

# Leasing policy for Victorian Crown land

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# 1. Definitions

|                         |  |
|-------------------------|--|
| Agreement to lease      | An agreement under which the Minister undertakes to grant a lease to a proponent upon fulfilment of pre- conditions set out in the agreement.  |
| Crown land              | Lands reserved and/or administered under the <i>Crown Land (Reserves) Act 1978</i> , <i>Land Act 1958</i> and <i>Forests Act 1958</i> .  |
| Crown land reserve      | Crown land reserved under section 4 of the <i>Crown Land (Reserves) Act 1978</i> .   |
| Delegate                | A person or position authorised by the Minister to carry out responsibilities under the <i>Crown Land (Reserves) Act 1978</i> , <i>Forests Act 1958</i> or <i>Land Act 1958</i> .  |
| DELWP                   | Department of Environment, Land, Water and Planning.   |
| Direct negotiations     | Exclusive negotiations between a Crown land manager and a proponent without first undergoing a competitive process.  |
| Land manager            | Department Environment, Land, Water and Planning (DELWP), Parks Victoria, trustees or committee of management appointed under the <i>Crown Land (Reserves) Act 1978</i> .  |
| Lease                   | A contract by which one party (the landlord or lessor), in consideration of rent, grants exclusive use and possession of land to another party (the tenant or lessee) for a specified purpose and for a specified term.  |
| Minister                | Refers to the Minister responsible for the <i>Crown Land (Reserves) Act 1978</i> , <i>Forests Act 1958</i> and <i>Land Act 1958</i> or the Minister's authorised delegate.   |
| Public land values      | Land values which should be preserved and maintained for the benefit of present and future generations because of their environmental, historic, recreation, tourism, natural resource, social or cultural significance, or because of some special strategic value (such as access, fire management purposes or Crown land reserve linkages.) |
| Renewal of lease        | The grant of a new lease to an incumbent tenant.   |
| Standard lease document | A lease document produced in a generic format that has been approved by the Minister.  |

## 2. Objective and Scope

Crown land is a valuable public asset and it is essential that it is managed wisely to maximise social, environmental and economic benefits to the State. With the increasing pressures of population growth and environmental stress, the Victorian Government recognises the importance of having a robust and relevant policy for leasing Victoria's Crown land.

The objective of this policy is to provide a framework for the leasing of Crown land by formalising 'Crown Land Leasing Principles' at a State-wide level. These principles will guide land managers, existing tenants and prospective tenants, help inform decision making around leasing and improve community awareness of government policy for the leasing of Crown land.

This policy accompanies the *Crown Land Leasing Guidelines - Leasing Legislation 2012*. The guidelines are the first in a series addressing the key statutory, policy and procedural requirements associated with Crown land leasing.

### 2.1 Scope

This policy applies to leasing under the:

- *Crown Land (Reserves) Act 1978*;
- *Forests Act 1958*; and
- *Land Act 1958*.

It does not apply to leases administered under other Acts, including the *National Parks Act 1975*. The principles established in this policy however may be applied to Crown land leased under the *National Parks Act 1975* and other Acts.

This policy came into effect on 13 October 2010 and was updated in May 2018.

## 3. Strategic context

### 3.1 Leasing Crown land in Victoria

About one-third of Victoria (approximately 8 million hectares) is Crown land. About 7.4 million hectares comprises national parks and state forest managed under the *National Parks Act 1975* and the *Forests Act 1958*. The balance is reserved under the provisions of the *Crown Land (Reserves) Act 1978* or unreserved under the *Land Act 1958*.

The Minister for Energy, Environment and Climate Change is responsible for the administration of the *Crown Land (Reserves) Act 1978*, the *Forests Act 1958* and *Land Act 1958*. These Acts enable leases to be granted over Crown land.

A lease is an agreement in which the landlord agrees to give a tenant the exclusive right to occupy land for a specific term, subject to the lease terms and conditions. A lease differs from a licence in that a licence gives permission to the holder to carry out a permitted activity without the right of exclusive occupation.

Most leasing of Crown land in Victoria is on land reserved under the *Crown Land (Reserves) Act 1978*. Reserved Crown land supports a wide range of uses such as sports grounds, parks, foreshores, hospitals and municipal buildings. There are approximately 7,400 Crown land reserves in Victoria and these are managed by a diverse range of land managers including local government, statutory bodies or government agencies (such as Parks Victoria). Land managers are appointed as a committee of management or trustees under the *Crown Land (Reserves) Act 1978*.

DELWP also manages a portfolio of leases granted under the *Land Act 1958* and the *Forests Act 1958* for a range of commercial, recreational and other uses.

Leasing enables the community to use, benefit from and enjoy Crown land, particularly through the provision of recreational, cultural and sporting facilities as well as for commercial uses such as restaurants, caravan parks and marinas. It is also available to government for major projects on Crown land such as hospitals or other important public infrastructure.

### 3.2 Legislation governing Crown land leasing in Victoria

#### **Crown Land (Reserves) Act 1978 (Vic)**

The *Crown Land (Reserves) Act 1978* enables reservation of land for a range of public purposes, stipulates how reserved land must be dealt with and prescribes some governance arrangements for committees of management appointed to manage reserved land.

The leasing provisions in the *Crown Land (Reserves) Act 1978* are used to authorise a wide range of leases for commercial and non-commercial purposes on reserved Crown land.

#### **Land Act 1958 (Vic)**

This Act deals with sale, grants and occupation of Crown land in Victoria. Examples of 'occupation' include leases for community, commercial and industrial purposes.

#### **Forests Act 1958 (Vic)**

This Act establishes the framework for the management, use and conservation of forests. It also contains provisions for leasing and licensing of reserved forest by the Minister.

### 3.3 Legislation that affects the grant of Crown land leases

#### **Planning and Environment Act 1987 (Vic)**

This Act establishes a framework for planning the use, development and protection of land in Victoria. Crown land tenants need to comply with relevant local planning schemes and obtain any required planning permits associated with the use of leased premises.

### **Coastal Management Act 1995 (Vic)**

This Act provides for coordinated strategic planning and management for the Victorian coast. Under the Act any proposal to use or develop coastal Crown land requires written consent from DELWP.

### **Transport Integration Act 2010 (Vic)**

This Act establishes a requirement for land managers to consider the transport policy framework when performing any functions that might have a significant impact on the transport system.

### **Retail Leases Act 2003 (Vic)**

This Act is the main governing legislation for retail leasing in Victoria. Leases for retail premises on Crown land granted under Crown land legislation must comply with the requirements of the *Retail Leases Act 2003*.

### **Aboriginal Heritage Act 2006 (Vic)**

This Act provides for the protection and management of Victoria's Aboriginal heritage. It establishes a system of management plans and permits which Crown land tenants need to comply with when carrying out specified activities that may impact on Aboriginal cultural heritage.

### **Native Title Act 1993 (Cth)**

This Act establishes a mechanism for determining claims for native title and provides for a process of authorising new leases. The granting of leases on Crown land must comply with the requirements of the Act.

### **Traditional Owner Settlement Act 2010 (Vic)**

This Act provides for the making of agreements between the State and traditional owner groups to:

- recognise traditional owner rights and confer rights on traditional owner groups for access to, ownership or management of certain public land; and
- determine decision-making rights and other rights that may be exercised in relation to the use and development of the land or natural resources on the land.

## **3.4 Leasing Principles**

There are 3 principles that must be followed when leasing Crown land. Each principle is outlined in detail in the next section.

**Principle 1 - To provide benefits to the public through leasing**

**Principle 2 – To ensure consistency and transparency in leasing**

**Principle 3 – To manage leased Crown land in an ecologically sustainable manner**

## 4. Principle 1

### Provide benefits to the public through leasing

Crown land is controlled by the State for the benefit of the Victorian community. Decisions to lease need to consider social, economic and environmental outcomes that may result from a lease proposal.

Granting exclusive occupation of Crown land under a lease should not occur, except where it can be justified there are benefits to the community from the lease.

Leasing should support the development of healthy communities and, where appropriate, promote investment and encourage innovation. Both future and present needs and opportunities should be considered. Benefits may be short or long term; direct or indirect.

Government policy and programs provide a guide in determining community benefits. Applications to lease Crown land will be assessed by land managers on their merits and an assessment will be made of potential benefits and burdens.

#### Guidance

Factors to be considered in assessing an application include, but are not limited to:

#### Community

- distribution of benefits to the community;
- promotion of public health and wellbeing;
- improvement of sporting, recreational and cultural facilities;
- protection of public land values;

#### Economic

- attracting investment;
- creation of employment;
- promotion of tourism;
- economic return to the State or land manager;

#### Continuity

- support for the implementation of government policies or government programs;

#### Innovation

- introduction of new skills or improved technology;
- provision of new services;

#### Environment

- protection of natural assets; and
- biodiversity and environmental impacts.

## 5. Principle 2

### Consistency and transparency in leasing

To ensure consistency and transparency in leasing processes, and to adhere to legislative requirements, a two-stage process applies to the granting of leases. First, all lease proposals require the Approval in Principle (AIP) of the Minister to lease before a land manager agrees or commits to lease Crown land. Second, all leases require the Minister's approval of the terms and conditions of the lease which must align with the permitted purpose and conform to government policy and statutory requirements.

Generally, a competitive selection process will apply to the leasing of Crown land, although in special circumstances direct negotiations will be permitted. Lease allocation processes must be fair, open and impartial.

#### 5.1 Approval to lease

##### 5.1.1 Approval in Principle to lease

Proposals to lease must be submitted to DELWP for Approval in Principle (AIP) by the Minister. The AIP process requires the Crown land manager or proponent to prepare a detailed submission for assessment by the Minister.

In the case of leases issued under the *Crown Land (Reserves) Act 1978*, the AIP process fulfils legislative requirements to obtain the Minister's written approval to the grant and purpose of the lease. In some cases, the Minister's decision to proceed may need to be presented to Parliament as set out in the *Crown Land (Reserves) Act 1978*.

The AIP process provides the Minister with the ability to:

- properly review a lease proposal before the parties commit to a lease; and
- assess if the proposal aligns with the principles of leasing Crown land.

The Minister may direct the Crown land manager to modify aspects of a proposal to reflect legislative or government policy requirements. This process provides certainty in the planning and implementation of a lease proposal.

##### 5.1.2 Approval to terms and conditions of the lease

Subject to the requirements of the AIP being achieved and a lease agreement being prepared, all lease agreements require the Minister's approval of the lease terms and conditions, regardless of whether the lease is granted by a committee of management, trustees or the Minister.

##### 5.1.3 Granting/entering a lease

Only the Minister can enter a lease for a term greater than 21 years. However, leases up to 21 years under the *Crown Land (Reserves) Act 1978* can be entered into or granted by the Minister or a committee of management/trustees.

##### 5.1.4 Costs

Unless the Crown land manager decides otherwise, the lease proponent is responsible for the costs associated with the preparation of the AIP submission and the negotiation and preparation of the lease.

The level of detail provided in the AIP submission will vary depending on the scope of the lease proposal and the issues involved. It must provide sufficient detail for the Minister to make an informed decision. The Minister may require the land manager or proponent to provide additional information.

## Guidance

The lease submission must include the following:

### Background

- details of the land proposed to be leased, including the current use of the land;
- purpose of the lease and activities proposed under the lease;
- details of any proposed capital works program;
- timetable for implementation of the lease proposal;
- evidence that the proponent has the experience, capacity and competence to manage the lease;
- evidence that the proponent has the capacity to fund any developments and meet lease commitments (rental, maintenance expenses etc);
- evidence that the proposal is financially viable;
- information addressing ministerial approval to the grant and purpose of the lease if the lease proposal relates to a Crown land reserve;
- details of any other statutory approvals processes associated with the proposal;
- details of consultation processes proposed, to gauge community views on the proposal;
- evaluation of potential risks;

### Leasing Principles

- benefits of the proposal (Principle 1);
- the proposed method of allocating the lease and a justification for the selected process (Principle 2);
- the proposed terms and conditions of the lease (Principle 2) including:
  - lease term, including how this has been determined; and
  - rental structure; and
- how the lease proposal addresses ecologically sustainable management principles (Principle 3).

The level of detail provided in the AIP submission will vary depending on the scope of the lease proposal and the issues involved. It must provide sufficient detail for the Minister to make an informed decision. The Minister may require the land manager or proponent to provide additional information.

## 5.2 Allocating leases in a fair and equitable manner

### 5.2.1 New leases

A competitive selection process will apply to the leasing of Crown land unless direct negotiations would better achieve an outcome which serves the community interest. A competitive selection process may be conducted through a formal lease tender process or expression of interest process. Any other competitive selection process must first be approved by the Minister.

The selection of tenants through a competitive selection process is particularly relevant to commercial leasing. A competitive process improves probity, and is better able to address conflicts of interest (real or perceived) and transparency in the decision-making process.

It also provides an opportunity for interested parties to compete for a lease (the closed nature of direct negotiations creates a perception that private interests could influence or be seen to influence the outcome of a selection process).

Where a competitive selection process is followed it must be conducted in accordance with the following Department of Treasury and Finance (DTF) *Guide-to-evaluation-negotiation-and-selection*, *Guide-to-specification-writing* and *Guide-to-Supplier-feedback*. It is important that all prospective tenderers receive consistent information about existing assets, capital improvement/expenditure expectations and rent estimates and are aware of the criteria that will be used to evaluate the tenders.

The tender specification should clearly outline a complaints management process with appropriate escalation triggers. The DTF *Guide-to-complaints management* provides a useful schedule of timelines for managing complaints. Where a complaint relating to a delegated lease cannot be resolved to the satisfaction of both parties, DELWP would act as the review facilitator rather than the Victorian Government Procurement Board.

There are special circumstances where it may be impractical to use a competitive process and direct negotiations are an acceptable way to achieve an outcome which serves the community interest. The guidance section below lists some of the circumstances where direct negotiations are appropriate. Land managers should fully examine whether a direct negotiation process is the most suitable course of action and explore the alternatives before seeking Ministerial approval to negotiate directly with a proponent.

Regardless of whether a competitive or direct negotiation lease allocation process is used, it must be fair, open and impartial.

### 5.2.2 Renewal of lease to incumbent tenants

A proposal to grant a new lease to an incumbent tenant may be considered by the Minister subject to the same considerations as a new lease. Generally, proposals to issue a new lease to an incumbent tenant will not be considered until at least 50% of the term of the lease has expired.

Any further term of lease to an incumbent tenant will be through the grant of a new lease. A variation of lease cannot be used to extend the term of a lease to an incumbent tenant.

### 5.2.3 Ministerial approval

Regardless of the lease term, the final decision to allocate a lease through a direct negotiation process instead of a competitive allocation process rests with the Minister at the time of the AIP consideration. The Minister may require as a condition of the AIP that the Crown land manager or the proponent undertake a public notification process of the intention to negotiate directly.

## Guidance

### Direct negotiations

Circumstances that may justify direct negotiations include:

- where, after an assessment of the site, it can be determined that direct negotiation with a prospective tenant would maximise benefits to the community and/or government (for example the site is currently occupied by a community group that has acted as a good tenant); or
- when the current market rental value of a property is low relative to the cost of conducting a competitive process; or
- when an appropriate competitive process has not produced a satisfactory outcome; or
- when it is clear beyond reasonable doubt that there is only one prospective tenant for a property asset; or
- when the lease is short term and does not include obligations on the tenant to carry out capital works; or
- where there is evidence that conducting a competitive process may place a project of regional or state significance at risk; or
- where the only practical access is available from adjoining land owned by the proponent; or
- when it can be demonstrated that the process of selection will be open, fair and impartial.

## 5.3 Ensuring leases contain appropriate terms and conditions

Leases will contain terms and conditions which align with the purpose of the lease, conform to government policy and statutory requirements and reflect an appropriate balance between the needs of the tenant and responsibility of the landlord as manager of the Crown land.

To ensure a consistent approach to the leasing of Crown land, standard leasing documentation will be used by Crown land managers unless otherwise approved by the Minister. Land managers will ensure tenants comply with tenure conditions by establishing suitable governance structures and monitoring processes.

If a formal lease cannot be entered into until certain events have occurred (for example, planning approvals are obtained or capital works carried out), the Minister or land manager, with the approval of the Minister, may offer a prospective tenant an Agreement to Lease.

### 5.3.1 Lease term

#### 21-year lease terms

A term of 21 years is considered sufficient to accommodate the purposes of most leases. The primary considerations when determining the term of any lease are the nature and significance of the proposed permitted use and development under the lease. Factors that will be considered when assessing the term of a lease include:

- the ability of the prospective tenant to fund, resource and manage the lease;

- the level of investment to be made by the tenant under the lease;
- the purpose of the lease and activities proposed under the lease; and
- the minimum term permitted under the *Retail Leases Act 2003* if the lease is for retail purposes.

### **Lease terms greater than 21 years**

It is recognised that for large-scale projects of regional or state significance, where the associated costs are inevitably higher, a longer-term lease may be required. The term granted must be appropriate to that use and not necessarily the maximum lease term permitted under the relevant Act.

#### *Crown Land (Reserves) Act 1978 and Forests Act 1958*

The Minister will only consider departures from the 21-year maximum term of lease under the *Crown Land (Reserves) Act 1978* and *Forests Act 1958* in accordance with the criteria specified in these Acts. These Acts provide that the Minister may grant leases for a term of more than 21 years, but not more than 65 years, if the Minister is satisfied that:

- the purpose of the lease is not detrimental to the reserve purpose;
- the proposed use, development, improvements or works specified in the lease are of a substantial nature and of a value which justifies a longer-term lease; and
- the granting of a longer-term lease is in the public interest.

#### *Land Act 1958*

The *Land Act 1958* provides for the granting of leases on Crown land up to 99 years. Under the *Land Act 1958*, the Minister may grant a lease:

- for a term exceeding 21 years but not more than 50 years for commercial and industrial purposes;
- for a term exceeding 50 years but not more than 99 years for commercial and industrial purposes where the Minister is satisfied that the building structure or improvement made or to be made is of a substantial nature and of a value which justifies the term; or
- for a term not exceeding 99 years for any Crown improvement of a substantial nature.

### **Guidance**

#### **Business case requirements for lease terms greater than 21 years (any Act)**

To enable the Minister to assess lease terms greater than 21 years under the *Crown Land (Reserves) Act 1978*, *Forests Act 1958* and *Land Act 1958*, a business case must be prepared which provides comprehensive details of:

- the strategic importance (state or regional significance, or provision of essential services) of the proposal;
- the environmental, social and economic costs and benefits of the lease proposal;
- the capital outlays proposed and term proposed to amortise investment;
- any reasons why the investment cannot be amortised within a 21-year term; and
- any other matters relevant to the Minister's assessment.

The onus will be on the proponent to provide the information in a business case.

### **Statutory exclusions from maximum lease terms**

A maximum lease term of 21 years applies to land reserved under the *Crown Land (Reserves) Act 1978* to conserve rare or threatened species, significant plant communities, or valuable habitat for populations of significant fauna.

### **5.3.2 Options**

Leases may provide for options for further terms. The total of the initial term plus any option term(s) cannot exceed the maximum lease term specified in legislation.

### **5.3.3 Variation of lease terms and conditions**

The Minister may consider a proposal for variation to the existing terms and conditions of a lease. The decision to vary a lease rests solely with the Minister.

If a proposal for variation of a lease involves substantial changes to the lease, a surrender of the lease and grant of a new lease will be required. Substantial changes to the terms of the lease would include but are not restricted to:

- the term of the lease;
- the area leased; or
- the lease purpose.

### **5.3.4 Rent and rent valuations**

#### **Commercial and private uses**

All commercial leases will be subject to a market valuation by the Valuer General Victoria or a registered valuer. This valuation will determine the market value of the land, considering all restrictions, regulations and conditions specified in the lease document. It is preferred that rental be reviewed at three-yearly intervals during the term of the lease. The requirement for market rental valuation extends to tenants who, under the terms of their lease, undertake a mixture of community and commercial uses.

In some limited circumstances, consideration may be given to alternative rental models which will be dealt with on a case by case basis. These include:

- revenue sharing reflecting a proportion of the profit/turnover generated from the leased premises;
- case by case negotiation: the rental arrangement forms part of the bid for the lease as part of a competitive allocation process; and
- pricing formula: site rentals are calculated on a predetermined formula.

#### **Community use/commercial use**

Community use tenants who are permitted under their lease to conduct commercial activities may be eligible for a rent subsidy. To be eligible, tenants must meet certain criteria such as:

- under the terms of its lease, the tenant provides or promotes community, cultural, sporting, recreational or similar facilities or activities;
- tenants apply their profits toward promoting their objectives and prohibit the payment of any dividend or amount to their members; and
- activities undertaken on the leased land are not in direct competition with the same or similar services in the local area of interest.

In determining the rental, the Crown land manager may consider such matters as the tenants' gross annual turnover in operating the leased premises, and provision of public benefits as outlined in Principle 1.

## **Community use**

Community use tenants that, under the terms of their lease, provide solely community or social benefits will pay a minimum rent based on cost-recovery reflecting the preparation and administration of the lease. Annual minimums will be reviewed periodically to ensure that they are appropriate.

The 'burden of proof'/justification in relation to a tenant being granted a rental subsidy from market rent or paying a minimum rent lies with the tenant.

### **5.3.5 Ownership and maintenance of existing and new improvements**

Unless the tenant is required under the lease to remove the improvements or structures at or before the end of the lease, all improvements and structures on the leased premises become the property of the Crown at the end of the lease term. Generally, it is policy that all structures and improvements are to be maintained by the tenant at the tenant's cost during the lease term.

### **5.3.6 Power to sub-let**

All sub-leases and sub-licences made under a lease must be consistent with the purpose of the head lease and require the consent of the land manager in its capacity as landlord. If the lease is granted by a committee of management or trustees, the committee of management or trustees must obtain the written consent to sub-let from the Minister before the tenure is entered into.

### **5.3.7 Assignment and mortgage**

All assignments or mortgages of leases require the consent of the land manager in its capacity as landlord. If the lease is granted by the committee of management or trustees, the committee of management or trustees must obtain the Minister's prior consent to assign or mortgage the lease.

### **5.3.8 Insurance**

All leases will require that the tenant hold public liability insurance. A minimum cover for public liability insurance will be provided under the lease. The land manager or the Minister may determine that other forms of insurance may be required under a lease as appropriate.

### **5.3.9 Financial security**

Generally, leases should contain provisions to ensure compliance with obligations under the lease, such as payment of rent or maintenance and repair. This may take the form of a bond, bank guarantee or similar instrument.

### **5.3.10 Over holding**

If a lease expires and the tenant remains in occupation of the leased premises with the consent of the landlord, the holdover provisions in the lease will apply for, and not exceed, the period permitted by the relevant Act (if any).

## 6. Principle 3

### Ecologically sustainable lease management

Victoria's natural environment is diverse, unique and precious. Victorians treasure the environment not just for its own sake, but for its indispensable value to individuals and communities. The economic, social and cultural benefits to the community from the leasing of Crown land depend on the long-term sustainable management of this important natural resource. These benefits should be available to current generations without compromising the ability of future generations to enjoy similar benefits.

The Victorian Government's *Protecting Victoria's Environment – Biodiversity 2037* established directions towards achieving environmental sustainability. Proposals to lease Crown land will need to demonstrate the application of these directions including:

- responding to the challenge of climate change;
- maintaining and restoring our natural assets;
- providing opportunities for Victorians to connect with nature;
- using resources more efficiently; and
- reducing biodiversity and environmental impacts.

#### Guidance

##### **Adapting to the future impacts of climate change**

Land managers and proponents will need to consider the potential impacts of climate change when developing a lease proposal, including measures to address or mitigate the potential impacts of climate change on land and buildings over the life of the lease.

##### **Maintaining and restoring our natural assets**

Proponents will need to:

- assess then minimise the potential impacts on biodiversity;
- prevent degradation and loss of native vegetation by complying with native vegetation management regulations;
- manage pest plants and animals through pest control programs; and
- protect native flora and fauna by creating buffers.

## **Using resources more efficiently and reducing impacts**

Proponents will need to:

- commit to improve the environmental efficiency of new and existing buildings on Crown land;
- commit to the use of an Ecologically Sustainable Development program or rating tool;
- use relevant Green Building Council of Australia Green Star Tools in major projects;
- improve the efficiency of water and energy use;
- reduce or minimise greenhouse gas emissions;
- reduce waste and maximise use of renewable or recyclable materials; and
- implement best-practice stormwater management.





