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LAWYERS

LICENSES TO USE CROWN LAND



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November 2006

A recent case referred to me, shows very clearly the extreme care licensees need to exercise in placing reliance on licences to use Crown land. The case involved the purchase of a substantial business asset and the goodwill of the business conducted with the asset for a figure in excess of a million dollars. As a legal requirement, the owner of the asset and the related business, was required to hold a series of permits, licences and leases including a license to use a small area of adjacent Crown land. That licence was crucial to the operation of the business.

Without the permits, leases and licences, it is fair to say there would have been no goodwill at all. Without them, in order to operate the asset, it would have been necessary to move it to another location, probably interstate, with the likelihood that its continued operation there would be substantially less profitable than would have been the case at the existing site in Victoria.

The system requiring the owner of the asset to hold the permits, leases and licences involved had grown up over many years under a former, fairly benevolent government agency. It had issued the same documents for the same general purposes for many years but, more recently, before the ultimate demise of that agency, the purpose had become far more specialised and the number of participants in the industry had increased substantially. After the termination of the agency another agency had been awarded the same task. Its approach was more businesslike in that the documentation involved was far more exhaustive and specific and, as well, the annual fees for the permits and licences had risen quite spectacularly.

The client in fact owned quite a number of the same assets and the permits, leases and licences

necessary to go with them. Just what percentage of the price paid for each of the assets it had purchased could be attributed to the asset itself, the goodwill or the leases, licences and permits, had never been specified. It is fair to say, however, that without the licences, the cost of the package in each case would have been substantially less.

A licence, it has been held, is an authority to do something which would otherwise be inoperative, wrongful or illegal and in the case of the licences we are talking about to do it on specified Crown land. In the case under consideration, the licence was clearly more than a 'mere' licence revocable at the licensor's will. It did in fact have a specific term and a substantial annual licence fee was payable, and consequently unilateral revocation before the natural expiration of the term was out of the question. As I have already said it, together with the other documents, had been regularly renewed without question in the past and there had always been a clear expectation that the licence would be renewed unless the licensee was in breach.

The licence eventually ran out once again and after some time had elapsed during which, it appears that all similar licences had also run out, the licensor (the new agency) initiated a totally new regime. Leaving aside the reasons why that new regime was imposed, the net effect on the client was shattering. The landlord had decided that the number of licences to be issued should be sharply reduced and that each applicant should be limited to one licence only whereas the licensee had previously held three. It had also decided to establish a fairly complex procedure involving what was effectively a tender process in order to determine those to whom licences should be issued. In the result the client, for whom I did not then act, failed to obtain any licence at all as a result of the tender process but was able to negotiate one privately at a later date. The licensee was however reduced, overall, to only a third of the licences it held prior to the introduction of the new regime. This resulted in a substantial decrease in the client's commercial abilities.

Clearly, from the above, what constitutes a licence in the eyes of government agencies tends to vary from

agency to agency and use to use. This may be acceptable in the case of, say, grazing and even agricultural licences but is intolerable when extended to licences designed to enable the conduct of business on Crown land, particularly when substantial funds have to be outlaid in establishing the business in the first place.

The law already imposes different obligations on a licensor in respect of a 'mere' licence in comparison with a licence that is coupled with an interest and which is therefore irrevocable until its term or purpose has been fulfilled (otherwise than in the case of default). Licences under the *Land Act* 1958 or the *Crown Land (Reserves Act)* 1978 are normally limited to a term of three years after which they can be terminated or even re-issued to a commercial competitor.

As governments throughout Australia seek more and more to establish public – private partnerships and generally to remove unnecessary restrictions on business, it may be time to legislate a 'continuing' licence in respect of Crown land. Significant businesses, particularly those supplying tourist services in parks and other unalienated Crown land are all forced to rely on licences rather than leases to give them the right to use specified Crown land in the conduct of those businesses. Licences are used because, unlike leases they do not give the licensee any exclusive right of occupancy. Exclusive occupancy is almost invariably out of the question for a variety of reasons notably that the same land will need to be used by others and consequently cannot be leased exclusively to anyone.

A continuing licence might well comprise a right to the continued renewal of the term of the licence unless and until a Ministerial decision (incapable of delegation) approves that licence being brought to an end and the Ministerial decision has lain in either House of Parliament for a specified time without being challenged. By whatever means, those legitimately providing goods or services through businesses on Crown land the use of which is provided under a licence need as much ability as anyone else to plan the future of those businesses without at the same time acquiring any inappropriate right to remain there forever.

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