

Russell Kennedy Government CPD

Session 5. Divesting Leasehold and Disposal of Freehold Interests: Considerations for Government

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Webinar housekeeping

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- We have BD tech support live to assist with any technical issues
- Use the chat function for any comments/technical issues
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- There will be a post webinar survey link sent at the end of the webinar. We value attendee feedback
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Disclaimer

The information contained in this presentation is intended as **general commentary only** and should not be regarded as legal advice

Should you require specific advice on the topics or areas discussed, please contact the presenters directly

Introduction



Introduction

➤ Policies

- Summary of Applicable Policies
- Look at Policies

➤ Disposal of land in context

- Proposed sale or lease of land
- Assurance and probity
- Due diligence
- VGV and VLM
- Sale of land
- Leasing of land
- Government to government
- Sale Options

➤ Options for divesting leasehold interests

➤ Questions



Policies



Overview of Policies

➤ Various Policies and Guidelines apply to Victorian Government Agencies

- Landholding Policy and Guidelines
- Land Transactions Policy and Guidelines
- Crown Land Assessment Policy and Guidelines

➤ Not exhaustive

- Land Use Policy and Guidelines
- Market-led Proposals Guideline
- And More

➤ Policy vs Guidelines

- Most documents contain both Policies and Guidelines
- Policies identify objectives. Guidelines outline steps to achieve objectives.

➤ Applies to (most) Victorian Government Agencies

Look At: Landholding

➤ Agencies must not hold (or purchase) land unless permitted by Policy

- Permitted where land contributes directly to current or future service delivery outcomes
- Permitted where approved by relevant Minister (or Board/CEO for Public Entities)

➤ Agencies must review

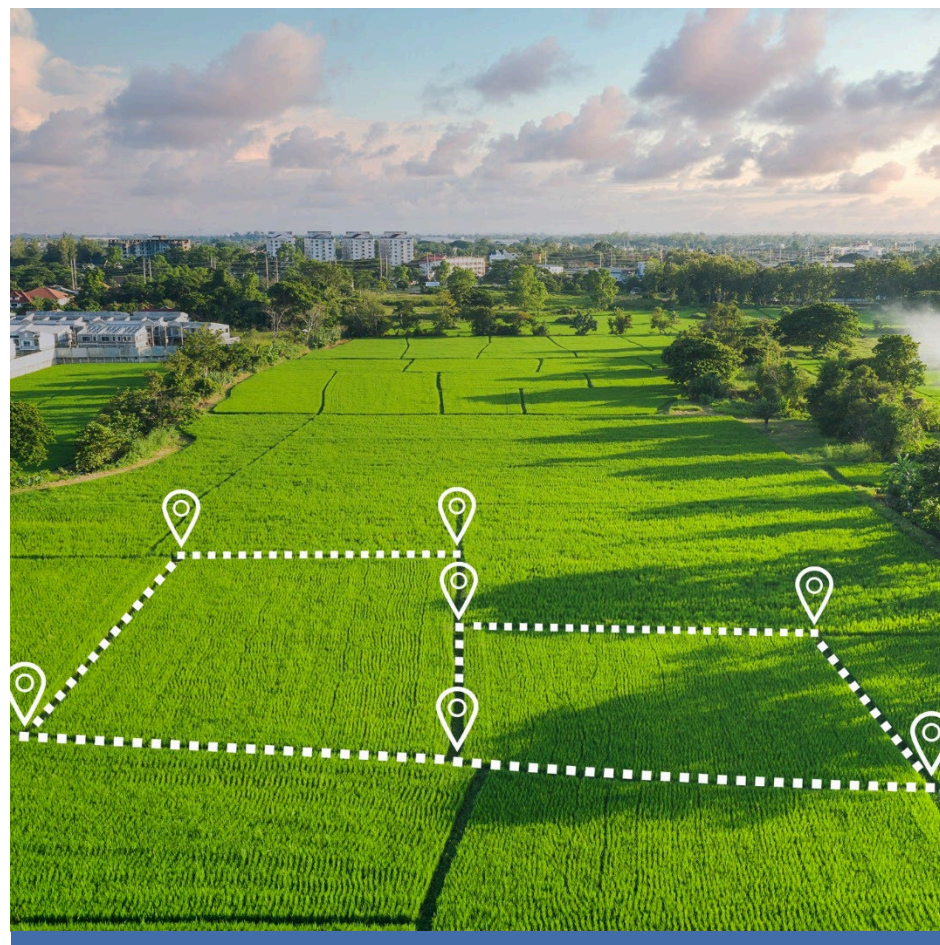
- Maintain accurate dataset of controlled land (other than some Crown land held by DELWP)
- Annual review to justify retention of land, utilisation of land, and any surplus land (excludes most Victorian Public Entities, other than Police)
- Annual report submitted to DTF

➤ First Right of Refusal

- Surplus land must be notified to other Agencies (via DELWP) for expressions of interest
- Available for 60 days for agencies to submit EOIs, and minimum of 30 days good faith negotiations between disposal and submitting Agencies
- Submitting Agencies can be a State, local, or Commonwealth government level
- If no submissions received, or no terms agreed, land can be disposed of (in accordance with Land Transactions Policy and Guidelines)
- Crown land subject to strategic assessment

Look At: Land Transactions

- Applies to any sale or leasing (and acquisition) of land by Agencies
- Number of processes
 - Assurance and Probity
 - Due Diligence
 - Victorian Government Land Monitor
 - Valuer-General Victoria
 - Sale specific processes
 - Lease specific processes
 - Government to Government transactions
- Look at in more detail shortly



Look At: Strategic Crown Land Assessment

➤ Applies to Crown Land

- unreserved or reserved Crown land and Crown leasehold land which has been declared surplus
- not freehold land

➤ Strategic Crown Land Assessment

- “SCLA” undertaken by DELWP or by assessors approved by DELWP
- Identifies status of traditional owner / native rights and public land values
- Provides information to landholding Minister and Minister for Environment, Climate Change and Water to consider whether to retain or dispose of land

Disposal of Land



In Context: Proposed Sale or Lease of Land

➤ Policy steps

- Assurance and Probity
- Due Diligence
- Victorian Government Land Monitor
- Valuer-General Victoria
- Sale specific processes
- Lease specific processes
- Government to Government transactions

➤ Potential options / Consideration in disposal

In Context: Assurance and Probity

➤ Accountability

- Confirm legislative power
- Check necessary internal and external approvals
- Delegations
- Clearly understood roles, responsibilities, authorities and accountabilities of officers

➤ Transparency

- Processes involved must evidence appropriate transparency, equity in dealings, confidentiality, probity assurance, and management of conflicts of interest
- Ethical and professional conduct

In Context: Due Diligence

- Pre-disposal due diligence conducted by landholding Agency
 - **Legal Review:** Check legal status of land (ownership, encumbrances), and legal implications of proposed transaction.
 - **Survey:** Boundaries, access, encroachments etc. identified and confirmed.
 - **Planning:** Appropriate planning provisions to support valuation at highest and best use.
 - **Contamination:** Consider and adequately assess contamination risk and status.
 - **Pollution:** Agencies must not sell *polluted* land .
 - **Cultural Heritage:** Assess cultural heritage, and potential future impacts.
 - **Public Values (Crown land):** Undertaken as part of SCLA.
 - **Native Title and Traditional Owner Rights (Crown land):** Undertaken as part of SCLA.

- Assists Agencies to identify and manage risks
- Extent of due diligence will vary from site to site

In Context: VGV and VGLM

➤ Valuer-General Victoria

- Generally, sale or lease must for at least current market value / rent
- VGV valuation required (either by VGV, or by valuer approved by VGV)
- “Check” valuation required for non-government transactions where value \geq \$750,000 excl GST
- Valuation usually on highest and best use, taking into account any proposed sale/lease terms
- Confidential – not for distribution to counterparties
- Valuations expire, and must be extended or updated if transaction not entered into by expiry date

In Context: VGV and VGLM

➤ Victorian Government Land Monitor

- Provides support and guidance on appropriate processes
- Helps ensure relevant policies and guidelines are being fulfilled to the appropriate extent
- Approval must be obtained for sales or leases with a transaction value \geq \$750,000 excl GST (as assessed by VGV)
- If approval not required, Agency still required to adhere to Policy and Guidelines
- VGLM does not grant exemptions to some sale or lease processes, but provides recommendations to Minister for Planning



In Context: Sale of Land

➤ Public sales process

- **Licensed real estate agent:** For sale of land by public auction or tender.
- **Reserve Price:** Must not be less than VGV valuation.
- **No prior sale:** Auction or tender must close.
- **Tender:** If tender, submissions must be lodged with Agency or legal representatives (not real estate agents) and opened by tender panel.
- **Deposit and Settlement Date:** Preferred terms are 10% deposit (with tender, 1% upfront with 9% on tender acceptance), and balance on 30, 60, or 90 days. Alternative terms must be discussed with **VGV** to ensure no impact on valuation.
- **Reserve not met - negotiate:** If reserve not met, Agency may negotiate with highest bidder/respondent to try meet reserve price.
- **Reserve not met – private sale:** If negotiations unsuccessful, private sale permitted at reserve price on terms no less favourable, OR on alternative price/terms supported by VGV and VGLM (excluding Crown land, which requires Governor in Council approval).

In Context: Sale of Land cont.

➤ Public sales process cont.

- **Appointment of agents / consultants:** Agents and consultants must be independent, and sign appropriate conflict of interest declarations. Consultants should carry appropriate insurance.
- **Expressions or Registrations of Interest:** Qualify as public process. Suitable where there are significant or complex development outcomes, potentials, or barriers, or relevant policy outcomes.

For complex transactions, Agencies must engage a probity advisor and/or auditor.

VGV valuation not required prior to EOI and ROI, but required prior to entering into documentation. Recommended that VGV and VGLM engaged as early as possible, to avoid unexpected delays or impediments.

In Context: Sale of Land cont.

- Exemptions from public sales process
 - Government to government transactions
 - Market-led or Integrated Development Opportunity proposals
Separate Market-led Proposals Guideline applies
 - Unreserved Crown land can be sold by private treaty, but VGV and other processes still apply
 - Others, e.g., certain leasehold railway land, sale to lessee with option to purchase, or as approved by Minister for Planning



In Context: Leasing of land

➤ Leases by Agencies

- **Current market rent:** As assessed by VGV
- **No option to purchase:** Except to a government agency
- **Low value commercial leases:** VGV can approve a schedule of lease use types and value, in lieu of requiring individual valuations for each transaction
- **Low value non-commercial leases:** Landholding Minister can delegate approval to Secretary/CEO/Director of Housing to lease below current market rent for non-commercial leases (where rent does not exceed \$10,000 for a parcel). If no delegation, Ministerial approval required.
- **No VGLM approval**

➤ Exemptions

- Agency specific and broad exemptions apply to various lease transactions

In Context: Government to government

➤ Inter-agency

- Public process not required
- VGV valuation still required, on highest and best use of land
- VGLM approval required for transactions valued \geq \$750,000 excl GST
- Transactions must be documented
- Nominal consideration allowed for certain transactions (e.g., between transport Agencies)

➤ Inter-government

- Public process not required
- VGV valuation still required, usually on highest and best use of land
- Restricted use sales (with lower VGV valuations) permitted with approval of landholding Minister
- Zoning must be appropriately zoned unless approved by Minister for Planning
- VGLM approval required for transactions valued \geq \$750,000 excl GST

In Context: Sale Options

Sale Structures

- Sale strategy shaped by a number of factors: value; location; policy objectives etc.
- Standard tender or auction appropriate for lower value, less complex, or straight sales
- EOI, ROI, or Request for Tenders may be more suitable where land is high value, has high development potential, or anticipates a high degree of proposed future involvement or integration with government or government strategy
 - Consider sales strategy early
 - Determine key objectives and assess what sales strategy is likely to best yield those outcomes
 - Consider market conditions and appetite

Options for Divesting Leasehold Interests

➤ Divestment options

- Surrender
 - Generally there is no 'right' to surrender a lease. The ability to do so will depend on the lease terms.
 - Once a surrender is agreed upon, the parties are released from performing their obligations under the lease from the agreed surrender date.
 - General considerations for surrenders: What is the required timing for the surrender? What is the cost of surrendering the lease? Does the surrender affect any third parties? What releases should be agreed to? Should there be conditions precedent to the surrender?
 - Comparison to other divestment options.

Options for Divesting Leasehold Interests

➤ Divestment options

- Assignment
 - Tenant has the ‘right’ to assign as an incident of its proprietary interest in the property. However, most leases will restrict the tenant’s ability to assign a lease.
 - Assignment has the effect of transferring the tenant’s interest to the new tenant. The release of the outgoing tenant from its obligations under the lease post assignment will depend on the terms of the lease, or agreement of the parties, unless the *Retail Leases Act* applies.
 - General considerations for assignment: What are the terms of the lease pertaining to assignment? If landlord consent is required, has it been obtained? Is the outgoing tenant to be released from its obligations after assignment? Are there appropriate indemnities in place?
 - Comparison to other divestment options.

Options for Divesting Leasehold Interests

➤ Divestment options

- Sublease
 - Tenant has the 'right' to sublet as an incident of its proprietary interest in the property. However, most leases will restrict the tenant's ability to sublet a lease.
 - A sublease is a separate lease by the tenant to the subtenant. As such, the tenant remains liable to the landlord under the terms of the head lease and the subtenant has obligations to the tenant under the sublease.
 - General considerations: What are the terms of the head lease? If consent is required, has it been obtained? Is the sublease for part of the premises or the whole of the premises? Is the use permitted by the head lease? The term must be for one day less than the term of the head lease. What happens to the sublease if the head lease ends? Consider obligations arising under Victorian Government policies and guidelines.

Options for Divesting Leasehold Interests

- Consider divestment strategy early
- Determine key objectives and assess what divestment strategy is likely to best yield those outcomes
- Consider market conditions and appetite



Q&A – Your Russell Kennedy Contacts



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