



Does my commercial lease need to be registered on title?

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After finalising negotiations and entering into a [retail or commercial lease](#), the need to register a lease on title in NSW can seem to be an unnecessary additional step resulting in further expenses. However, registration of a lease is often an important step to ensure the interests of both parties are protected.

What is registration of a lease?

Registration of a lease refers to the process of formally recording the lease on the title of the landlord's property and noting on title that the tenant has an interest in the property under the terms of the lease.

In NSW, registration is required for all leases with a term greater than 3 years. Any [option to renew period contained in a commercial or retail lease](#) is included in the term when determining whether registration is necessary. For example, a 2-year lease, with an option to renew for an additional 2 years, would need to be registered. This is because the **maximum** term of the lease is over 3 years.

A lease that is 3 years or less can be registered if both the landlord and tenant agree to do so.

For a lease that falls within the *Retail Leases Act*, the lessor is required to register a lease of 3 years or more within 3 months after it has been signed and returned to the lessor.

Will my lease still be binding if it is not registered?

A properly signed and executed lease will be binding on both the landlord and tenant who signed the lease, regardless of whether or not the lease is registered on title.

Registration is not required to 'perfect' or otherwise complete a lease.

Why is lease registration necessary?

Registration of a lease with a term (including option periods) greater than 3 years is necessary to protect the tenant's interest under the lease.

Generally speaking, a tenant has the most to gain from lease registration. By ensuring their lease is registered on the landlord's property title, a tenant gains a registered interest over the title of the property, which the tenant can claim on, if necessary.

In NSW, only leases with a term of 3 years or less are provided statutory protection under the relevant land titles legislation. This means that a lease of a term greater than 3 years (including any options to renew) should be registered in order to gain statutory protection and a registered interest on the title.

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

Risks if a lease is not registered

The most common problems that can arise for tenants with an unregistered lease for a term greater than 3 years are:

- where the landlord sells the property; and
- where the landlord has a mortgage on title.

When a landlord sells a commercial property

If a lease is registered on title and the property is sold, the new owner (who will become the new landlord) will be required to adhere to the terms of the existing lease, including being bound to provide any new lease required under an option period in the lease. They will not be able to set the lease aside or unilaterally change the terms of the existing lease.

If a lease is not registered and the property is sold, if the purchaser of the property was unaware of the lease of the premises, then they could seek to avoid recognising the lease and seek to evict the tenant even if the lease remains in term.

The purchaser cannot merely claim they were unaware of the lease or actively choose to ignore the fact the premises was tenanted. The purchaser would genuinely need to have been unaware of the tenant's occupation. This may be somewhat unlikely, given any diligent purchaser would likely inspect a property before purchasing, but registration is a relatively inexpensive process to

avoid any potential argument or risk of becoming a test case.

When there is a mortgage on title of a commercial lease property

If a bank holds a registered interest over the title, the bank or mortgagee is not obligated to recognise the tenant's right to occupy the property unless they have consented to the lease.

The process of registering a lease includes contacting the mortgagee for consent and requesting production of the title, meaning a record of consent is obtained. Mortgagees will often pass on their costs for consenting.

Lease registration if the lease term is under 3 years

A lease with a term that is shorter than 3 years (including option periods) is automatically protected under legislation in NSW. Registration is not required to protect the tenant's interest in the property.

A lease can still be registered even if it is shorter than 3 years if the parties wish for it to be noted on title.

Registration of a commercial lease has no detriment to a landlord

For a landlord, allowing a lease to be registered on their title is of no detriment and has little effect to their ownership of the property, given they would have already agreed to the lease.

Some may view the registration of the lease to add value to their property. For example, in the event that a landlord was attempting to sell their property as an investment, prospective buyers will want to be aware of all potential interests over the property and the entitlements they will receive upon purchasing. If applicable, the land may also be of more value if it has already been surveyed or identified using a subleasing plan or deposited plan, allowing a prospective buyer to enter into multiple leases over the premises.

What is the process for lease registration?

If a lease has been prepared and is in registrable form (ie. it complies with the Land Registry's requirements), then the process of registration is relatively unobtrusive.

Consent will need to be obtained from:

- any mortgagee of the landlord;
- a head lessor if the lease is a sub-lease; and
- [Crown lands if the lease includes an area of crown lands](#) (for example, leases of areas within a marina).

The tenant will be responsible for costs of registration, which will include registration fees payable to Land Registry Services and PEXA. For commercial leases, the tenant may also be responsible for the lessor's legal fees in attending to registration.

Registration can be completed in a few weeks, subject to any delays in obtaining necessary consents and the Land Registry Services approving the registration.

Conclusion

Registration of a lease can be an important final step when entering into a retail or commercial lease. Particularly for tenants of leases over 3 years, registration should be insisted upon to ensure their interest in the lease is protected and upheld.

Need help with your retail or commercial lease?

E&A Lawyers have significant commercial law experience, in particular with drafting and reviewing commercial leases. Contact one of our commercial lawyers for advice and assistance about your lease.

Contacting E&A Lawyers

For more information or to arrange a consultation with a lawyer, you can call or email us.

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