



Retail Leases of Crown Land

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Presentation Content

- What is (and what's not) Crown land
- The essential statutory provisions governing Crown tenures
- The types of issue faced by Crown landlords and tenants – at commencement, during the term, and at reversion
- The major policy directions applicable to Crown tenures
- Areas in which policy deficiencies still need to be addressed

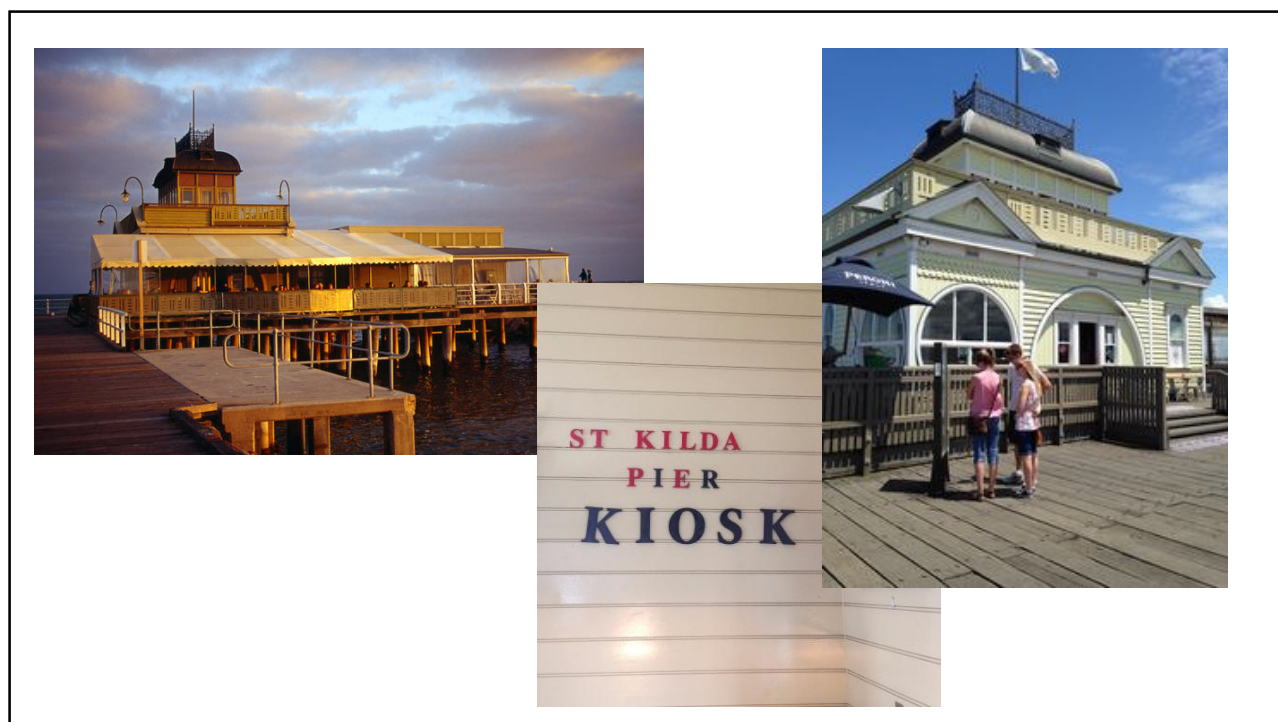
What is Crown land?

- Land which is not Freehold – neither Torrens title nor Old Law
The Transfer of Land Act 1958, Subdivision Act 1988 and Sale of Land Act 1962 do not apply
- Reserved Crown Land – *Crown Land (Reserves) Act 1978*
- Unreserved Crown Land – *Land Act 1958*
- ‘Site-specific’ Crown land – *e.g. Melbourne Cricket Ground Act 2009*
- Government Roads – *Land Act 1958* or *Road Management Act 2004*
- Alpine Resorts – *Alpine Resorts (Management) Act 1997*
- National Parks – *National Parks Act 1975*; Reserved Forest – *Forests Act 1958*; Land ‘vested’ in Authorities under various Acts

Reserved Crown Land

Crown Land (Reserves) Act 1958

- Crown land can be reserved for various purposes. There is no necessary connection between Reserve purposes and Planning Scheme Zones
- Reserves may (but need not) be placed under a C’tee of Management – the relevant municipality, Parks Victoria, a citizens’ committee etc
- Section 8, CL(R) Act – any lease or licence of reserved Crown land must be made under some Act which ‘explicitly and not merely by implication’ authorises such lease or licence – otherwise it is ‘absolutely void’
- Same test can be assumed to apply to unreserved Crown land
- *Retail Leases Act 2003* does not pass this ‘section 8’ test
- Thus retail leases of Crown land must be under one of the Crown land Acts, but may be subject to *Retail Leases Act 2003*



What is (and what's not) a Retail Lease

- 'Retail premises' are defined by the *Retail Leases Act 2003* sec 4...
"premises used wholly or predominantly for ... the sale or hire of goods by retail or the retail provision of services"
- Various exceptions in the Act itself; further exceptions by Ministerial determination
- Many tenures of Crown land are licences, not leases
- Thus many Crown tenures are for retail purposes, yet do not fall under the RL Act

The Ministerial Determinations

Section 5(1)(c), Retail Leases Act

- Premises not constituting retail premises (may apply to Crown land) include...
- Leases longer than 15 year term
- Leases for community, cultural, sporting or recreational purposes
 - made by a Council prior to 1 Jan 2015
 - made by any landlord after 1 Jan 2015
- Leases where the tenant is a listed company

Mornington Yacht Club

- Crown land managed by Shire of Mornington Peninsula
- The head lease from Shire of Mornington Peninsula is for a yacht club, and does not fall under the Retail Leases Act



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- Crown land manager
- The head lease from the Yacht Club, and does not fall under the Retail Leases Act
- BUT...
A sub-lease from the Yacht Club to the Rocks Restaurant does fall under the Retail Leases Act



The Landlord-Entity

Managers of Reserved Crown Land

- The ultimate landlord is the Crown, normally represented by the Minister for E&CC, whose agent is DELWP
- Exception – Crown land vested in (*e.g.*) VicTrack, Water Authorities, Minister for Education etc, with leasing powers under their own Acts
- Under CL(R) Act, GinC may delegate to Trustees (*e.g.* Melbourne gardens)
- Under CL(R) Act, Minister for E&CC may delegate to Committees of Management, Councils, bodies 'established for a public purpose'
- Councils can in turn sub-delegate to sec.86 Ctees, Local Govt Act
- Under various Acts, Minister for E&CC can assign management responsibility to Parks Victoria

The Landlord-Entity

Managers of Reserved Crown Land



- Special case: Fitzroy gardens, Carlton Gardens, Yarra Park, etc
- GinC has appointed 'Joint Trustees' being Minister for E&CC and City of Melbourne
- The Joint Trustees have appointed the City of Melbourne as Committee of Management
- The Joint Trustees are landlord for the Fitzroy Gardens kiosk

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Statutory Provisions governing Crown Land
Crown Land (Reserves) Act 1958

- Various provisions for leases and licences
- The nominal landlord is the Committee of Management, but is ultimately the Crown, represented by the Minister responsible for the CL(R) Act, whose agent is DELWP
- Sec 17 allows licences (not leases) for purposes 'consistent with' the purpose of the reservation
- Sec 17B allows licences for purposes 'not detrimental to' the purpose of the reservation
- Sec 17D allows leases for purposes 'not detrimental to' the purpose of the reservation

Crown Land (Reserves) Act 1958
Complications

- Leases and licences will be negotiated by the Committee of Management, but may need two approvals from the Minister (in effect, DELWP)
 - 'grant and purpose' approval – confirming that the land is available for the proposed use
 - 'terms and conditions' approval – agreeing to the choice of tenant, rental, term etc
- In some cases the Minister's 'grant and purpose' approval must lie before Parliament
- This rigmarole must be adhered to every time the lease or licence is renewed

Crown Land (Reserves) Act 1978
The 'not detrimental' test

- Two further qualifications to the 'non detrimental' test on Crown land reserved for:
 - conservation purposes
 - parks and gardens
 - protection of the coastline
- 1. a lease may issue only if it is not inconsistent with an adopted recommendation of the Victorian Environmental Assessment Council (VEAC, formerly the LCC)
- 2. The Minister's consent must lie before Parliament where it is subject to disallowance.

Crown Land (Reserves) Act 1978
The 'not detrimental' test



A florist's shop in a hospital built on Crown land reserved for hospital purposes. A florist is not consistent with the reservation purpose – but could hardly be described as detrimental to it. This lease or licence will pass the test.

The 'not detrimental' test
What about...

- A florist shop in a hospital (Crown land reserved for hospital purposes)?
- A native plants nursery in a flora reserve (Crown land reserved for the preservation of species of native plants)?
- A lock-up for a surf-board hire business on the ocean beach (Crown land reserved for protection of the coastline)?
- A licensed restaurant in the Fitzroy Gardens (Crown land reserved for the purpose 'Fitzroy Gardens'?)
- A licensed restaurant on Port Phillip Bay foreshore (Crown land reserved for unspecified public purposes)?

Statutory provisions governing Crown land
Other Acts

- *National Parks Act 1975* – very few (site-specific) provisions for leases
- *Coastal Management Act 1995* – on 'coastal Crown land' CMA consent must be obtained in addition to tenure under e.g. CL(R) Act or National Parks Act
- *Native Title Act 1993* (C'wealth) – on Crown land a lease may require an Indigenous Land Use Agreement (ILUA)
- *Planning and Environment Act 1987* – will the proposal pass the 'Associated with the public land use' test?
- *Local Government Act 1989* – a Council may choose to exhibit under sec 223, but this is perhaps unnecessary

Major policy directions applicable to Crown tenures
DELWP's 'Three Leasing Principles'

1. Benefits to the public
 - community benefits,
 - wider economic benefits,
 - support of government programs
2. Consistency and transparency
 - competitive selection, especially for commercial leasing, unless 'special circumstances' justifying direct negotiations
3. Ecological sustainability
 - adapting to climate change
 - maintaining / restoring natural assets
 - efficient resource usage and environmental impacts

Issues at Commencement

- Are we issuing a lease or a licence? Many Crown 'licences' exhibit all the essential features of a lease (this has never been tested!)
- Development capital is often provided by the developer/tenant, not by the landlord
Ministerial Determination 2004: leases which impose substantial financial obligations on the tenant are exempt from Retail Leases Act
- Setting the rent...
 - commercial tenants – 'full market rental'
 - community tenants – nominal rentalBUT – what about a mixed commercial/community arrangement?

Issues at Commencement

- It's almost impossible to consider unsolicited tenders
- Consents sequence? Planning permit, Coastal Management Act consent, Crown land lease, Native Title... which comes first?
- DELWP insists on its own standard documentation; all variations to be assembled in an appended schedule
- What term? A business case and risk assessment may be required to justify longer terms
- Bank Guarantees where major capital works are to be undertaken by the tenant
- 'Agreement to lease' prior to formal commencement of lease

Crown Land (Reserves) Act 1958 Issues during the Term

- Variations may require revisiting some or all of the initial approvals (even the Parliamentary scrutiny)
- Landlord's consent for assignments and sub-tenancies. The normal 'which shall not be unreasonably withheld' clause is omitted, but in reality can be implied (this has never been tested!)
- Mortgages are possible (the collateral is the leasehold interest, not the land). A useful source of capital for Crown land upgrades
- Performance guarantees (otherwise only remedy is determination)

- Insurance – tenant must hold insurance (but in the event of the fire or flood, who collects the pay-out?)



Crown Land (Reserves) Act 1958 Issues at Reversion

- Ownership of improvements: *Our Club members paid for the pavilion, now you claim it's yours!?*
- Responsibility for site remediation... "all improvements to be removed and the site restored"
- Roll-over: *I've been a good tenant, why are you evicting me?*
- Unamortised investments: *You allowed me to spend \$\$ just a few years back, now I must abandon it??*
- What's a fixture, what's a chattel?



Issues at Reversion Fixture or Chattel?

- *State of Victoria v Tymbook Pty Ltd*, VCAT, 2008
- Chandelier affixed to ceiling for 80 years by chain, tackle, electrical wiring...
- The Crown: it's a fixture
- Tymbook: it's a chattel
- VCAT: *Caselaw considers ownership prior to annexation, the nature and intention of the annexation...*
- *In this case it's a chattel*

Crown Land (Reserves) Act 1958 Policy Deficiencies

- Rents for mixed commercial / community tenures
- No accounting for implied subsidies
- No recognition of Tenants' Residual Interest
- Poor Mid-term monitoring

Policy Deficiencies

Community Or Commercial?

- Theory: commercial tenants pay 'market' rental; community tenants pay nominal rental
- What about the sporting club with a licensed restaurant?
What about the yacht club with a ship repair business?
- A nominal rent is an implied subsidy – but it's not visible, and is not brought to account
- Should the benefit of an implied subsidy flow through to a commercial sub-tenant?

Policy Deficiencies

No Recognition of Tenant's Residual Interest

- On Crown land the capital investment is often made by the tenant, not the landlord
- Mid-term recapitalisations or upgrades are unattractive to the tenant
- Deficient solutions:
 - 1 – renew the term without going to tender
 - 2 – don't reinvest, let the premises run down
- The better solution: recognise tenant's residual interest



Why did Arthurs Seat Chairlift fall down? And then fall down again? A 21 year lease was extended (without competition) to 42, and then to 63 – to accommodate a tenant whose investment had not been fully amortised.

Policy Deficiencies Poor Mid-term Monitoring

- Typically, the landlord-entity (DELWP or Council as Committee of Management) will commit resources and exercise care at the commencement of a lease, and then put the file away.
- Typically, the management of the tenant-entity will change as the years pass. The new management will lose sight of the terms and conditions of the lease
- Situations may arise that could render the lease void, and expose both landlord and tenant to litigation

