest will be required. The mortgagee must not include any further consideration in the transfer, e.g. by direction to another person or by love and affection etc. The power of the mortgagee to transfer is limited to the estate or interest of the mortgagor and does not extend to any further transaction. A
further sale must be by separate transfer.

Where a Mortgagee has granted multiple mortgages to the same registered proprietor over different land, each mortgage interest being sold under power of sale should be prepared on a separate Transfers. This transaction scenario will fall within the double interest transfer definition.¹

¹ [Guide updated on 01/08/2018 to add new paragraph]

2 Transfer by Mortgagee Exercising Power of Sale for Mortgages under the National Credit Code

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Section 3 of the National Consumer Credit Protection Act 2009 (the Act) enacts the Consumer Credit (Western Australia) Code (the Code). Mortgages lodged under the Code are dealt with in section 2 of policy and procedure guide MTG-01 Mortgages

2.1 Default notices under the Code

The effect of the Code is that, if a mortgagee wishes to exercise power of sale under the mortgage and the Code, then, except in limited circumstances outlined below, the mortgagee must send to the mortgagor a default notice in the terms required by the Act and the Code. That default notice must have a period of no less than 30 days.

Sections 88 and 93 of the Code set out what is required to be included in the default notice.

2.2 Default notices under the TLA

The effect of the Code is that it does not exclude the requirement to send a default notice under s.106 of the TLA to the mortgagor. However, it is possible to combine both notices into the one default notice.

2.3 Methods of service of notice

The service of notice provisions under the Code differ from the service of notice provisions under the TLA. Although there are some differences, there are also overlapping service requirements. Legal advice should be sought as to the appropriate methods of service of notices, under the Code and the TLA, in respect of any overlapping methods of service.

It is suggested that a combined notice forwarded to a defaulting mortgagor may be served, under both the Code and the TLA, by the following methods:

- delivered personally to the mortgagor;

- sent by Registered Mail to:
- the address of the mortgagor as shown on the Register but only if this address is nominated in writing by the mortgagor to the mortgagee as the address for service; or
- if there is no such nomination, the address of the place of residence of the mortgagor last known to the mortgagee;

or

- facsimile transmission to the mortgagor, if the mortgagor nominates in writing to the mortgagee such a fax number as a nominated address for service.

2.4 Notices to joint mortgagors

Where there is more than one mortgagor under a mortgage, then the default notice must be sent to each mortgagor.

2.5 Power of sale transfer

After the notices under both the TLA and Code have expired and the default has not been remedied, the power of sale arises under s.88(2) of the Code and s.108 of the TLA.

When the mortgagee has exercised power of sale, a Transfer document (Transfer of Land by Mortgagee [Power of Sale] form) is required to be lodged at Landgate. This transfer document is the same as that used for mortgages that are not under the Code.

2.6 Statutory Declaration

In addition to the power of sale transfer, a supporting statutory declaration must also be lodged at Landgate. The statutory declaration must be made either by the lender, the lender’s employee’s or the lender’s solicitors if they are personally acquainted with the facts.

The matters deposed to in the statutory declaration are similar to but different from those matters deposed to in a statutory declaration supporting a power of sale transfer under the TLA. The following is a list of all the matters which must be deposed to in the statutory declaration:

- The identity, authority and means of knowledge of the declarant.
- The particulars of the mortgage such as the document number and the name of the mortgagee,
- That the mortgage is affected by the Act and/or Code;
- That a default (clearly specified in the notice or demand in writing) under the terms of the mortgage and the Code has occurred, i.e.:
  - default in the payment of principal or interest (or both) and the date of default;
  and/or
- failure to perform or observe the mortgagor’s covenants in the mortgage, setting out the default complained of and the date of default.
That, in accordance with the terms of the mortgage, the Code and the Regulations to the Code, notice to remedy or demand to repay the monies secured was made on .......... (date) and the default complained of has continued for 30 days after the service of a notice of the default.

That the notice stated that, unless the default was remedied within the time referred to above, the mortgagee may exercise the mortgagee’s power of sale.

That the default complained of continued up to and including the date of sale (defined as the date on which an unconditional and binding contract for sale came into effect).

That, in the case of an accelerator clause in the Mortgage (see s.93 of the Code), the notice has stated the manner in which the mortgagor’s liability is affected by the operation of the accelerator clause and the amount required to discharge the accelerated mortgage.

That the default notice or demand in writing had been properly served in accordance with s.106 of the TLA and s.195 of the Code by ........... (insert the specific mode of service used as authorised under s.106 of the TLA and s.195 of the Code).

It is not necessary to produce any other proof as to the manner in which the statutory notice is given, but care should be taken to ensure that proper procedures are carried out and the evidence preserved. Where an application is made for an Order for Foreclosure, strict proof of service of notice is a necessary part of the application.

Whilst the Regulation to the Code establishes that the default notice issued under the Code should be in a print of not less than 10 point, Landgate will not require a copy of the notice to ensure that it complies with the requirements for print size. All that Landgate will require is that the statutory declaration deposited to the fact that the notice complies with the Code.

2.7 Default notice not required in limited circumstances

The Code also provides that there are some circumstances in which a default notice is not required under the Code. These are where:

- The credit provider believes, on reasonable grounds, that the mortgage was induced by the fraud of the debtor or mortgagor.

- The credit provider has made reasonable attempts to locate the mortgagor without success.

- The Court authorises the credit provider to begin the enforcement proceedings.

- The credit provider believes, on reasonable grounds that:

  - the debtor or mortgagor has removed or disposed of the mortgaged goods under a mortgage related to the credit contract;

  - the debtor or mortgagor intends to remove or dispose of the mortgaged goods without the credit provider’s permission; or

  - urgent action is required to protect the mortgaged property.

Note: The above would only apply to mortgages over land if that mortgage secures the advance to purchase the goods.

The above situations, which entitle no notice to be issued under the Code, will be rare but they do
not remove the need to issue notices under the TLA. However, if they do arise, then Landgate will require a statutory declaration to be lodged with the transfer document (Transfer of Land by Mortgagee [Power of Sale] form).

2.8 Additional matters to be deposed to in statutory declaration where default notice not required under the code

The declaration is to be made by the lender or an employee of the lender who is personally authorised to swear the declaration on behalf of the lender or the solicitor of the lender if the solicitor is personally acquainted with the facts. In all of the above cases in which the default notice is not required, Landgate requires the declarant to depose to the following, in addition to the matters required for notices issued under the TLA:

- In the case of fraud:
  all the circumstances surrounding the fraud; and
  a report from the police indicating that the mortgagor has been fraudulent or a submission based on case law that supports the position that the mortgagor has been fraudulent within the meaning of the Code.

- In the case of an inability to locate the mortgagor:
  all the attempts that have been made to locate the mortgagor which would, as a minimum, include attendance at the mortgagor’s last known address both during and after business hours
  letters sent by registered mail and receipts showing non receipt
  and
  notes of telephone calls over a period of at least one month after the default of the mortgagor.

- In the case of Court authorisation:
  the terms of the order annexing a service copy of the order; and
  a submission as to the effect of the order.

- In the case of removal or disposal of the mortgaged goods under a land mortgage which secures the money advanced under the credit contract:
  the full circumstances surrounding the removal or disposal of the mortgaged goods; and
  permission of the credit provider not being obtained by the mortgagor; and
  a statement that the mortgage secures advances made under the credit contract in respect of the goods sought to be removed or disposed.

- In the case of the mortgagor’s intention to remove or dispose of the mortgaged goods, without the credit provider’s permission:
  the full circumstances of the mortgagee credit provider’s belief that the mortgagor intends to remove mortgaged goods;
  permission of the mortgagee credit provider has not and would not be given to such action; and
a statement that the mortgage secures advances made under the credit contract in respect of the goods intended to be removed or disposed.

- In the case where urgent action is required to protect the mortgaged property:

then the declarant should depose to the full circumstances surrounding the need for urgent action to be taken; and

it must be a substantially urgent need.

3 Transfer by a Debenture Holder

Not all security documents are registered at Landgate; floating charges and Debentures are registered with the Australian Securities & Investments Commission, and may be used, (where default occurs) to sell the land of the borrower (mortgagor) to repay the debt. Part VI (Mortgages) of the Property Law Act 1969 contains a series of provisions setting out the various rights of the parties, and, as in the TLA, the right to sell is dependent upon notice to the mortgagor to remedy the default.

A subsequent sale of the land would be conducted by a Receiver appointed under the terms of the charge or debenture, and, in accordance with the Property Law Act 1969, the appointment of a receiver is conditional upon the mortgagee becoming entitled to exercise the power of sale. Where the transfer exercising the power of sale is executed by a receiver (see DOC-04 Statutory Declarations), Landgate requires only proof of the receiver’s appointment, and subsequent registration of that appointment with the Australian Securities & Investments Commission.

On occasions the mortgagee prefers to use the power of attorney provisions of a charge or debenture to effect a sale. To ensure that the mortgagee has the right to sell the land, at the time of the registration of a copy of the charge or debenture as a Power of Attorney, proof of the service of notice to remedy default must be lodged.

This requirement of Landgate may not be avoided even if the terms of the charge or debenture do not require default to occur for the Power of Attorney claim to become operative. The Registrar of Titles is concerned that before any proprietor is deprived of land by a forced (mortgagee’s) sale that an opportunity to remedy the default has been given.

4 Transfer by Annuitant (Chargee)

The same principles apply as for a transfer by a mortgagee. The manner in which the proceeds of sale are dealt with differ (s.109 of the TLA).

After payment of the expenses of the sale and the arrears of the annuity to the annuitant, the residue is deposited in a bank in the joint names of the annuitant and the Registrar. As payments under the charge accrue they are met. On the death of the annuitant or other termination for the annuity the balance of the money, if any, is held for the benefit of the parties who may then be entitled.