



VGSO Blog - Lease vs Licence - What difference does it make? Friday, 4 September 2015

The State and its agencies own and manage vast tracts of land in Victoria, much of which offers potential economic or other benefits to the private sector. For example, the State often makes land and buildings available to a business operator for the purposes of running its business or a community group so it can hold meetings, workshops and/or training sessions. Alternatively, the State may wish to make land available for use by the private sector in the furtherance of particular significant policy objectives.

Preliminary considerations

- Before deciding on the nature of the tenure which your department or agency should grant over a piece of land, it is important to step back and ask a few questions. For example, you should consider:
- Who wants to occupy the land and for what purpose?
- Does the Government want to make the land available to achieve a particular policy objective?
- Does achieving that purpose require exclusive possession or is a lesser form of tenure sufficient?
- Does the future tenant need to put up the tenure as security for raising capital so they can finance the project?
- Will the department or agency or third parties need to access the land while it is occupied?

The answers to these questions will assist with determining which form of tenure you should offer to the prospective occupant and the terms and conditions of that tenure.

When is a lease appropriate?

A lease is an agreement between an owner of land and a tenant which grants a right of exclusive possession to the tenant. This means the tenant can exclude the whole world, including the landlord, from accessing the land for the term of the lease as long as the tenant complies with its obligations under the lease agreement. Even if a tenant breaches a condition of the lease and risks 'forfeiting' the lease, a leasehold tenant can apply to the Court for the equitable remedy of relief against forfeiture. If the tenant is successful, the Court will permit the tenant to remain on the land, subject to prompt rectification of the existing breaches and compliance with other conditions.

The rights under a lease will attach to the leased land - if the tenant assigns the lease to a third party, for example if the tenant sells its business, the third party will also enjoy the same right of exclusive possession of the leased premises.

Another aspect of a lease is that it is capable of being registered on the title to the land. Registration of the lease also enables registration of any mortgage granted over the leasehold interest. So if a tenant has granted a mortgage to a bank as security for money borrowed against the lease and the tenant defaults in its mortgage repayments, the bank will be able to access the important statutory powers applicable to a mortgagee in Part IV of the Transfer of Land Act 1958.

These include a mortgagee's power of sale, the power to take possession of the land and a right to seek an order for foreclosure. As a result, banks may be more willing to provide finance to a tenant with a registered leasehold interest.

These aspects may make a lease an attractive option to someone who wants to operate a business from the premises and needs to raise investment capital for its start up and who also wants the flexibility of later transferring the leasehold interest, along with the business, to a third party.

Of course, a downside for a tenant is that a higher commercial value is likely to attach to the lease consistently with the powerful bundle of rights held by a leasehold tenant.

When might you grant a licence?

Like a lease, a licence grants a right to a party to access and occupy land subject to the terms of the licence.

Unlike a lease, the occupant under a licence does not have the right to exclusive possession of the licensed premises - in other words they may have to share occupation with the licensor and third parties or may only be able to use the licensed area at certain times or days.

Another key difference of a licence to a lease is that the rights of a licensee are not assignable to a third party (unless the agreement specifically permits this). Additionally, a licence interest cannot be registered on title.

Therefore, a licence is likely to be suitable where an occupant needs specific rights to an area of land, water or airspace, but it is not necessary or appropriate for the occupant to have the right to exclude the rest of the world from the premises. Examples of where

licences are commonly used in Government include granting a right to a telecommunications company to install a mobile telecommunications tower on State owned land and allowing community groups to use school buildings and facilities.

As property law experts within Government, the VGSO Property Team is well placed to assist you with land use arrangements and other property issues. Please contact:

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