

Priority Notices; their application to leasing transactions

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Worthwhile read for: Landlords, Land Owners, Property Managers

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Recently, HopgoodGanim Lawyers assisted a client in a commercial transaction that included the grant of leases over several premises, from several different landlords. To provide greater protection to our client, who was incurring considerable costs in the commercial transaction, HopgoodGanim Lawyers registered Priority Notices with the Queensland Titles Office.

The *Land and Other Legislation Amendment Act 2017* (Qld) gave legislative effect to a move by the Queensland Registrar of Titles toward national consistency by substituting part 7A of the *Land Title Act 1994* (Qld). Although principally intended as a replacement for settlement notices (which had limited effect), the Priority Notice has been expanded to preserve the priority of instruments, which affect a lot (or an interest in a lot) that are intended to be lodged. Please note, references to section numbers throughout are to the *Land Title Act 1994* (Qld).

A Priority Notice may be deposited “*by... a person who is, or will be, a party to an instrument that is to be lodged*” (section 139(1)(a)) and that instrument “*will affect the lot or an interest in the lot*” (section 139(1)(b)).

A proposed lessee, being a person who will be a party to an instrument that is to be lodged (a lease), which instrument affects an interest in the lot, may lodge a Priority Notice.

A proposed lessee may consider lodging a Priority Notice:

1. upon receipt of a draft lease from the lessor;
2. upon signing a Heads of Agreement; or
3. even earlier, during lease negotiations between the parties.

Fundamentally, a lease is not effective to pass the interest in the leased premises until signed. However, as dealings are registered on title in the order that they are lodged and registered interests have priority in the order of registration and over unregistered interests, in some circumstances, it would be beneficial to lodge a Priority Notice to:

1. give notice of the lessee’s future interest in the lot; and
2. to protect the priority of the lease when lodged on title.

This is particularly important where:

- the lessee may have paid significant key money or a lease deposit (that may or may not be refundable);
- the lessee is undertaking expensive relocation and incurring consultation costs regarding its fit-out; and/or
- the proposed lease is a condition of a business sale agreement or similar transaction.

A lessee may have some comfort in proceeding with those actions, knowing that their interest is protected (to a degree).

While current, a Priority Notice prevents registration of any instruments affecting the lot or an interest

in the lot other than:

- the instrument/s specified in the Priority Notice;
- an instrument the applicant has consented to;
- an instrument of transfer or release of mortgage executed by a mortgagee whose interest was registered before the Priority Notice was deposited;
- an instrument lodged before the Priority Notice was deposited;
- a caveat; and
- another instrument that, if registered, would not affect an interest the subject of the Priority Notice (section 140).

A Priority Notice is current until one of the following:

- the instrument/s specified in the Priority Notice have been lodged;
- sixty days from the lodgement date (unless extended) in accordance with section 141(1);
- withdrawn by the applicant (section 143(1));
- removed by order of the Supreme Court (section 144(1)); or
- cancelled by the Registrar (section 145(1)).

Additionally, in contrast to the old settlement notices, a party can lodge unlimited, successive Priority Notices.

Section 146 *Land Title Act 1994* (Qld) provides that an affected person can apply to the Supreme Court for compensation for loss suffered or damage caused due to:

- an unreasonable deposit of a Priority Notice;
- an unreasonable extension of a lodged Priority Notice; or
- a Priority Notice that is not withdrawn within a reasonable time; and
- those actions prevent registration of other instruments. In addition to compensation, exemplary damages may be awarded by the Court (section 146(3)(a)).

Lessees are cautioned to ensure they are not frivolous or dismissive in their use of Priority Notices.

As a lessor, particularly of larger properties (shopping centres, office buildings and industrial estates), the right of a proposed lessee to lodge a Priority Notice can cause difficulties including:

- complications when proposing to refinance or create a mortgage over the lot;
- incorrectly lodged Priority Notices (that is, lodged over the wrong premises or all of the lot) which delays registration of other instruments;
- arguments with proposed lessees (whether before or after heads of agreement are signed) using Priority Notices as a means of forcing negotiations over lease terms.

Although the legislation provides a mechanism for obtaining an Order to remove the Priority Notice (section 146), any litigation is expensive and time consuming. Lessors should therefore consider whether it is appropriate to include in lease documents (letter of offer, heads of agreement and/or agreement for lease) that:

- the lessee is expressly prohibited from lodging a Priority Notice until a draft lease has been presented or at some later stage in negotiations; and
- if the lessee has lodged a Priority Notice, they must present to the lessor within, say, two business days of lodgement, a copy of the lodged Priority Notice and the Registration Confirmation Statement.

Regardless, all lease documents should include a lessee covenant to remove the Priority Notice within a reasonable time, upon written request of the lessor, to alleviate those difficulties listed above.

Please contact our Commercial Property team with any questions you may have about Priority Notices or your leasing requirements generally.

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