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Leasing traps & tips for local government

By Ellie Quartermaine

Introduction

Local government plays a vital role in the disposal of freehold and Crown land by way of leases to community groups, commercial entities and other persons for commercial and public purposes. However, the leasing of property is complex and can have significant consequences if careful analysis of factors such as classification of tenure, the proposed use of the leased premises as well as legislative and other legal considerations are not correctly addressed. This article discusses these factors in detail and provides suggestions as to how these factors may be considered by a local government prior to entering into a lease.

Land tenure and power to lease

Freehold land

A freehold interest in land is considered as the most absolute form of ownership and means the ownership of the land in fee simple for an unlimited period of time. As the registered proprietor of the land, the owner has the right to lease or otherwise dispose of the land without any restriction, subject to relevant legislative considerations and existing interests and encumbrances registered on the Certificate of Title.

Crown Land

Crown land is all land in Western Australia which is not the subject of a freehold Certificate of Title or a memorial or grant registered under the *Registration of Deeds Act 1832* and currently makes up approximately 92% of land in Western Australia. Crown land is owned by the State of Western Australia, but local governments and some statutory authorities can be granted the power to manage Crown land by way of a vesting order or management order.

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Under section 46 of the *Land Administration Act 1997 (LAA)*, the Minister for Lands has the ability to grant a management order vesting a person or persons with the care, control and management of a reserve for the same purpose as that for which the relevant Crown land is reserved under section 41 and for purposes ancillary

or beneficial to that purpose. The management order is registered under the *Transfer of Land Act 1893* and creates a statutory right, subject to certain conditions, for the care, management and control of the Crown land.

However, it is important to note that not all Crown land is subject to a management order and not all management orders grant the local government the power to lease. Therefore, before engaging in any lease negotiations concerning Crown land, it is essential to consider:

- (a) Whether there is a management order granted to the local government;
- (b) Whether that management order is subject to any conditions; and
- (c) Whether the management order contains the power to lease.

In the absence of any of the aforementioned, the local government does not have the right to lease the Crown land and must request the revocation and/or creation of the appropriate management order.

Description of the leased premises

Once the land tenure and local government's power to lease has been identified, consideration must be given to a proper and accurate description of the premises in the lease. Where the premises comprises portion of a lot, the relevant portion must be accurately described by either a narrative description (for example by reference to a building or portion of a building on the land) or an annexed plan. If the lease is intended to be registered, then a surveyed plan of the premises may be required.

In practice, we often see instances where the intention of the local government has been to lease a portion of land comprising of a building and surrounding area, but has instead entered into a ground lease. A ground lease is a lease of the land itself, which may contain existing buildings and other improvements or be undeveloped. Under a ground lease, the tenant is often entitled to develop or construct improvements on the land for its own use and ownership. As the improvements on the land will remain the property of the tenant for the duration of the lease, insurance, repair and maintenance obligations are the responsibility of the tenant.

This is in contrast to a lease of a building and surrounding area whereby the ownership of any fixtures constructed on the premises will, in most cases, remain the property of the landlord. In that case it is typically the landlord's responsibility to take out and maintain building insurance and undertake necessary structural repairs, unless such repair is necessary as a result of the tenant's negligent act or omission.

As the allocation of risk and responsibility in relation to ownership, insurance, repair and maintenance obligations is substantially different between a ground lease and a lease of land with a building or other improvements, it is essential that the lease accurately describe the premises, its precise extent and whether it encompasses any existing buildings or improvements.

Identifying the permitted use

It is important to consider what the lessee's intended and permitted use of the leased premises will be in order to ensure compliance with any conditions relating to the land and also to determine whether the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (**Retail Shops Act**) will be applicable to the lease.

The Minister for Lands will not consent to a proposed lease over a reserve if the permitted use under the lease is not consistent with the permitted purpose of the reserve as identified in the management order. However, the Minister for Lands has the power to change the purpose of a reserve pursuant to section 51 of the LAA.

The Retail Shops Act imposes rights and obligations on parties to a “retail shop lease”. Section 3 of the Retail Shops Act defines a “retail shop lease” to mean a lease that provides for the occupation of a retail shop, being:

- (a) any premises situated in a retail shopping centre that are used wholly or predominantly for the carrying on of a business; or
- (b) any premises not situated in a retail shopping centre that is used wholly or predominantly for the carrying on of a retail business,

by a business that wholly or predominantly involves the sale of goods by retail or a specified business, subject to certain exceptions.

The applicability of the Retail Shops Act will effect multiple aspects of the lease including but not limited to:

- (a) rent review;
- (b) operating expenses and outgoings;
- (c) permitted length of term and exercise of options;
- (d) redevelopment of the premises;
- (e) provision of a disclosure statement;
- (f) incorporation of a tenant guide; and
- (g) responsibility for legal costs in connection with the preparation of the lease.

Failure to comply the requirements of the Act may result in the lease being invalid and the landlord being liable to the tenant for compensation and other remedies. It should therefore be determined at the outset of preparing a lease whether the lease constitutes a “retail shop lease” as defined under the Retail Shops Act.

Required consents

In regard to Crown land, section 18(2) of the LAA provides that a person must not, without the prior written approval of the Minister for Lands, grant a lease of Crown land in a managed reserve. Therefore, in order for a local government, as the management body of the land, to grant a lease of Crown land, the consent of the Minister for Lands must first be obtained. Importantly, the Minister for Lands cannot grant retrospective consent. Therefore, the lease’s commencement date must not precede the date on which the Minister for Lands’ consent is received.

The Western Australian Planning Commission’s approval will be required pursuant to section 136 of the *Planning and Development Act 2005* if the lease is for a portion of freehold land and for a term exceeding 20 years, including any option to renew, subject to certain exceptions. This requirement is due to the fact that a lease over a portion of land which exceeds 20 years may be considered a de facto subdivision of the land. However, the Commission’s approval is not required for leases of Crown land nor long term leases to occupy buildings where such buildings are or will be constructed in accordance with a building permit issued by the relevant local government authority. This includes leases of a building which include a surrounding area, such as a car park, that is necessary or desirable for the convenient occupation of the building.¹

¹ Section 136(4) of the *Planning and Development Act 2005*

Registration of leases

Generally, the benefit of registering a lease is to ensure that the lease constitutes a legal interest and can be enforced at law. Section 86(1A) of the *Transfer of Land Act 1893* protects unregistered leases with a term of less than five years. However, the Act permits the registration of leases over freehold land with a term exceeding 3 years and leases of Crown land for a term of 12 months or more² and in the instance a lease with a term in excess of 5 years is not registered at Landgate, the lease will only be recognized by the Courts as an equitable lease.

Equitable leases can only be enforced in the Court's equitable jurisdiction. Equitable remedies are discretionary and the party seeking to rely on an equitable remedy must have 'clean hands'. The notion of 'clean hands' requires the party claiming relief to not be in default or otherwise have acted unreasonably in order for the Court to assist and provide relief. It is therefore beneficial for both parties that the lease be registered in order to ensure its terms are legally enforceable.

Further, section 19 of the LAA provides that a dealing on Crown land will not be effective until it is registered at Landgate. Therefore, it may be argued that leases which are over Crown land may not be valid or enforceable until registered. However, it is important to note that the effect of section 19 on the enforceability of Crown leases at law or equity has not been finally determined by a court to date.

Conclusion

Local governments should ensure that the key factors discussed above are appropriately addressed in any lease of local government land in order to protect local government interests and minimise the possibility of lease disputes arising. Whilst this article is intended to provide general information in relation to common leasing issues to assist local governments, we recommend legal advice be obtained in relation to each lease transaction independently in order to ensure that local government interests are adequately protected.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For further information please contact Ellie Quartermaine by email to equartermaine@mcleods.com.au.



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² Sections 91 and 81Q of the *Transfer of Land Act 1893*