

Registering Leases in WA: Valuation Principles

The importance of registering leases in Western Australia has been the subject of some focus after the recent decision of the Supreme Court earlier this year in *Primewest (Mandurah) Pty Ltd v Ryom Pty Ltd and Kedo (Aust) Pty Ltd* [2014] WASCA 28 (**Primewest**). While the state of the law has not changed since the 2008 decision in *Lighting by Design (Aust) Pty Ltd v Cannington Nominees* [2007] WASC 88; [2008] WASC 23 (**Lighting by Design**), landlords and tenants would be prudent to ensure that leases granted for a term of greater than 5 years are registered. The growing interest in this area, particularly by property valuers and financiers means that there is very likely to be a change in the way leased properties are valued.

The Law in Western Australia

The state of the law requiring the registration of leases in WA has repercussions for sellers, buyers and tenants alike. The recent case law confirms that a lease of a term greater than 5 years will be extinguished on transfer to the buyer if that lease is not registered.

In 2008 the Court in deciding *Lighting by Design* found that an unregistered lease for a term greater than 5 years was destroyed upon the landlord transferring its land to a third party. In legislative terms, this means that section 68 of the *Transfer of Land Act 1893* (WA) (section 68 creates indefeasibility of title for a proprietor of land; section 68(1A) provides an exception for leases not greater than 5 years) prevailed over sections 77 and 78 of the *Property Law Act 1969* (WA) (the combined effect of sections 77 and 78 is that all of the covenants under a lease run with the reversion of the sale of the property).

More recently, the 2014 Supreme Court of Appeal decision *Primewest* confirmed the decision in *Lighting by Design*. In *Primewest* the buyer, wary of the *Lighting by Design* decision, made it a condition of the sale that documentation was provided proving that any unregistered leases for a greater term than 5 years were adequately assigned and registered. It was found the buyer rightfully terminated the sale contract when that documentation was not provided.

What Landlords Need to Consider

Property valuers are considering making the registration of leases a requirement of conducting a property valuation for both banks and potential buyers.

Current practice is for property valuers to sight a copy of the lease before conducting a valuation. We understand that a number of property valuers are considering changing this practice so that if a lease for a term over 5 years is not registered the relevant property will be valued on a vacant or 'to let' basis.

A valuation conducted on a vacant or 'to let' basis includes an assessment based on rent paid at the current market rate. If a tenant under an unregistered lease for a term greater than 5 years pays above the market rent at the time of valuation, the property valuation will not adequately reflect the true value of the property.

What Can You Do?

We recommend that all leases for a term of over 5 years are registered. However, if the parties do not wish to register the lease, we recommend that 3 original copies of all leases are executed so in the event that a landlord considers selling a property, we have the ability to register the lease easily if the property developer or banks require registration to value the property as a leased entity. Buyers should also require the production of assignment documentation for all leases over 5 years as a condition precedent to any sale.

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