

Guide to leases

**This guide sets out the requirements to lodge:**

* a lease under section 66,
* a sub-lease under section 71,
* a variation of lease under section 67A,
* a surrender of a lease under section 69,
* a recovery of possession by a lessor under section 70,
* a full satisfaction, extinguishment and/or determination of a lease under section 106(1)(c) of the *Transfer of Land 1958* (TLA).

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Registering a lease/sub-lease – section 66 or 71 TLA

A lease in the approved form with a term greater than three years may be lodged for registration in the Register of land under section 66 of the TLA. A sub-lease in the approved form for a term greater than three years may be lodged for registration under section 71 of the TLA. There is no requirement that leases/sub-leases be registered in Victoria.

Documents required to register a lease/sub-lease

Electronic lodgment of leases/sub-leases

A lease is created electronically using the ‘Application to record an instrument – Lease – Transfer of Land Act – section 66’ as described in the [Guide to residual documents](https://www.land.vic.gov.au/land-registration/for-professionals/electronic-submission-of-paper-instruments). The essential terms of the lease must be set out in the electronic residual document, that is the lessor (relinquishing party), lessee (receiving party), leased land and leasehold estate in the respective panels with the commencement date, expiry date and rent set out under the additional details panel.

The electronic residual document is not an application form to be lodged with an attached paper lease or other lease agreement but is the approved form for a lease and forms the first page of the lease. It contains the operative words necessary to create a lease and is signed by both the Lessor and the Lessee. The Registrar will not register the document where a completed paper lease or other lease agreement is attached as an Image Instrument.

Additional covenants can be:

1. included in a Memorandum of Common Provisions (MCP) and once that is recorded, referenced in the additional details panel; or
2. included in the additional details panel including in combination with a [MCP](https://www.land.vic.gov.au/__data/assets/word_doc/0029/498044/Memorandum-of-common-provisions-91ATLA-V3.docx) referenced in that panel; or
3. set out in a supporting document and uploaded as an ‘Image Instrument’. Note: this must not be a completed lease.

Any lease diagram must be included in a supporting document as an ‘Image Instrument’.

A sub-lease is created electronically using the ‘Application to record an instrument – Sub-lease – Transfer of Land Act – section 71’ as described in the [Guide to residual documents](https://www.land.vic.gov.au/land-registration/fees-guides-and-forms). The above information applies to sub-leases.

Paper lodgment of leases/sub-leases

Similar to electronically lodged leases, the paper form constitutes the first page of the lease and contains the operative words necessary to create the lease (paper lease). The paper lease can be downloaded from the [Fees, guides and forms page](https://www.land.vic.gov.au/land-registration/fees-guides-and-forms). Covenants can be included in full in the covenant panel (followed by the executions) and/or refer to an MCP that has been recorded by this office. The paper lease must be lodged using the Generic Residual Document ‘Record – Notice – Transfer of Land Act – Section 104’ using an Electronic Lodgment Network. See the [Electronic submission of paper instruments](https://www.land.vic.gov.au/land-registration/for-professionals/electronic-submission-of-paper-instruments) page for more information.

The above information applies to paper sub-leases.

Drafting information

The information in this section is provided to assist in the drafting and preparation of leases/sub-leases that are lodged for registration and applies to both electronic and paper leases/sub-leases unless otherwise specified. This information also applies to any MCP that is lodged in anticipation of its inclusion in a lease/sub-lease. If any of the issues identified below are present in a lodged lease/sub-lease or MCP, it may be requisitioned following lodgment.

Land

For an electronic lease, the land to be affected by a lease must be described by current volume and folio references.

If part of a folio is affected, ‘Part – Lot on Plan’ or ‘Part – Other description’ must be selected. Please refer to the ‘Part land’ section of the [Guide to residual documents](https://www.land.vic.gov.au/land-registration/fees-guides-and-forms) for further requirements on ‘Part – Other description’.

For paper leases which affect part of a folio, the following land descriptions may be entered:

*The land hatched/marked [insert identifier] on the attached plan being part of the land in folio of the Register [volume and folio reference]*

OR

*Lot [insert identifier] being part of the land in folio of the Register [volume and folio reference]*

OR

*Crown allotment [insert identifier] being part of the land in folio of the Register [volume and folio reference]*

If a plan is required, parties need to fix the land which is the subject of the lease in a way which enables it to be conclusively located by Land Use Victoria. See [Lease Plans](#_Lease_plans) below.

Estate or interest

For an electronic lease, the estate or interest panel relates to the nature of the folio of the Register the lease is sought to be registered against as set out below and not the lease itself:

* fee simple
* leasehold
* life estate
* remainder expectant

For paper leases which affect an estate or interest that is not the fee simple of the land, the affected estate or interest must be specified in the ‘Land’ panel, after the volume and folio references are set out.

Term

To be registrable, the term of the lease must exceed three years ie, the minimum term is three years and one day. The exact date of termination must either be known or ascertainable.

Note, if the maximum extent of the term is fixed, it may be possible to have it determine earlier on an uncertain event happening within the term, for example, “21 years determinable if the tenant ceases to live on the premises” or “90 years or for the life of X”.

Commencement Date

The commencement date cannot be a future date.

Rent

At least the initial rent figure should be included.

Covenants

**Terms and terminology**

The terminology of the TLA must be used when drafting a lease.

Common issues with terminology include the use of or references to:

* the terms ‘landlord’ (or ‘sub-landlord’) and ‘tenant’ (or ‘sub-tenant’) in place of lessor (or ‘sub-lessor’) and lessee (or ‘sub-lessee’)
* the terms ‘premises’, ‘site’ or ‘building’ instead of ‘land’ being the leased land
* use of terms such as ‘lot’ and ‘common property’ in a way that is inconsistent with their defined meaning in the *Subdivision Act 1988* (or *Owners Corporations Act 2006*). In other words, as the terms relate to land in plans under the *Subdivision Act 1988* – alternative terminology must be used to avoid confusion
* the ‘certificate of title’ when the correct terminology is ‘folio of the Register’
* the Land Titles Office or other similar descriptions when there is no such office, and the lease should instead refer to the Office of Titles or the Registrar of Titles as appropriate
* (for a paper lease) the rent expressed as monthly or any other periods as the operative words require rent to be expressed in yearly terms
* the lease document as an agreement or deed rather than a lease
* ‘assignment’ of the lease when the appropriate term is ‘transfers of lease’
* ‘clause’, ‘provision’ or ‘special condition’ used interchangeably when consistent terminology must be used throughout the lease
* the lease or MCP as an ‘approved form’ - rather than referring to those documents as the ‘approved form’, an MCP must refer to a lease as the ‘lease’, and a lease must refer to an MCP by its instrument number (i.e. ‘Memorandum of Common Provision AA1234’)

**Repetition or use of defined terms that cause confusion**

The TLA and approved form of lease set out a number of defined terms that should not be repeated in the lease or used in a way that causes ambiguity. These include:

* definitions of ‘commencement date’, ‘expiry date’, ‘rent’, ‘land’, ‘lessor’, ‘lessee’ and ‘term’ which are already defined terms either under the TLA or in the approved form of lease including the operative words that constitutes the first page of the lease
* defining ‘lessee’ or ‘lessor’ to include successors at law which is unnecessary due to the operation of section 4(2) of the TLA
* use of the term ‘adjoining land’ without definition may cause confusion as ‘land’ is a defined term and cannot include any adjoining land – careful consideration needs to be given to defining adjoining land if it is needed.

**Lease/sub-lease plans**

Lease plans must be properly identified and referenced in the body of the lease. The affected land must be mathematically fixed in accordance with the title diagram using dimensions and bearings. The affected land must be clearly referenced with an identifier(s), such as the use of hatching or alphabetical reference.

The image of the plan must:

* be in black and white - colour and greyscale are not acceptable;
* have a minimum resolution of 300 dpi for satisfactory image quality; and
* have all pages of the PDF file orientated to appear upright when viewed on screen.

Lease plans that are of poor quality, unreadable, unsuitable for imaging or in colour cannot be used.

**Off-Register documents**

When an off-Register document affects an essential term of a lease, being the parties (lessor / relinquishing party and lessee / receiving party), term (commencement date and expiry date), rent or land, then the provisions in the off-Register document must be set out in full to provide certainty to persons searching the Register. If the off-Register document does not affect an essential term, parties must insert the phrase ‘references to [specific document] do not affect the essential terms of this lease (or sub-lease)’.

Where it is unclear whether an off-Register document affects an essential term, the lease may be requisitioned following lodgment.

**Inappropriate covenants and clauses**

**Granting of the lease:** Clauses that grant the lease are unnecessary as the operative words are included in the approved form on the first page of the lease.

**References to trusts:** Section 37 of the TLA prohibits notice of trusts in the Register. Parties may wish to consider using contingent wording, for example, ‘if a trust exists, the following provisions apply…’. Note the provisions should not go on to state or imply that a specific trust does exist.

**Lease vs licence:** Clauses which suggest that the lease is in fact a licence will be requisitioned. For example, if it is unclear whether the lessee is being granted exclusive possession of the land.

**Conditional leases:** It is not possible to register a conditional lease. If the covenants contain any conditions precedent or subsequent, both parties or their representatives will need to confirm in writing that they consider that the lease is no longer conditional before the lease can be registered.

**Confidentiality clauses:** As registered leases are publicly searchable, clauses requiring the lease to be treated as confidential or commercial-in-confidence are a nonsense.

**Holding over provisions/further terms:** Even if a lease specifies a holding over provision or provisions allowing for further terms, the registration of the lease expires on the expiry date.

**Registration of the lease**: A lessor or lessee is not able to register a lease, only the Registrar of Titles may do so.

**Restraints on alienation:** Clauses which prohibit the lessor’s right of alienation must not be included in a lease. The Registrar will only accept such provisions in a lease if the lease also includes a clause stating that any restraint on alienation clause may only be exercised by the lessee (or sub-lessee) for a valid collateral purpose.

**Default provisions:** Default periods that do not specify a time period or event create uncertainty. This can be particularly problematic if the Registrar is asked to make a determination under section 70 of the TLA in the future.

**Recitals or clauses unrelated to the lease:** Only clauses relating to the lease should be included.

**Easements**

The lease should be clear as to whether the parties intend to create an easement for registration or whether the rights granted by the lease are contractual only.  Please note that pursuant to section 73B of the TLA, Council’s consent is required to the creation of an easement of carriageway.

Variation of a lease/sub-lease

The information in this section applies to both leases/sub-leases unless otherwise specified.

Only the covenants or conditions of the lease may be varied.

A variation to the term, area of leased land or parties to the lease will not be accepted. To effect the variation of the term, land or parties of a lease, the lease must be surrendered and if desired a new lease lodged.

Variation of a lease/sub-lease – section 67A TLA

A variation of lease is created electronically using the ‘Application to record a variation to an instrument – Lease – Transfer of Land Act – section 67A’ as described in the [Guide to residual documents](https://www.land.vic.gov.au/land-registration/fees-guides-and-forms).

If lodging in paper, the paper variation of lease or sub-lease can be downloaded from the [Fees, guides and forms page](https://www.land.vic.gov.au/land-registration/fees-guides-and-forms). This document must be lodged using the Generic Residual Document ‘Record – Notice – Transfer of Land Act – Section 104’ using an Electronic Lodgment Network. See the [Electronic submission of paper instruments page](https://www.land.vic.gov.au/land-registration/for-professionals/electronic-submission-of-paper-instruments) for more information.

Removal of a lease/sub-lease

The information in this section applies to both leases/sub-leases unless otherwise specified.

In cases where a [surrender of lease](https://www.land.vic.gov.au/land-registration/fees-guides-and-forms) can be obtained from a lessee, lessors are advised to seek a surrender of lease under section 69 of the TLA rather than making a section 70 application. Applications under section 70 are discretionary and require detailed evidence and take longer to process.

When a lease is fully satisfied, extinguished and/or otherwise determined, for example, after a lease expires on its expiry date, lessor(s) and/or lessee(s) may apply to remove the lease under section 106(1)(c) of the TLA.

In other cases, the only option might be for the lessor to seek to establish adverse possession of the leasehold estate under section 60 of the TLA.

In cases of a disclaimer of lease occurring under the *Corporations Act 2001* (Cth), applicants should apply for removal of the lease under section 106(1)(c) of the TLA.

Surrender of a lease/sub-lease – section 69 TLA

A lease may be surrendered as to the whole of the area of the leased land or in part where the surrendered part is the whole of the land in a folio of the Register or a separately transferable parcel such as lot or Crown allotment. You will need to lodge a residual document application to remove an instrument. The applicable one is: ‘Application to remove an instrument - Lease – Surrender –Transfer of Land Act - section 69’. Details about how to make such an application are available in the [Guide to residual documents](https://www.land.vic.gov.au/land-registration/fees-guides-and-forms).

The lessor and lessee are both required to digitally sign the surrender of lease.

If lodging in paper, both the lessor and lessee must execute the approved form which can be downloaded from the [Fees, guides and forms page.](https://www.land.vic.gov.au/land-registration/fees-guides-and-forms) This document must be lodged using the Generic Residual Document ‘Record – Notice – Transfer of Land Act – Section 104’ using an Electronic Lodgment Network. See the [Electronic submission of paper instruments page](https://www.land.vic.gov.au/land-registration/for-professionals/electronic-submission-of-paper-instruments) for more information.

Recovery of possession by lessors/sub-lessors and determination of leases/sub-leases – section 70 TLA

Using an ‘Application to remove an instrument – Lease – Determination – Transfer of Land Act – section 70’ as described in the [Guide to residual documents](https://www.land.vic.gov.au/land-registration/fees-guides-and-forms), lessors may apply to the Registrar for the removal of any lease, Crown lease or perpetual Crown lease from the Register in the following circumstances:

1. possession of the lease has been recovered by a legal proceeding,
2. the lessor has re-entered the leased premises in strict conformity with the provisions for re-entry contained or implied in the lease,
3. or the lessee has abandoned the leased premises and the lease, and the lessor has re-entered the land undisturbed by the lessee.

If lodging in paper, the approved form must be used. It is available at the [Fees, guides and forms page.](https://www.land.vic.gov.au/land-registration/fees-guides-and-forms) This document must be lodged using the Generic Residual Document ‘Record – Notice – Transfer of Land Act – Section 104’ using an Electronic Lodgment Network. See the [Electronic submission of paper instruments page](https://www.land.vic.gov.au/land-registration/for-professionals/electronic-submission-of-paper-instruments) for more information.

Applicants must specify which ground for re-entry they are relying upon by selecting the appropriate option and provide evidence of the determination of the lease.

#### Possession of the lease has been recovered by a legal proceeding

If a court has made an order for the recovery of possession by a lessor, a copy of the order should be uploaded as a supporting document with the application.

#### The lessor has re-entered the leased premises in strict conformity with the provisions for re-entry contained or implied in the lease

When an applicant claims that re-entry has occurred in strict conformity with the provisions of the lease, they should state under which provisions of the lease they have used to re-enter. The lease will then be examined to ensure that the re-entry was in conformity with those provisions.

In cases where default notices must first be served on a defaulting lessee, a copy of the notice should be provided. In some instances, it may be necessary for applicants to prove due service of the notice – for example, with acknowledgment by the lessee or a registered post receipt. If time periods limit a lessor’s ability to re-enter, re-entry must not be claimed to have occurred prior to expiration of the period.

A statutory declaration from the lessor and copies of any notices served on the lessee should be provided. It may also be useful to provide a copy of any relevant correspondence from a lessee or their representative.

#### The lessee has abandoned the leased premises and the lease, and the lessor has re-entered the land undisturbed by the lessee

When an applicant claims abandonment and re-entry, particulars of the abandonment must be provided. Applicants should also provide proof that the lessor’s re-entry has been undisturbed by the abandoning lessee. If acknowledgment of the abandonment has been provided by the lessee or their mortgagee, this should be provided. Lessors and their representatives should consider the law on abandonment of leased premises and leases before making an application under this ground.

Full satisfaction, extinguishment and/or determination of a lease/sub-lease – section 106(1)(c) TLA

Using an ‘Application to remove an instrument – Encumbrance – Transfer of Land Act – section 106’ as described in the [Guide to residual documents](https://www.land.vic.gov.au/land-registration/fees-guides-and-forms), a lease may be removed if it is fully satisfied, extinguished and/or otherwise determined.

If lodging in paper, the approved form must be used. It is available at the [Fees, guides and forms page.](https://www.land.vic.gov.au/land-registration/fees-guides-and-forms) This document must be lodged using the Generic Residual Document ‘Record – Notice – Transfer of Land Act – Section 104’ using an Electronic Lodgment Network. See the [Electronic submission of paper instruments page](https://www.land.vic.gov.au/land-registration/for-professionals/electronic-submission-of-paper-instruments) for more information.

#### The lease/sub-lease has expired

A statutory declaration from the applicant’s conveyancer or lawyer must be provided and include at the minimum the following statements:

1. that the lease expired on (date) without any holding over period and/or renewal (or if there was a holding over period and/or renewal, that the lease as held over and/or renewed expired on (date));
2. that the lessee has vacated the land that is the subject of the lease; and
3. the lease is fully satisfied, extinguished, or otherwise determined and no longer affects the land.

#### Disclaimer of a lease/sub-lease under section 568 of the Corporations Act 2001 (Cth)

The following evidence must be provided:

1. Proof of the appointment of the liquidator;
2. Notice of the disclaimer; and
3. A statutory declaration from the applicant’s conveyancer or lawyer that includes at the minimum the following statements:

* that the notice of disclaimer has taken effect in accordance with section 568C of the Corporations Act 2001 (Cth); and
* the lease is fully satisfied, extinguished, or otherwise determined and no longer affects the land.

#### Other situations

Evidence that the lease is fully satisfied, extinguished, or otherwise determined and no longer affects the land must be provided.

***Contact us***

*For location and contact details, please go to* [*www.land.vic.gov.au/contact-us*](http://www.land.vic.gov.au/contact-us)