LEA-01 Leases of Land

Version 2 – 07/03/2019

The information provided in this guide is not intended to amount to legal advice. Professional assistance may be required to determine the most appropriate action to protect your legal rights. Please read our Terms of Use on the Land Titles Registration policy and procedure guides web page. Landgate accepts no responsibility where parties print this guide and seek to rely on information that is out of date.

1 General

The TLA provides for the registration of a lease under the operation of the TLA for any term (excluding options to renew) exceeding three years for freehold land or exceeding 12 months for Crown land.

A duplicate copy of a lease may be lodged for registration along with the original. Although not required, where a duplicate lease is produced for a subsequent dealing against the lease, the duplicate lease will be endorsed (and if necessary updated) to show all the relevant interests registered against the lease.

The duplicate Certificate of Title (if any) must be provided when a lease is lodged for registration.

2 Form

A lease may be prepared using the electronic Record Interest – Lease form for a lease of freehold land or a lease of Crown land, available via Landgate’s Land titling forms webpage.

3 Preparing the Lease Form

All panels of the Lease form must be completed. Where a deed forms part of the lease it should contain appropriate section headings and where appropriate, a table of contents. It must also be consecutively page numbered.

Note:

References to the body of the lease or schedule to the lease within the form are not permitted and will only be accepted for notes 7 and 8.
Where subsequent transactions have occurred against the lease prior to registration of the lease (e.g. Transfer, Extension), the relevant subsequent documents should also be lodged.

3.1 Description of Land

3.1.1 Whole of the land in a Title

Please see the standard document preparation guide DOC-01 Document Preparation.

3.1.2 Part of the land in a Title

Where the lease relates to a portion of a lot or location, it must have a Land Description that is defined by a sketch or an Interest Only Deposited Plan. Where the lease affects part of a building, a narrative land description may be acceptable.

A lease by the State of Western Australia as lessor that affects part of a lot must be supported by an Interest Only Deposited Plan, unless the lease is over a portion of a building.

The Description of Land panel should identify the portion of land being leased by making reference to the sketch or Interest Only Deposited Plan. For example:

- "Part of Lot 100 on Deposited Plan 61023 shown hachured on the sketch at Annexure A"; or
- "Part of Lot 100 on Deposited Plan 61023 shown and marked ‘E’ on Deposited Plan 432000".

A land description may also describe the portion being leased by making reference to the shop number or unit number. For example:

"Part of Lot 1 on Deposited Plan 156789 described as shop 33 on the site plan at Annexure A".

3.1.3 Narrative Description of Buildings

A Lease of part of a building may have a land description defined by sketch, or by words referring to permanent walls. Care should be taken that in referring to parts of a building that any areas outside the building also included in the lease (such as parking or storage areas) are not forgotten.

For example, a lease with a land description panel reading as follows, can be registered without requiring a sketch:

- "The first floor of the CSA Centre, erected upon Lot 16 on Plan 13455, being part of the land in Certificate of Title Volume 99 Folio 100".

Note: Where a shop number or unit number does not comprise the whole of the floor of a building, a sketch or Interest Only Deposited Plan will be required.

3.2 Tenancy of the Lessee¹

Where there are two or more Lessees a tenancy is to be stated. The Lessee panel should clearly state if the interest is held ‘Jointly’ or as ‘Tenants in Common’ (equally or in shares).

[¹ New section added on 11/02/2019]
3.3 Term of the Lease

The term of the lease must be clearly defined, in that it must have a commencement date (which may be a past date or up to 21 years in the future) and either a finish date or a finite term stated in years, months and days.

Any options to renew the lease for a further term are also required to be shown.

Note: Where the initial term of a lease has already expired but the lease has an option to renew that has not yet expired, the lease can be accepted for registration.

3.4 Encumbrances

Only encumbrances affecting the area of land that is being leased are required to be shown.

Where a lease exists over the same area of land that is being leased, it must be removed prior to registration of the new lease. Please see LEA-03 Leases of Land - removal.

The following exceptions would apply to the above requirement:

- Where the new lease being lodged has a commencement date that is after the expiry date of the existing lease. In this case, the existing lease is to be shown as an encumbrance in the new lease.

- Where the new lease is a concurrent lease. Please see LEA-02 Leases of Land - Variations of and to section 3 Concurrent Leases.

3.5 Execution

The Lessor(s) and the Lessee(s) must both sign the lease form. Standard execution requirements apply, please see the policy and procedure guides on document signing (SIG-01 to SIG-13 inclusive).

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

3.6 Consents

3.6.1 Ministers 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 (CRW-01 Crown Land - General).

3.6.2 Mortgagee Consent

The consent of any mortgagee or annuitant registered in priority to the lease is required. (See section 91 of the TLA). Consent should be included in the body of the lease or affixed to the document.
Where the consent is signed under a Power of Attorney that has been noted at Landgate, the attorney must have power to consent to creating or granting leases.

Where a certificate of title is encumbered by a mortgage and no duplicate certificate of title has been issued, a letter of consent to subsequent lodgement should also accompany the lease. Please see COT-02 Duplicate Title.

3.6.3 Western Australian Planning Commission Consent

Unless a lease of freehold land is of a whole lot or lots the consent of the Western Australian Planning Commission is required where:

- the term of the lease, including any option to renew exceeds twenty years; and

- the terms of a lease, in the aggregate, exceed twenty years including any option to renew.

Where a lease affects a building that has been constructed in accordance with a building licence, or a building licence to construct the building is in force, consent of the Western Australian Planning Commission is not required. (See section 136 of the Planning and Development Act 2005).

Leases of Crown land over part of a Lot do not require Western Australian Planning Commission consent.

4 Lease of Crown Land

Section 47 of the Land Administration Act 1997 allows for a lease for a purpose in accordance with the reserve purpose and section 48 of the LAA allows for a lease for a purpose different to the reserve purpose but compatible with a future intended purpose.

Leases created under s.47 may be mortgaged whilst a s.48 lease cannot be mortgaged.

While it is possible for a Lease of Crown land by the State of Western Australia to be registered over a managed reserve, it is preferred that where a lease is required over a managed reserve, it be created by the management body where they have the power to lease.

5 Pastoral Leases

Pastoral leases granted under the Land Administration Act 1997 cannot be converted to freehold.

All pastoral leases granted under the Land Act 1933 expired in the year 2015. Lessees of pastoral leases granted under the LAA may apply for a renewal of their lease at any time during the period twelve months before the date 10 years before the expiry of the pastoral lease.

5.1 Temporary Care, Control and Management of Pastoral Lease

If the Pastoral Lands Board is of the opinion that a pastoral lease has been abandoned, or otherwise left without proper care, control and management, it may recommend to the Minister that the Board be authorised to assume temporary care, control and management of the lease.

Where a Temporary Care, Control and Management Authorisation document is registered against
the lease, it takes priority over all other charges against the lease. Consent of the Pastoral Lands Board is required for any further encumbrances against the lease and the Authorisation document must be removed prior to any Transfer or Surrender of the lease.

The Authorisation document does not remain on the Crown title upon forfeiture or expiration of the lease.

6 Option to Renew a Lease

A lessee’s right arising from an option or series of options to renew the lease are protected by registration. Any further instruments lodged on the lessor’s title after the expiry of the initial term, but within the period of an option, must either show the lease as an encumbrance or provide evidence that the options were not exercised. Anyone searching a lease to ascertain whether it has expired should also consider the effect of section 13 of the Commercial Tenancy (Retail Shop) Agreements Act 1985.

The best evidence would be a statutory declaration by the lessee that the option was not exercised and that neither the lessee or any transferees or assignees of the lessee are in possession of the premises. A declaration in similar terms by the lessor but including details of the lack of availability of the lessee to make the declaration previously referred to, will be considered on its merits.

Registration will only protect options to renew the lease of the original premises. Options to extend the lease to additional premises are better protected by a caveat (as to the area of the extension).

7 Option to Purchase

A lease may contain a provision granting the lessee the right in certain circumstances to purchase the fee simple of the leased premises from the lessor. The registration of that lease does not necessarily protect the lessee’s option and it would be recommended that a caveat be lodged, claiming an interest based on the option to purchase.

8 Covenants by the Lessee

Section 92 of the TLA sets out implied covenants which apply, whether written into the lease or not, unless expressly negativled. Briefly, these are:

- to pay the rent, rates and taxes; and

- to keep the property in good repair and yield up the property on termination of the lease.

9 Powers of the Lessor

Section 93 of the TLA sets out implied powers of the lessor. Briefly these are:

- to inspect the leased premises at reasonable times; and

- where the rent is in arrears for one month, to re-enter upon the premises and take possession thereof.
10 Short Form of Covenants

Section 94 of the TLA provides for the use of short forms of covenants in the drafting of any lease. The Twelfth Schedule to the TLA sets out the short and long forms of covenants.

Where the short form of covenant is used, the lease is construed as if the long form of covenant has been used. Exceptions and qualifications may be added to the short form of covenant with a similar effect on the long form of covenant.

11 Memorandum of Common Provisions

A Memorandum of Common Provisions containing the covenants and contractual obligations of the parties to the lease may be lodged at Landgate, in the same manner as a Memorandum of Common Provisions of a mortgage. Please see DOC-06 Memorandum of Common Provisions.