



PROPERTY & BUSINESS LAWYERS

Should commercial and retail leases be registered?

Why leases should be registered

In short, registering a lease creates a legal interest in the land for a tenant, meaning the tenant's interest under the lease will be afforded protection from dealings affecting the title to the land. For instance, if the landlord sells/transfers the land that has a registered lease on title, the purchaser/transferee of the land would be on notice of and be bound by the lease terms.

The law

Section 53 of the *Real Property Act 1900* (NSW) ("the RP Act") provides that when land under the RP Act is leased for a term exceeding three (3) years (including the initial term and any option terms), the lease must be in the 'approved form'.

Further, s 42(1)(d) of RP Act provides that a dealing in land (including a lease exceeding three years) must be registered on title in order for the dealing to have priority against future registered dealings, such as the registration of a Transfer on the sale of the property.

Neither ss 53 nor 42 of the RPA mandate the registration of a lease. Section 42 merely provides that unregistered leases with a term exceeding three years do not pass with land.

Leases with a term not exceeding three years (i.e., up to and including three years—including any option(s) to renew) have statutory protection need not be registered.

By contrast, s 16 of the *Retail Leases Act 1994* (NSW) ("the RLA") provides that any lease that comes under the RLA and which has a term exceeding three (3) years (including any option(s) to renew) must be registered. Failure to comply with the RLA can incur penalties.

Consequence of non-registration

If a lease is not registered, any competing registered interest over the title will take preference.

Practically, the biggest concern for a tenant will most often be that if the landlord sells the land and the lease is for a term exceeding three (3) years and not registered on title, the purchaser of the land would not be bound by the unregistered lease and the tenant could be forced to vacate. However, the

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unregistered lease could be protected by the registration of a Caveat, which will put a purchaser on notice of the lease

While lease registration costs are typically payable by a tenant, the cost is minimal compared to the potential legal costs and practical issues that can arise if the lease is not registered or protected by a Caveat.

How leases are registered

Since 11 October 2021, NSW has abolished physical Certificates of Title and moved to 100% mandatory electronic conveyancing. NSW Land Registry Services no longer accepts or issues Certificates of Title.

As a result, lease dealings (including lease, sublease, variation of leases, surrender of lease, and transfer of lease) must be registered via an Electronic Lodgement Network Operator (ELNO). At the moment, the most commonly used ELNO is Property Exchange Australia (PEXA).

Only certain entities can subscribe to PEXA, meaning that individuals will usually need to engage a Licensed Conveyancer or an Australian Legal Practitioner to act on their behalf for the purposes of registration.

While certain leases are afforded statutory protection and do not require registration, any lease, whether commercial or retail, that has a term exceeding three (3) years (including any option term(s)) should be registered on title to the landlord's property to create a legal interest in the land for the tenant.

Contact

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