

Anglican Church Property Trust Diocese of Sydney

Guidelines for Leases and Licence Agreements

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Introduction

1. With the introduction of the *New Tax System* in July 2000 new rules have been adopted for the execution and administration of leases and licence agreements over property owned by the Church. In particular, the Property Trust has revoked all authorities previously given to churchwardens to sign licence agreements on its behalf. However, under amendments made to the Church Administration Ordinance 1990, the churchwardens of a church now have power to enter into licence agreements as principals, provided that certain conditions are met.

2. The purpose of this paper is to outline the rules about the execution and administration of lease and licence agreements over property owned by the Church.

Distinction between leases and licences

3. In common parlance, the terms "lease" and "license" are used interchangeably. However a legal distinction exists between leases and licences. In general -

(a) Under a lease the party given the right to use property (commonly known as the "lessee") is given the *exclusive* right of use. No other person (including the owner of the property) is able to use the property at any time without the lessee's consent. The amounts paid by a lessee under a lease are commonly termed "rent".

(b) Under a licence, a party given the right to use property (commonly known as a "licensee") is given a *non-exclusive* right of use. This means that others (including the owner of the property) can use the property at times when it is not being used by the licensee. At one extreme, a licence may be granted to a third party to use a hall on a one off occasion. At the other extreme, a licence may be granted to a licensee to use a hall on weekdays between specified hours for a child care centre. The amounts paid by a licensee under a licence agreement are commonly termed "licence fees".

4. The legal distinction between leases and licences is important.

(a) A lease is generally considered to give the lessee an interest in the property over which the lease is granted, whereas a licence agreement only gives the licensee a contractual right to use the property. Only the Property Trust, as owner of the property, may grant a lease.

(b) Land which is the subject of a lease is generally rateable under the Local Government Act 1993 whereas land which is the subject of a licence is generally not rateable.

The guidelines - a general summary

5. Generally speaking, the effect of the guidelines is as follows -

Leases

- The Property Trust, as owner of church property, will continue to be the party responsible for signing all lease documents (including Residential Tenancy Agreements and Management Agency Agreements). See paragraph 4(a) above.
- To ensure compliance with the *New Tax System* requirements (in particular the payment of GST), all rents and other payments made by the lessee under the lease must be paid to the Property Trust. There is an exemption in the case of some residential leases. See paragraph 15 below.

Licence Agreements - where the Property Trust is the licensor

- The Property Trust must sign all licence agreements where it is the licensor. The churchwardens no longer have power to sign licence agreements on the Property Trust's behalf.
- All licence fees and other payments by the licensee under a licence agreement in which the Property Trust is the licensor must be paid to the Property Trust.

Licence Agreements - where the churchwardens are the licensors

- The churchwardens may sign licence agreements in the circumstances permitted by clause 20A of the Church Administration Ordinance 1990. In those circumstances, the churchwardens will be the licensors.
- Where the churchwardens are the licensors, all licence fees and other moneys payable by the licensee are to be paid to the churchwardens.

6. The remainder of this paper explains the guidelines in more detail.

Leases

Power of the Property Trust to lease

7. The Property Trust can only grant a lease of property of which it is trustee where it is authorised by the trusts on which the property is held, or by a specific ordinance.

8. Clause 10(1) of the Anglican Church Property Trust Diocese of Sydney Ordinance 1965 (the "1965 Ordinance") also gives the Property Trust general power to lease property for a term not exceeding 10 years. However this power cannot be exercised if the trusts of the property do not permit the leasing of the property.

Property Trust's policies

9. The Property Trust has the following policies about the leasing of church property -

(a) Unless authorised by a specific ordinance, the Property Trust will not usually grant a lease for a term of more than 5 years, except where the property the subject of the lease is to be used commercially (such as a shop).

(b) If the relevant property is held on trust for the purposes of a church or parish which is experiencing financial difficulties, the Property Trust will not usually grant a lease for a term of more than 1 year unless there is a plan for the rationalisation of ministry and the lease furthers its implementation.

(c) All leases are to -

- (i) be on a commercial basis, and
- (ii) be in writing, and
- (iii) reserve a market rent, and
- (iv) include rent reviews at appropriate times.

(d) Except for the circumstances referred to in paragraph 11 below, a solicitor must be appointed to prepare the lease and act for the Property Trust. This requires that the Property Trust and the solicitor enter into a costs agreement (contact the Property Trust for further details).

(e) The Property Trust requires that all leases (other than residential leases) contain provisions to the following effect -

- (i) the lessee must effect and maintain during the term legal liability insurance of not less than \$5 million,
- (ii) where the lessee is to use the property for counselling or as a pre-school, kindergarten or child care centre, the lessee must effect professional indemnity insurance of not less than \$2 million,
- (iii) the lessee must pay or provide a bond equal to 3 months' rent by way of cash deposit or bank guarantee,
- (iv) the lease must contain the Standing Committee's social covenants (contact the Property Trust for further details),
- (v) the lease must contain a hold over clause (the Property Trust will not generally permit the holdover to continue for a period in excess of the original lease term),
- (vi) all building work to be undertaken on the property is to be fully documented in the lease,
- (vii) all rents and other payments must be paid to the Property Trust,
- (viii) the lessee must not use the property for any illegal purpose.

(f) Where the lease relates to a licensed or consecrated church building the requirements of the Use of Church Property Ordinance 1995 must be satisfied.

Submission of leases for execution

10. A lease which is submitted to the Property Trust for execution must be accompanied by each of the following -

(a) the written consent of the majority of the parish council (see pro forma attached), unless a specific ordinance authorising the lease was passed in the preceding 12 months,

(b) the written approval of the regional archdeacon,

(c) written evidence of the GST inclusive market value of the rent from a real estate agent or qualified valuer,

(d) a cheque for the document handling fee equivalent to 0.2% of the annual rent payable under the lease (minimum fee of \$200 and a maximum fee of \$1,000),

(e) except as referred to in paragraph 11 below, a certificate from a solicitor acting for the Property Trust confirming that the lease is in order for execution by the Property Trust (contact the Property Trust for further details).

11. Where the lease is a standard residential lease or another form of lease approved by the Property Trust, the lease does not need to be reviewed by a solicitor if there are no significant amendments or alterations to the form of lease.

Payment of rents

12. All rents and other moneys payable under a lease are payable to the Property Trust. The Property Trust will ensure that all GST obligations in relation to those payments are met.

13. The balance of the payments will be applied in accordance with any specific ordinance applying or if there is no such ordinance, in accordance with the trusts on which the land is held.

14. The churchwardens will continue to have responsibility for initiating and advising the Property Trust about rent reviews and the payment of outgoings.

15. Where the rent payable under a residential lease does not exceed \$750 per week the churchwardens of the principal church in the parish may collect the rent directly from the lessee (tenant) or managing agent if appointed. In this case the churchwardens will be responsible for ensuring that any GST obligations in relation to rental of the property including the payment of outgoings are met.

Licence Agreements - Where the Property Trust is the Licensor

Power of the Property Trust to licence

16. The comments made in paragraphs 7 and 8 above also apply to the granting of licences by the Property Trust.

Property Trust's policies

17. The policies referred to in paragraph 9 above also apply to licences to be granted by the Property Trust or licence agreements to be entered into by the Property Trust.

Submission of licence agreements for execution

18. The comments made in paragraphs 10 and 11 above also apply to the submission of licence agreements to the Property Trust for execution.

Payment of licence fees

19. The comments made in paragraphs 12, 13 and 14 above also apply to the payment of licence fees and other amounts payable under a licence agreement executed by the Property Trust.

Licence Agreements - Where the Churchwardens are the Licensors

Power of the churchwardens to licence

20. Under clause 20A of the Church Administration Ordinance 1990 the churchwardens may grant a licence to permit a person or organisation (the "licensee") to use real property of the church for a purpose not connected with the church if -

(a) the use of the property by the licensee is not prohibited by law or by the trusts on which the property is held, and

(b) the terms upon which the licensee is to be permitted to use the property are documented in a form last approved by the Property Trust, and

(c) the period during which the licensee is permitted to use the property does not exceed 5 years, and

(d) the amount payable by or on behalf of the licensee for the licence is not more than \$20,000 per annum, or such other amount as may be determined by the Standing Committee by resolution from time to time, and

(e) the grant of the licence has been approved in writing by the archdeacon of the region in which the church is situated, and the majority of the parish council of the parish.

21. The powers of the churchwardens under clause 20A are subject to the following provisions -

(a) *Clause 18 of the Church Administration Ordinance 1990* - Under this clause neither a church nor rectory can be used for a purpose not sanctioned by the minister. A church hall must not be used for any purposes not sanctioned by the minister and churchwardens acting together.

(b) *Part 3 of the Church Grounds & Buildings Ordinance 1990* - This part sets out rules concerning the persons who are permitted to officiate in churches, and rules about the use of churches.

(c) *Use of Church Property Ordinance 1995* - This ordinance sets out the specific rules which apply before a licensed or consecrated church building can be used by a church of another denomination.

Use must be lawful and consistent with trusts

22. For the purposes of the matters referred to in paragraph 20(a) above, the types of matters which need to be considered by the churchwardens include the following -

(a) Is the proposed use of the land by the licensee permitted by the zoning of the land on which the building is constructed? If there are doubts, the local municipal council should be consulted.

(b) Does the licensee intend to use the building for the purposes of "public entertainment" as defined in the Local Government Act 1993? If so, the relevant building must have been licensed for use for public entertainment or specific permission for the use obtained. If there are doubts as to whether a building can be used for "public entertainment" the local municipal council should be consulted.

(c) Is the licensee required to hold any authority or permit from a government authority to use the building in the manner proposed?

23. The Property Trust can provide information about the trusts upon which a property is held.

Form of licence agreement

24. For the purposes of the matter referred to in paragraph 20(b), the Property Trust has approved as generally suitable for use by churchwardens the following forms of agreement -

(a) Licence Agreement for the Use of an Anglican Hall or Rooms (excluding Church Building)

(b) Licence Agreement for the Use of an Anglican Site (excluding Buildings)

(c) Licence Agreement for Pre-schools, Kindergartens, Long Day Care Centres and Before and After School Child Care Centres

(d) Licence Agreement for the Use of an Anglican Hall by Another Denomination

(e) Licence Agreement for the Use of an Anglican Church by Another Denomination

(f) Licence Agreement for Casual (one off) Use of an Anglican Hall or Rooms (excluding Church Building)

(g) Licence Agreement for Use of an Anglican Hall or Rooms (excluding Church Building) as a Polling Place

25. The churchwardens should ensure they use the appropriate form of agreement last approved by the Property Trust. This can be checked by obtaining a copy of the appropriate form from the diocesan web page www.sydney.anglican.asn.au/synod or by contacting the Property Trust on 9265 1646.

26. A form of agreement will cease to be in an approved form if the churchwardens make any amendment to the agreement (other than the completion of the necessary details in the schedule to the agreement) which has not been specifically authorised by the Property Trust. As a general policy, the Property Trust will not agree to amendments which have the effect of reducing the insurance requirements and the application of the social covenants. If the churchwardens intend to use an approved form of licence without amendment, the agreement does not have to be submitted to the Property Trust for approval.

27. The churchwardens should consider whether additional provisions should be included in the agreement to meet the specific requirements of the licence and/or to further protect the interests of the churchwardens as licensor.

Use of property must not exceed 5 years

28. The term of any licence agreement signed by the churchwardens must not exceed 5 years. The 5 year period includes any option to renew the licence.

Amount payable under the licence

29. The amount payable under the licence agreement must not exceed \$20,000 per annum. This includes the licence fee and any other moneys payable by the licensee under the licence agreement.

Approval of Archdeacon and Parish Council

30. The churchwardens should obtain the written approval of the archdeacon and the majority of the parish council of the parish.

Other matters

31. If churchwardens choose to enter into a licence agreement using their powers under clause 20A, they will assume the legal obligations of the licensor under the agreement. Part of those obligations include ensuring stamp duty on the agreement is paid as necessary.

32. The Property Trust also expects that the churchwardens will -

(a) quote the relevant ABN of the parish or parish-related entity on both the licence and any tax invoice; and

(b) issue tax invoices to the licensee and collect the licence fee and other moneys payable under the licence (either directly or through the agent); and

(c) remit any GST to the ATO and also claim any input tax credits able to be claimed for expenses incurred in relation to granting the licence.

33. Where the churchwardens do not have power to grant a licence or do not wish to contract as principals the Property Trust will execute and administer the licence agreement. However the Property Trust will not generally execute and administer a licence agreement for casual one-off use or use of church property as a polling place even if the churchwardens do not have power to grant such a licence or do not wish to contract as principals. Where a licence agreement is required to be administered by the Property Trust, the procedures referred to in paragraphs 16 to 19 above apply.

If you have any questions about Guidelines for Leases and Licence Agreements please email us at infosec@sydney.anglican.asn.au

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