

THE LOCAL GOVERNMENT TENDERING PROCESS
AND ITS RELEVANCE (IF ANY) TO THE APPLICATIONS IN QUESTION

The relevant statutory provisions and State Government instructions/guidelines relating to the local government tendering arrangements in NSW are set out in -

- Chapter 4, Part 3, Division 1 of the *Local Government Act 1993* (the LG Act),
- Part 7 of the *Local Government (General) Regulation 2005* (the LG Regulation) and
- the *Tendering Guidelines for NSW Local Government* (the Tendering Guidelines) issued under section 23A of the LG Act.

What are a council's legal and other requirements re tendering?

Clauses 163-179 of the LG Regulation set out a highly prescriptive and detailed tendering scheme for certain types of contractual situations that might be entered into by councils. The Tendering Guidelines provide a further 60+ pages of advice and instructions in relation to that scheme.

However, it is crucial to appreciate that not all potential council contractual situations are subject to the detailed requirements of this particular tendering scheme (and, as will be explained later, the proposed licences in question were clearly in one of the categories that are exempted from the prescribed scheme). In this regard, clause 163 of the LG Regulation specifies that the prescribed tendering scheme is applicable to contracts “for which a council is required by section 55 of the Act to invite tenders”. (A copy of clause 163 is at Attachment A.)

An examination of section 55 reveals, in sub-section (1), a list of nine situations in which a council is required to invite tenders and, in sub-section(3), a list of sixteen situations in which tenders are specifically not required to be invited. (A copy of s.55 is at Attachment B.) It is clear from an examination of the two lists that what the Parliament was intending to capture in its detailed prescribed scheme were mainly council contracts for the supply of goods and services and for the disposal of council property. (And, even in those categories, only contracts valued at \$150,000 or more are legally required to be covered by the LG tendering scheme.)

It is clear that, in enacting this legislation, the Parliament sought to provide an arrangement that (a) would provide appropriate statutory protections in identified high risk situations and (b) would not unnecessarily burden local councils in relation to the many other low and minimal risk contractual situations that they might regularly encounter.

Not surprisingly, the Tendering Guidelines confirm the Parliament's and the Government's clear intentions in relation to which types of situations are, and are not, to be the subject of the prescribed tendering procedures. In this regard, copies of relevant pages from those guidelines are attached (Attachment C) with a number of the pertinent areas highlighted for your assistance. Your attention is particularly drawn to the following statements on pages 25 and 26 of the guidelines.

- “Councils must use the tendering method set out in the Regulation before entering into any of the types of contracts specified in section 55(1) of the Act”.
- “Section 55(3) of the Act outlines the types of contracts that are exempt from the tendering process.”

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Samuel Griffith

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What do these 'rules' effectively say about the licence applications in question?

Not only do the licence applications in question obviously have nothing to do with matters such as the supply of goods/services or the disposal of property, but also paragraph (e) of sub-section 55(3) specifically identifies this particular type of licensing situation as being one that is exempt from the requirement to invite tenders.

It is clear therefore that the Eurobodalla Shire Council (the ESC) has no legal obligation under the LG Act (and associated State Government instructions) to initiate a tendering process for the determination of the successful applicant for the hire of the Crown land in question.

Of course, the use of some appropriate type of tendering process might sometimes be appropriate (in the public interest) in situations that fall outside those for which the LG Regulation arrangements are mandatory. This possibility, usually involving some type of commercial activity by a profit making enterprise, is recognised in various guidelines and instructions and also in the note contained in clause 163(1) of the LG Regulation.

However, any rational and objective examination of the relevant guidelines inevitably leads to the conclusion that a full blown tendering process is not appropriate or relevant in the circumstances in question - that is, in the circumstances of two non profit organisations applying to hire a public facility for the purpose of conducting their particular individual events at a fee determined by the Council.

What has the Eurobodalla Shire Council had to say about its tendering obligations?

To date, the mayor and the council staff have persisted with an assertion that they "*are required to undertake a tendering process*" with respect to the two applications that they received for the hire the relevant facility for the period from 2018 to 2022. They have declined every oral and written request that has been put to them to justify this assertion in the light of the relevant statutes and guidelines.

Instead, they have consistently provided one or both of the following reasons for imposing the full local government tendering scheme on the applicants.

(1) "We have legal advice that it must be a confidential tendering process."

The Council has declined to make public the details of its legal advice.

Given the background to this situation (as described above), it is difficult to understand how it would be possible for the council to have been provided with competent legal advice along the lines that are claimed. A possible explanation for this situation could be that any such legal opinion has been based on an inadequate and/or inappropriate brief from the council staff.

(2) "The requirement to use the tendering process in such circumstances has been confirmed by Crown Lands."

Presumably, your agency is well placed to decide whether or not this was, in fact, the case.

The background to this can be found in the new ESC '*Code of Practice – Licensing of Public Reserves*' that was tabled by council staff at the Council's meeting on 8 December 2015. (It should be noted that this new code had not been the subject of any prior notice to, or consultation with, the community.)

In broad terms, the code provides (a) for an annual advertising for expressions of interest in hiring council controlled reserves and facilities for the conduct of activities such as markets, events and commercial activities and (b) for a process for resolving any conflicts in terms of dates/venues. In relation to the latter issue, the code contains the following process.

“Where a conflict arises such as two or more applicants requesting the same venue for the same date(s), Council will use a selective tendering process. The outcome of the tendering process will come to Council for a decision.”

No other options for resolving such conflicts are provided in the code. That is, regardless of the nature of the applicant organisations and their proposed activities and regardless of whether those activities were to be primarily commercial or not, the only method that is provided within the ESC's code for resolving conflicts over dates/venues is a tendering process – and, as we have subsequently learnt from the council, a tendering process that must be fully compliant with all the provisions of both Part 7 of the LG Regulation and the Tendering Guidelines.

As will be noted on page 137 of the agenda for the 8 December 2015 meeting (a full copy of the relevant report is at Attachment D), the following claim is made.

“Crown Lands confirmed in July 2015 that Council's proposed process as outlined in this report is acceptable to them”.

Against a background of community incredulity about the likelihood of Crown Lands having actually endorsed a 'tender only' arrangement, copies of all relevant correspondence between the ESC and Crown Lands were subsequently sought from the ESC under the provisions of the *Government Information (Public Access) Act 2009*. The outcome of that process has established that the proposed code (or any document outlining the details of the proposed code) was never in fact provided to Crown Lands for examination and endorsement.

In this regard, the only pieces of correspondence that have been provided by the ESC, in support of its Crown Lands endorsement claim, are two relatively brief emails (Attachments E and F). You will note that there would seem to be nothing in either of those emails that suggests anything other than your agency's expectation that long term licence opportunities would be “progressed by way of an open and transparent competitive process”.

Of course, such an expectation would be consistent with your agency's 'Leasing and Licensing' instructions (Attachment G) which recognise (on page 3) the possibility of either “competitive tenders” or “competitive proposals”. Similarly, on page 145 of the 'Trust Handbook' (relevant extracts are in Attachment H), even in the case of applications for licences to undertake genuine commercial activities, your agency recognises the possibility of calling for either proposals or tenders.

Summary

- The relevant provisions of the LG Act and the LG Regulation (and associated instructions) do not require the ESC to undertake a 'Part 7' tender process with regard to decisions on conflicting applications for licences for the use of council controlled reserves and facilities, and
- there is no evidence to suggest, or reason to believe, that Crown Lands has either (a) required the ESC to undertake a tender process or (b) endorsed a proposal by the ESC to

always undertake a tender process in connection with the granting of Crown land licences in situations where multiple applications have been received.

ISSUES AROUND THE DURATION OF THE HUNTFEST LICENCE

The controversial ESC decision in question was triggered by a request that was submitted in August 2015 by the South Coast Hunters Club (the SCHC) for a further Huntfest licence for the five years from 2018 to 2022. A copy of that request, which was obtained under GI(PA), is attached (Attachment I).

As you will note, although the SCHC sought to justify its application on the basis of alleged demands from major sponsors, scant information relating to that assertion was provided in the club's August 2015 letter to the Council. Additionally, the above-mentioned GI(PA) process also revealed the absence of any attempt by the ESC to verify or clarify the Club's various assertions before the Council initiated (on 10 December 2015) the EOI/tendering process for the hire of the relevant Crown reserve for the period 2018 to 2022.

The decision of the ESC to approve the Huntfest licence to and including 2022, effectively means that all other potential users would now be excluded from access to this prime Narooma event site on every June long weekend until at least 2023.

In the circumstances, this would seem to be an exceptionally long time into the future and it is therefore difficult to imagine how this could represent a decision that would be in the best longer term interests of the community. In an area such as Narooma, that is highly dependent on the tourism industry, the retention of a capacity to react and respond to new initiatives for the use of the local infrastructure is obviously highly desirable. However, there is no evidence to suggest that the ESC has acted in other than a perfunctory manner in relation to the proposed duration of the licence.

In this regard, section 14.6 (page 151) of the *Trust Handbook* (Attachment H) sets out Crown Lands' views on the matter of the length of the terms of licences such as these. The following quotes from that section are directly relevant to this situation.

"The term of a licence should be as short as possible".

"Future changes in community needs should also be kept in mind when negotiating the length of term."

The public has been denied access to the SCHC's 'tender' that was before the ESC at its closed meeting on 22 March 2016. However, given what is publicly known and understood about the Huntfest event, it is very difficult to imagine that, on balance, the case could have been made that it would be in the public interest to effectively exclude any other option for the use of the relevant Crown reserve through to and until 2023.

Some guidance, on the type of exceptional case that would be needed to justify a long-term licence, is provided in section 14.2 (page 145) of the handbook. The example given is where the applicant in question *"may be making a significant financial commitment to the reserve; for example, by building or improving a clubhouse, grandstand or other facilities"*. A financial commitment of that nature and significance is most unlikely to be involved in the case of the SCHC's conduct of the Huntfest event.

Summary

Although the details of the SCHC's 'tender' are not publicly available, it would seem most unlikely that a case has been made, within the terms of the relevant Crown Lands guidelines and instructions, for the Minister to consent to a licence for the duration requested by the SCHC.

THE TIMING OF ANY MINISTERIAL APPROVAL

The SCHC's request for a further five year licence was submitted to the ESC in August 2015 – almost three years out from the commencement of the proposed licence in June 2018. (The current licence has been approved until 31 May 2018.)

At the ESC meeting of 22 March 2016, many of the Public Forum presenters and some of the councillors strongly argued that any consideration of the SCHC's 'tender' should be deferred until after the local government elections in September this year. The views expressed were that the controversial issues around the Huntfest event, particularly the issue of the use of council facilities for the promotion and facilitation of gun sales, should properly be something that could be addressed by local community members during the up-coming ESC election campaign. Those requests for a deferral were rejected by the Council without explanation.

Some relevant commentary on this question of the timing of any early licence renewal is provided on page 3 of the Department's '*Leasing and Licensing*' instructions (Attachment G). That commentary suggests that, where a need has been established, some renewals "*may need to commence some 12 to 18 months before the terminating date of the licence*".

Given (i) the nature of the Huntfest event and (ii) that the initial event in 2013 was able to be organised within 6 to 8 months of the issuing of the necessary Council and Ministerial licence approvals, it is difficult to see that any approval for the 2018 event could not reasonably be deferred until later this year – which would still be more than 18 months out from the 2018 June long weekend.

Summary

There is no obvious reason why the question of ESC support for a further Huntfest licence for five years from 2018 could not be deferred until after the local council elections which are in less than four months time. To not defer such a decision in these circumstances would represent a serious and unjustifiable disenfranchisement of the community in relation to a matter of obvious significant local concern and debate.

SAFE Inc.
May 2016



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LOCAL GOVERNMENT (GENERAL) REGULATION 2005 - REG 163

Application of Part

163 Application of Part

(1) This Part applies to all contracts for which a council is required by section 55 of the Act to invite tenders.

Note : This Part does not apply to other kinds of contracts. However, a council may apply provisions of this Part (with any necessary alterations) to other kinds of contracts if it wishes to do so.

(1A) The following persons are prescribed for the purposes of section 55 (3) (a) of the Act:

(i) Local Government Procurement Partnership (ABN 34 578 553 267),

(ii) MAPS Group Limited trading as Procurement Australia (ABN 45 058 335 363).

(1B) To avoid doubt, a reference to a person prescribed by subclause (1A) includes any duly appointed agent of that person.

(2) For the purposes of section 55 (3) (n) of the Act, section 55 does not apply to a contract involving an estimated expenditure or receipt of an amount of less than \$150,000.

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LOCAL GOVERNMENT ACT 1993 - SECT 55

What are the requirements for tendering?

55 What are the requirements for tendering?

(1) A council must invite tenders before entering into any of the following contracts:

- (a) a contract to carry out work that, by or under any Act, is directed or authorised to be carried out by the council,
- (b) a contract to carry out work that, under some other contract, the council has undertaken to carry out for some other person or body,
- (c) a contract to perform a service or to provide facilities that, by or under any Act, is directed or authorised to be performed or provided by the council,
- (d) a contract to perform a service or to provide facilities that, under some other contract, the council has undertaken to perform or provide for some other body,
- (e) a contract for the provision of goods or materials to the council (whether by sale, lease or otherwise),
- (f) a contract for the provision of services to the council (other than a contract for the provision of banking, borrowing or investment services),
- (g) a contract for the disposal of property of the council,
- (h) a contract requiring the payment of instalments by or to the council over a period of 2 or more years,
- (i) any other contract, or any contract of a class, prescribed by the regulations.

(2) Tenders are to be invited, and invitations to tender are to be made, by public notice and in accordance with any provisions prescribed by the regulations.

(2A) Nothing in this section prevents a council from tendering for any work, service or facility for which it has invited tenders.

(3) This section does not apply to the following contracts:

- (a) subject to the regulations, a contract for the purchase of goods, materials or services specified by a person prescribed by the regulations made with another person so specified, during a period so specified and at a rate not

exceeding the rate so specified

(b) a contract entered into by a council with the Crown (whether in right of the Commonwealth, New South Wales or any other State or a Territory), a Minister of the Crown or a statutory body representing the Crown

(c) a contract entered into by a council with another council

(d) a contract for the purchase or sale by a council of land

(e) a contract for the leasing or licensing of land by the council, other than the leasing or licensing of community land for a term exceeding 5 years to a body that is not a non-profit organisation (see section 46A)

(f) a contract for purchase or sale by a council at public auction

(g) a contract for the purchase of goods, materials or services specified by the NSW Procurement Board or the Department of Administrative Services of the Commonwealth, made with a person so specified, during a period so specified and at a rate not exceeding the rate so specified

(h) a contract for the employment of a person as an employee of the council

(i) a contract where, because of extenuating circumstances, remoteness of locality or the unavailability of competitive or reliable tenderers, a council decides by resolution (which states the reasons for the decision) that a satisfactory result would not be achieved by inviting tenders

(j) contract for which, because of provisions made by or under another Act, a council is exempt from the requirement to invite a tender

(k) a contract made in a case of emergency

(l) a contract to enter into a public-private partnership

(m) if a council has entered into a public-private partnership-a contract entered into by the council for the purposes of carrying out a project under the public-private partnership (but only to the extent that the contract is part of the project that has been assessed or reviewed under Part 6 of Chapter 12)

(n) a contract involving an estimated expenditure or receipt of an amount of less than \$100,000 or such other amount as may be prescribed by the regulations

(o) a contract that is an environmental upgrade agreement (within the meaning of Part 2A)

(p) a contract or arrangement between a council and the Electoral Commissioner for the Electoral Commissioner to administer the council's elections, council polls and constitutional referendums.

(4) A council that invites tenders from selected persons only is taken to comply with the requirements of this section if those persons are selected:

(a) from persons who have responded to a public advertisement for expressions of interest in the particular contract for which tenders are being invited, or

(b) from persons who have responded to a public advertisement for recognition as recognised contractors with respect to contracts of the same kind as that for which tenders are being invited.

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Tendering Guidelines **for** **NSW Local Government**

These Guidelines are prepared by the Director General under section 23A of the *Local Government Act 1993*. Councils are required to take guidelines issued under this section into consideration before exercising any of their functions.

NSW Department of Premier and Cabinet
Division of Local Government

OCTOBER 2009

Introduction

Tendering and the activities of procurement and disposal are important areas of council operations. Economic forces and technological change over the last 20-30 years have led to circumstances where organisations are spending more and more on the purchase of goods and services and the disposal of property. Local councils are no exception to this general rule.

The development of best practice in tendering is not a simple matter and may be affected by a range of factors including the scale of the organisation, the degree of commitment by senior management or the level of purchasing expertise within an organisation. While the current tendering threshold provided in the *Act* and *Regulation* is \$150,000, councils should consider whether to conduct a tender process when a lesser amount is involved to ensure that they obtain best value (see part 1.5).

Management of the tendering process is, or at least should be, an integral component of almost every aspect of the management of any organisation, including local and county councils. It should involve everybody, from councillors and managers to those responsible for on-ground delivery of services.

Purchase and disposal activities using the tendering process for local government, and other government agencies, are governed by strict considerations of probity, transparency and accountability in the expenditure of public funds for public purposes.

As part of the Division of Local Government's aim to encourage and support the spread of best practice, it has produced these Tendering Guidelines for NSW Local Government. The Guidelines aim to assist councils in applying clear policies, consistent procedures and effective risk management strategies in accordance with the *Local Government Act 1993*, the *Regulation* and other relevant legislation.

They are prepared by the Director General of the Department of Premier and Cabinet under section 23A of the *Act* and therefore must be considered by councils as part of the tendering process.

The Guidelines strengthen previous publications regarding local government procurement, namely the Code of Practice and Code of Tendering for the Construction Industry – Practice Note No. 8a (1996) and Competitive Tendering Guidelines (1997), as well as various State Government codes and guidelines regarding public procurement for the disposal and the delivery of goods and services to meet local community needs. The use of these Guidelines will reduce the risk to Local Government in any tendering undertaken and should be used within the context of the *Act* and *Regulation*.

Councils should be mindful that they must act in the interests of their residents, ratepayers and the wider community and that, when considering expenditure of public monies, they:

- Are open, transparent and accountable in their dealings.
- Ensure that their dealings promote fairness and competition, and
- Obtain best value

The Tendering Guidelines for NSW Local Government are divided into the following sections to assist councillors, council staff and business:

- Section One – Guiding Principles – sets out the overall principles that apply to the tendering process used by NSW local government.
- Section Two – Procurement Management - outlines processes necessary to effectively manage the tendering process
- Section Three - The Tendering Process – outlines the stages involved in the tendering process with reference to specific legislative requirements and recommended practices

- Section Four – Resources – provides useful publications, websites and contacts as well as a tendering checklist and list of commonly used terms in tendering, the purchase of goods and services and the disposal of property.

These Guidelines must be read in conjunction with Part 7 of the *Regulation*.

It should be noted that where a council enters into a public private partnership as defined by section 400B of the *Act*, it should refer to the Guidelines on the Procedures and Processes to be followed by Local Government in Public-Private Partnerships.

1. Guiding Principles

1.1. Overview

Tendering is a formal process for seeking offers for the supply of goods or services and the disposal of property whereby an invitation is extended and offers are made and considered, according to a set of pre-determined assessment criteria, prior to the creation of a contract for the supply of the goods or services.

The legislative requirements for tendering by NSW local and county councils are prescribed by section 55 of the *Act* and by the *Regulation*. However, other legislation is also relevant to council operations and activities involved in tendering, procurement and contracts. A legislative summary checklist is provided in Section 4 – Resources.

Where a council is unsure of its legal obligations and requirements, it should seek and be guided by its own legal advice. The Local Government Association of NSW and the Shires Association of NSW can provide legal advice to councils. The Division of Local Government, the Independent Commission Against Corruption (ICAC) and the NSW Ombudsman can provide information and assistance regarding general enquiries.

While the Guidelines address the issue of tendering by NSW Local Government above the \$150,000 threshold prescribed by the *Regulation*, councils may find them useful when undertaking procurement involving amounts below the prescribed threshold.

1.2. Standards of Behaviour and Ethical Principles

The following standards of behaviour and ethical principles are based on those developed for procurement and tendering activities by all NSW State Government agencies. Councils should adopt these standards and require their suppliers and contractors to behave in accordance with these standards at all times. These standards are consistent with the requirements for the effective and efficient operation and conduct of councils under the *Act*.

- **Honesty and fairness:** Councils must conduct all tendering, procurement and business relationships with honesty, fairness and probity at all levels. Councils must not disclose confidential or proprietary information. (Refer to 1.3 for further information regarding confidentiality).
- **Accountability and transparency:** Councils must ensure that the process for awarding contracts is open, clear, fully documented and defensible.
- **Consistency:** Councils must ensure consistency in all stages of the tendering process. For example, conditions of tendering must be the same for each tenderer on any particular tender; all requirements must be clearly specified in the tender documents and criteria for evaluation must be clearly indicated; all potential tenderers should be given the same information; and the evaluation of tenders must be based on the conditions of tendering and selection criteria as defined in the tender documents. In saying this, advice given to potential tenderers clarifying aspects of the tender need not be circulated to all tenderers.
- **No conflict of interests:** A council official with an actual or a potential conflict of interests must address that interest without delay. (Refer to 1.4 for further information regarding conflict of interests).
- **Rule of law:** Councils must comply with all legal obligations. These include the provisions of the *Act* and the *Regulation*. (Refer to Section 4 - Resources for a legislative summary checklist).

- No anti-competitive practices: Councils must not engage in practices that are anti-competitive or engage in any form of collusive practice.
- No improper advantage: Councils must not engage in practices that aim to give a potential tenderer an advantage over others, unless such advantage stems from an adopted Council procurement policy such as a local preference policy.
- Intention to proceed: Councils must not invite or submit tenders without a firm intention and capacity to proceed with a contract, including having funds available.
- Co-operation: Councils must encourage business relationships based on open and effective communication, respect and trust, and adopt a non-adversarial approach to dispute resolution.

1.3. Confidentiality

Councils must not disclose tender information received from tenderers that is intellectual property, proprietary, commercial-in-confidence or otherwise confidential, without their prior consent. In addition, council staff or councillors must not disclose information regarding the specific details of a tendering process, including a recommendation of the tender evaluation or assessment panel before the outcome of the tender has been determined.

Where a council is dealing with a tender pursuant to section 55 of the *Act* and confidential information needs to be disseminated to councillors for the purpose of deciding whether or not to accept any submitted tender, the confidential information should be issued as a separate confidential attachment to the council report with the non-confidential information included in the council business paper which is available to the public.

Section 10A of the *Act* outlines the circumstances under which a council or council committee meeting may be closed to the public. This includes information that would, if disclosed:

- Confer a commercial advantage on a person with whom the council is conducting (or proposes to conduct) business with, or
- Prejudice the commercial position of the person who supplied it, or
- Confer a commercial advantage on a competitor of the council, or
- Reveal a trade secret.

Councils are reminded that the *Act* emphasises openness and transparency in decision making and councils should consider whether any information provided in the report to the council is intellectual property, proprietary, commercial-in-confidence or otherwise confidential before considering any report in closed session.

Within the tendering process, councils must be mindful of their responsibilities under the provisions of other relevant pieces of legislation such as s.12 of the *Act*, the *Freedom of Information Act 1989* and the *Privacy and Personal Information Protection Act 1998*.

1.4. Conflict of Interests

The NSW Government established the ICAC to protect the public interest, prevent breaches of public trust and guide the conduct of public officials. ICAC investigations have identified a number of examples that highlight the need for all public agencies, including councils, to ensure that they adhere to high standards of probity in tendering.

Conflict of interests may occur when an individual could be influenced, or a reasonable and informed person would perceive that an individual could be influenced, by a personal interest when carrying out public duties. There is a

3. The Tendering Process

3.1. When is a tender required?

Councils must use the tendering method set out in the Regulation before entering into any of the types of contracts specified in section 55(1) of the *Act*. In addition to the types of contracts outlined in this section, councils are encouraged to use the tendering process in the following circumstances:

- Where estimated expenditure (including on-costs such as GST) is close to the tendering threshold specified in the Regulation (currently \$150,000). The calculation of estimated expenditure should be a critical element of planning and contract scoping.
- Councils should not invoice or order split to avoid tendering requirements as such activities would be contrary to the requirements of council's charter under the *Act*.
- Where the aggregated or cumulative cost of a contract conducted over more than one accounting period is likely to exceed the tendering threshold specified in the Regulation.
- Where the sale or purchase of good or services may be considered controversial, contentious or political.
- Where the sale or purchase of land may be considered controversial, contentious or political. Acknowledging that the sale or purchase of land is specifically exempt under 55(3) of the *Act*, council should still consider using the tender process in such circumstances.
- Where there is a risk that 'would be' tenders could claim that council has 'preferential' arrangements with a single supplier.

- Where there is a risk that 'would be' tenders could claim that they would have tendered for the work if a public tendering process had been undertaken.

By using the tendering process in circumstances other than those prescribed by section 55 of the *Act*, councils will be able to provide assurance of openness and accountability, build anti-corruption capacity and achieve the best value for money.

Section 55(3) of the *Act* outlines the types of contracts that are exempt from the tendering process. Extenuating circumstances and cases of emergency are not defined by the *Act* and should be used as an exemption to the tendering requirements only after careful consideration with the reasons clearly documented.

The decision in *Tonkin -v- Cooma Shire Council [2006] NSWCA 50* has emphasised the risk of surcharging action where the tendering provisions of the *Act* are not complied with.

3.2. Identification and Planning

It is critical to any effective tendering process that the need for the purchase of goods or services or the disposal of property is accurately identified, scoped and planned. Successful tendering requires effective planning and performance monitoring to ensure all parties' expectations are met and value for money is achieved.

The following principles should be applied:

- Planning both the definition of the works or services to be procured and the procurement process adds value to council's operations, programs, projects, and purchases.

FBD15/084 CODE OF PRACTICE - LICENSING OF PUBLIC RESERVES

E80.1320

Responsible Officer: Anthony O'Reilly - Director Finance and Business Development
Attachments: 1. Code of Practice
Focus Area: Support Services
Delivery Program Link: SS3.3 Provide administrative, technical, professional and trade services
Operational Plan Link: SS3.3.4 Manage Council property to achieve best value to the community

EXECUTIVE SUMMARY

Council has previously considered applications and granted licences for the use of public reserves under its control for a variety of activities on a 'first come, first served' basis.

Crown Lands has provided Council written advice that for licences in excess of 12 months it requires licences for Crown reserves to be considered via an open and transparent process in order to meet the provisions of the 2006 ICAC Direct Dealing Guidelines. This requirement applies to all NSW councils.

Accordingly, on 14 October 2014, Council resolved that:

"A procedure be developed to satisfy the Crown Lands Division's requirements regarding fairness and transparency in consenting to licences for terms in excess of twelve months."

To meet the requirement of Council's resolution and Crown Lands requirements which were confirmed in July 2015, and to ensure the process by which licences are granted by Council over all public reserves it controls is fair and transparent, a Code of Practice for the granting of licences for activities conducted within Council controlled public reserves and associated buildings has been developed.

The main focus of the Code is for the:

- calling of expressions of interest for the use of Council controlled public reserves to ensure all groups, organisations and commercial operators have an equal opportunity to make applications for licences.
- for the establishment of a selection criteria by which conflicting applications can be assessed and considered by Council in determining who will be granted licences.

This report is presented for Council to note the Code of Practice for Licensing of Public Reserves and Associated Buildings.

RECOMMENDATION

THAT the report on the Code of Practice for the Licensing of Council controlled public reserves and associated buildings for the purpose of conducting events, markets and commercial operations be received and noted.

FBD15/084 CODE OF PRACTICE - LICENSING OF PUBLIC RESERVES

E80.1320

BACKGROUND

Council has previously considered applications and granted licences for the use of public reserves under its control for a variety of activities on a 'first come, first served' basis.

Crown Lands has provided Council written advice that for licences in excess of 12 months it would require licences for Crown reserves to be considered via an open and transparent process in order to meet the provisions of the 2006 ICAC Direct Dealing Guidelines. This applies to all NSW councils.

At its meeting held on 14 October 2014, following consideration of a report to grant a temporary licence to the Caravan and Camping Industry Association NSW to stage the South Coast Caravan, Camping and Holiday Expo on the Mackay Park Reserve at Batemans Bay (it wanted a further five-year licence), Council resolved in part that:

2. *A procedure be developed to satisfy the Crown Lands Division's requirements regarding fairness and transparency in consenting to licences for terms in excess of twelve months.*

CONSIDERATIONS

Council regularly receives requests for five year licences. In the last 12 months, there have been multiple requests including from some water based, commercial businesses that operate from public reserves (including jetski and kayak hire businesses), and for events such as the Caravan and Camping Show, Fridays on the Foreshore, Huntfest and the Narooma Forest Rally.

A Code of Practice for the granting of licences for activities conducted within Council controlled public reserves and associated buildings has been developed. The administrative process will ensure Council grants licences for Council controlled public reserves and associated buildings in a timely manner that meets legislative requirements, and will establish a consistent and fair framework to deal with requests for the use of public land.

The use of Council controlled public reserves could be for markets, events or commercial operations.

Policy

Council's 'The Use of Community Land Policy' and the 'Events Policy' are relevant to this Code of Practice.

For events, the policy states that 'The full process for assessing event applications is outlined in the Eurobodalla Shire Event Guidelines.'

To ensure consistency with the Policy, the Code of Practice will form an appendix to the guidelines. The guidelines refer to applications where there is a date conflict but do not specify any procedural detail. To demonstrate that an open and transparent competitive process has been followed a rigorous process is required to be implemented.

Legal

Council must comply with the *Crown Lands Act 1989* and the *Local Government Act 1993* and any regulations made thereunder.

FBD15/084 CODE OF PRACTICE - LICENSING OF PUBLIC RESERVES

E80.1320

Crown Lands Act 1989

If the status of land is '**Crown Reserve**' managed by a Trust for which Council is Trust Manager, consent of the Minister responsible for the administration of the *Crown Lands Acts 1989* must be obtained before the licence is executed for a licence with a term greater than 12 months.

Licences may be granted through public tender, public auction or by invitation for expressions of interest.

Unless Council, as the appointed reserve trust manager for Crown reserves, progresses licences by way of an open and transparent competitive process, Crown Lands requires Council to justify and document a case for direct dealing on the basis of one of the exemption categories outlined in the 2006 ICAC Direct Dealing Guidelines.

The NSW Government released a paper, '*Response to Crown Lands Legislation White Paper*' in October 2015. This may change the legislative framework under which licences on Crown Lands are dealt with but it will not change the need for an open and transparent competitive process. Crown Lands confirmed in July 2015 that Council's proposed process as outlined in this report is acceptable to them based on its interpretation of the ICAC guidelines.

Local Government Act 1993

If the land is Council owned and classified as **community** land, Council must give public notice of any proposed licence on Council owned community land by advertising in the local press.

The notice of the proposal must include:

- information sufficient to identify the land concerned
- the purpose for which the land will be used
- the term of the proposed licence (including any option term)
- the name of the proposed licensee, and
- a statement that submissions in writing may be made to the Council concerning the proposal within a period not less than 28 days which is in addition to the EOI process and timeframe.

If any objections are received, Council must consider all submissions before determining the licence. If the term of the licence exceeds five years and objections are received, the proposal must be sent to the Minister for Local Government who will decide if a licence will be granted.

There is no proposed change to this process.

Code of Practice

The Code of Practice is attached and the process is as follows:

- An annual expression of interest (EOI) process is undertaken for proponents wishing to take out a licence for the use of Council controlled public reserves and associated buildings
- Applications received are reviewed to see if there are any conflicts in terms of venues/dates
- If no conflicting EOIs are received, the licence application will be processed in accordance with Council procedure and a report presented to Council for a decision

FBD15/084 CODE OF PRACTICE - LICENSING OF PUBLIC RESERVES

E80.1320

- If there are conflicting EOIs, a selective tendering process with pre-set selection criteria will be undertaken, and will be presented to Council for a decision
- If an application is received outside of the annual EOI process and does not conflict with any application received during the annual EOI process, it will be dealt with in accordance with Council's procedure and either the Crown Lands Act or the Local Government Act as appropriate then and will be presented to Council for a decision
- If an application is received outside the annual EOI process and does conflict with any application received during the annual EOI process and approved by Council, staff will seek to find alternative dates and venues for the applicant
- It is emphasised that all licences will be presented to Council for a decision.

Asset

In the Code of Practice:

"public reserves" means Crown Reserves under Trusteeship for which Council is Trust Manager and Council owned land classified as community land.

"associated buildings" means buildings within a reserve used in conjunction with the use of the reserve for the activity for which a licence is sought, not for the use of a building in isolation.

Social Impact

The Code of Practice will ensure all groups, organisations or commercial operators will have a fair and equal opportunity to apply for the use of a Council controlled reserve and associated buildings.

Economic Development Employment Potential

Public reserves in Eurobodalla host a number of activities crucial to the economic well-being of the Shire. These include national award winning Farmer's Markets, commercial events such as the Caravan and Camping Show which injects over \$1 million into the local economy, and commercial activities such as surf schools which are an essential part of the tourism economy.

Financial

The Code of Practice can be administered within current budgets.

Community Engagement

The first annual expression of interest process will be conducted in February and March 2016 and applicants will have 35 days to apply.

Where an application for a licence has already been requested, an EOI will be conducted immediately to allow such applications to be processed in a timely manner. An application for a five year licence to run from the expiry of their current licence has been received from Camping Caravan and Camping Industry Association NSW and the South Coast Hunters Club. Both applicants are seeking surety of tenure for their respective events. This surety proffers the opportunity to secure sponsorship for a longer period than otherwise would be available for a one year licence. A kayak business in Narooma and a Jet ski business in Batemans Bay have also sought multi-year licences.

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E80.1320

Subject to Council approval, the schedule for this immediate EO processes is:

10 Dec 2015	Call for EOIs for events already in the system
4 Feb 2016	EOIs for these applicants close (56 days)
5 Feb 2016	If there is a conflict, applicants advised they have three weeks to submit a selective tender
29 Feb 2016	Selective tenders closes
1-8 Mar 2016	Tenders assessed
22 Mar 2016	Council Meeting to determine intent to issue licence

The first annual EO schedule is planned for:

1 Feb 2016	First annual call for expressions of interest for all venues opens
21 Mar 2016	First annual call for expressions of interest closes
22 Mar 2016	If there is a conflict, applicants advised they have three weeks to submit a selective tender
12 Apr 2016	Selective tenders closes
19 Apr 2016	Tenders assessed
10 May 2016	Council Meeting to determine intent to issue licence

CONCLUSION

The implementation of the Code of Practice for the granting of licences for activities conducted within Council controlled public reserves and associated buildings will ensure Council's procedure for granting future licences will be fair, transparent and complies with relevant legislation.

CODE OF PRACTICE

Code name	Licensing of Council controlled public reserves and associated buildings for the purpose of conducting events, markets and commercial operations.
Responsible manager(s)	Divisional Manager Business Development and Events
Contact officer(s)	Andrew Greenway
Directorate	Finance and Business Development
Approval date	
Community Strategic Plan Objective	5. We help our local economy grow
Delivery Program link	L1.3 Implement recreation and community development initiatives L5.1 Implement Council's Recreation and Open Space Strategy P1.1 Facilitate growth and development of our business community P1.3 Seek and Support the development and hosting of events
Operational Plan link	L1.3.5 Improve community awareness and usage of recreation facilities P1.1.2 Provide business support and development activities P1.3.1 Support event organisers in the delivery of a range of events

Summary

Council owns both community and operational land, public roads and manages Crown Reserves as Trust Manager. Council manages the use of its land holdings for the benefit of the community and/or to maximise the amount of revenue it derives from its land holdings.

This document details the process that will be followed for the granting of licences for the use of Council controlled public reserves and associated buildings, including community land and Crown reserves, in a timely manner that meets legislative and community requirements and establishes a consistent and fair framework to deal with requests for the use of public land.

This Code covers the following:

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1 INTRODUCTION

1.1 Purpose

The purpose of this Code of Practice is to establish a process that will be followed for the granting of licences for the use of Council controlled public reserves and associated buildings, including **community** land and Crown reserves, in a timely manner that meets legislative requirements and establishes a consistent and fair framework to deal with requests for the use of public land.

1.2 Land to which this Code applies

This Code of Practice applies to all Council controlled public reserves and associated buildings, including community land and Crown reserves.

In this Code:

“public reserves” means Crown Reserves under Trusteeship for which Council is Trust Manager and Council owned land classified as community land.

“associated buildings” means buildings within a reserve used in conjunction with the use of the reserve for the activity for which a licence is sought, not for the use of a building in isolation.

1.3 Legislative Framework

Each application will be dealt with under the relevant legislation.

Crown Lands Act 1989

If status of land is ‘**Crown Reserve**’ managed by a Trust for which Council is Trust Manager, consent of the Minister responsible for the administration of the *Crown Lands Acts 1989* must be obtained before the licence is executed for a licence with a term greater than 12 months.

Licences may be granted through public tender, public auction or by invitation for expressions of interest.

Local Government Act 1993

If the classification of the Council land is '**Community**' and the licence is for any period that **does not** exceed five years, Council must give public notice of the proposal by advertising in the local press. The notice of the proposal must include:

- information sufficient to identify the land concerned
- the purpose for which the land will be used
- the term of the proposed licence (including any option term)
- the name of the proposed licensee
- a statement that submissions in writing may be made to the Council concerning the proposal within a period not less than 28 days which is in addition to the EOI process and timeframe.

If any objections are received Council must consider all submissions before determining the licence.

If the licence period exceeds five years, Council must give the same public notice of the proposal as above and if any objections are received consent for the licence will be required from the Minister for Local Government.

1.4 Objectives

The objectives of this Code are to detail the process that will be followed for the granting of licences for the use of Council controlled public reserves and associated buildings in a timely manner that meets legislative requirements and establishes a consistent and fair framework to deal with requests for the use of public land.

1.5 Relationship to Legislation/ Policy/ Plan

This Code should be read in conjunction with the following legislation, policy, plans or orders, standards or guidelines.

1.5.1 Legislation

Local Government Act 1993

Crown Lands Act 1989

1.5.2 Policy

Use of Community Land Policy

\\fs\common\DB\Policy\Documents\LivePolicyDocs\2038.pdf

Events Policy

www.esc.nsw.gov.au/inside-council/council/council-policies/policies/Events-Policy.pdf

This Policy states that the full process for assessing event applications is outlined in the Eurobodalla Shire Event Guidelines. For events, this Code of Practice will be an appendix to those guidelines.

1.5.3 Standards or Guidelines

Eurobodalla Shire Event Guidelines

www.esc.nsw.gov.au/data/assets/pdf_file/0015/12822/events_guidelines_and_application.pdf

1.6 Timeline

The Annual call for EOIs will be open for 42 days in February and March each year and seek EOIs for activities from 1 July of that year.

2 CODE DETAILS

Once annually, Council will call for Expressions of Interests (EOI) from parties interested in using public reserves and associated buildings under council control for the purpose of:

- Running markets
- Holding events
- Conducting commercial activities

A template for EOIs will request:

- The name of the organisation
- Description and purpose of the activity
- Location of the activity
- Dates or Periods of proposed use e.g. 1st Sunday of each month
- Term of Licence Sought

EOIs would then be reviewed to determine any conflicts of dates and/or venues. The EOI will be processed in priority order based on the date of the activity.

All existing licence holders will be notified of the calling for EOIs.

Applications received outside the annual EOI process

Council will accept licence applications all year round. Provided there are no conflicts with EOIs received during the annual EOI process and approve by Council, these applications can be processed.

Any requests for licences outside the EOI process will need to fit within the calendar of dates & venues available after the EOIs are processed.

Allocation

Where there are no conflicts, including where licences are currently held, applicants would proceed to the appropriate application process to apply for a licence for their nominated venue and activity. All licences would be granted in accordance with Council's existing policies and procedures and will come before Council for a decision.

Any current licences will remain valid subject to the terms and conditions of the licence.

A standard licence template has been written with scope for specific terms and conditions relevant to the activity.

Where a conflict arises such as two or more applicants requesting the same venue for the same date(s), Council will use a selective tendering process. The outcome of the tendering process will come to Council for a decision.

Unsuccessful tenderers will be given the opportunity to nominate an alternate date for consideration.

Selective Tendering

Where a venue is requested by more than one party for the same date and time, the applicants would each need to submit a tender for their activity including information to address the following selection criteria:

1. Economic activity (30%)

Level of economic activity expected and likelihood it will be achieved

- i. How the activity generates local economic activity and development
- ii. How the activity will attract external visitation to the area
- iii. The expected level of economic activity and overnight accommodation
- iv. The fee tendered – the amount of the fee payable to Council if the activity is not covered by Council's adopted fees and charges for the use of the public reserve

2. Future Growth potential (20%)

Level of future growth and likelihood it will be delivered

- i. How will the activity grow over the next 5 years and beyond
- ii. The expected level of visitation and / or economic activity

3. Sustainability (25%)

- i. Is the activity self-sustaining
- ii. If not, how likely is it that the activity will continue without ongoing external support

4. Other benefits to the community (25%)

- i. What is the level of community participation and what other benefits will the community receive from this event – e.g. support health programs, donations to the community, education support and development

It is expected that the details supplied about the activity would include the following information to enable assessment against the above criteria:

- A description of the activity, its longevity and sustainability, its future growth potential, and expected community benefits.
- A description of the proponent's management experience, financial viability and other relevant experience.
- Activity Marketing Plan. This may include information on whether the activity will be advertised locally or more broadly, and what mechanism will be used, such as print, and/or social media.

- Activity Budget. This may include such documents as profit and loss statements, balance sheets, or financial projections.
- Risk Management Plan
- Fee tendered, if the activity is not covered by Council's adopted fees and charges for the use of the public reserve

3 RESPONSIBILITIES

3.1 Staff

Under supervision, applicable Council staff will be responsible for ensuring that this Code is implemented appropriately within their work area, after they have received relevant training to do so.

3.2 Requests and Concerns

Requests and concerns received from the community regarding this Code will be recorded on Council's Customer Service Request (CSR) or records system and handled in accordance with council's Customer Service policy. They will be used to help determine follow up actions and to analyse the history of requests and concerns.

3.3 Complaints

Complaints received regarding this Code will be lodged with the Public Officer and handled in accordance with Council's Complaints Policy.

4 MONITORING AND REVIEW

This Code may be reviewed and updated as necessary when legislation or policy requires it; or Council's functions, structure or activities change; or when technological advances or new systems change the way that Council manages events.

5 GOVERNANCE

Related legislation and policies

Name	Link
Related Council Policy or Code	www.esc.nsw.gov.au
<i>Local Government Act 1993</i>	www.austlii.edu.au/au/legis/nsw/consol_act/lga1993182
<i>Crown Lands Act 1989</i>	www.austlii.edu.au/au/legis/nsw/consol_act/cla1989134/

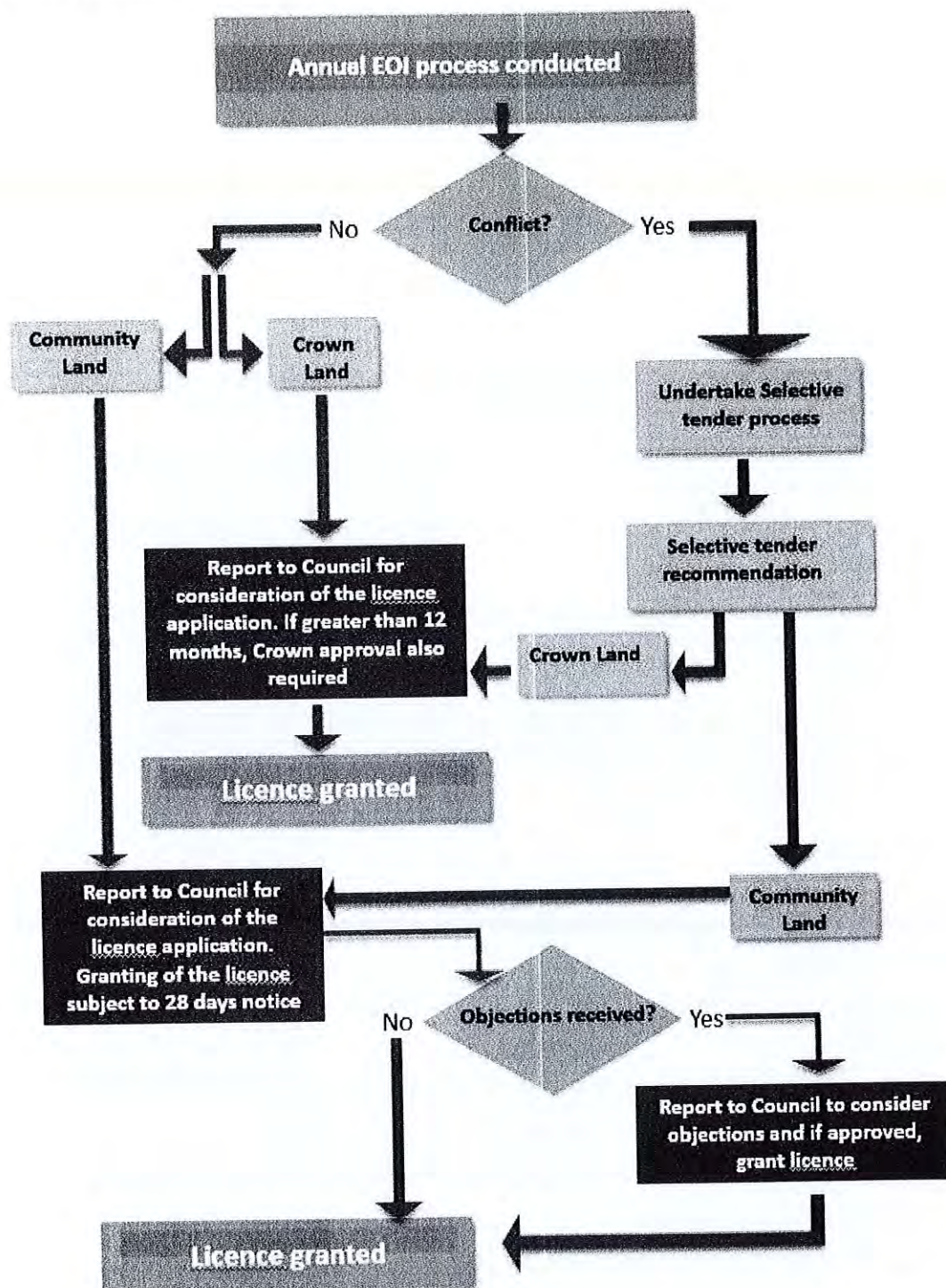
Name	Link
Division of Local Government	www.dlg.nsw.gov.au/

Change history

Version	Approval date	Approved by	Min No	File No	Change
1	2015	Council	xx/xx		Policy commenced

Internal use

Responsible officer	General Manager			Approved by	Council
Min no		Report no		Effective date	
File No		Review date		Pages	7



FBD15/085 LEASE OF COUNCIL HOUSE - BOTANIC GARDENS

91.2621.B

Responsible Officer: Anthony O'Reilly - Director Finance and Business Development
Attachments: 1. Confidential - Independent Rental Valuation
Focus Area: Support Services
Delivery Program Link: SS3.3 Provide administrative, technical, professional and trade services
Operational Plan Link: SS3.3.4 Manage Council property to achieve best value to the community

EXECUTIVE SUMMARY

The house within the Eurobodalla Regional Botanic Gardens has previously been occupied by the Botanic Gardens Manager. The current Gardens Manager has now moved.

At present, there are no alternate uses for the building and accordingly it is available for continued residential occupation.

Forestry Corporation of NSW, the landowner, has consented to the leasing of the premises for residential occupation.

For security reasons, it is considered appropriate for the lease of the house to be offered to Council staff with a preference given to employees associated with the Gardens or the Deep Creek Dam facility.

This report recommends the General Manager be given delegated authority to negotiate and grant a lease of the house to a Council employee for an amount not less than market rent determined by a registered valuer.

RECOMMENDATION

THAT The General Manager be given delegated authority to negotiate and grant a lease for the house within the Eurobodalla Botanic Gardens to a staff member of the Council for terms and conditions including:

- (a) A term of twelve months with an option of twelve months subject to Council's absolute discretion.
- (b) Rent being an amount not less than market rent determined by a registered valuer.
- (c) The lessee being responsible for locking gates at required times.
- (d) No plants to be introduced without the consent of the Botanic Gardens Manager.
- (e) Free-ranging pets prohibited.
- (f) Noise levels restricted to pre-determined level.
- (g) No personal exposure in the vicinity of the house.
- (h) Visitors' cars restricted to the public car park during Garden's opening hours.
- (i) The rent for an option, if granted, will be in line with the CPI.

Leasing and Licensing

The *Crown Lands Act 1989* enables Crown reserve trusts, with Ministers consent, to enter into leases and licences with third parties to use all or part of a reserve on an ongoing basis.

GENERAL

In granting leases and licences (other than temporary licences) reserve trusts are encouraged to engage the services of a solicitor to provide advice on legal aspects concerning the grant of the proposed tenure.

WHEN A LEASE SHOULD BE USED

A lease should be used when the lessee needs *exclusive* use of the whole or part of the reserve or a building because of the type of business or activity they will be conducting.

A lease may also be required if the lessee has invested, or proposes to invest, substantial sums of money installing or improving facilities on the reserve. This is usually likely to be a major user of the reserve, such as a sporting club.

A leaseholder has effective control of the leased area in the same way someone renting a house has sole rights to use the house. The lease document must contain all the provisions applicable to the use and occupation of the land by the lessee.

WHEN A LICENCE SHOULD BE USED

When the proposed user does not need exclusive use of any part of the reserve, a licence is more appropriate than a lease.

Occasional or short-term use of a reserve is usually covered by a licence; for example, the use of a showground by a show society on specific days of the year.

Licences can also provide greater flexibility of use by different users. Provided the uses don't directly conflict, licences covering the same reserve can operate at the same time. For example, a sporting club can use a playing field under licence, while food and other goods are sold on the site by a vendor under a separate licence.

A number of licences can be issued over the same area for different times or days; for example, a sporting field might have several different users on the same day or on different days.

TEMPORARY LICENCES

Temporary licences allow the trust to permit short-term (up to one year) and generally low impact activities on the reserve without the Minister's consent, provided they fall within one of the permitted purposes under clause 31 of the *Crown Lands Regulation 2006*.

MINISTER'S CONSENT

Before a lease or licence (other than a temporary licence) is signed, the trust must obtain the Ministers written consent. Application for consent is made to the Department of Primary Industries - Lands (the Department). It is important to contact the Department when first considering leasing or licensing of reserve assets, particularly if the reserve hasn't been used for the proposed purpose before.

In determining whether consent will be given to the grant of a lease or licence the following issues will be considered:

- whether the proposed lease or licence is in the public interest
- whether the purpose of the proposed lease or licence is compatible with the reserve purpose,
- whether the granting of lease or licence is consistent with the principals of Crown land management
- the environmental impacts of the activities permitted by the lease or licence
- the proposed term of the lease or licence
- whether the proposed lease or licence was, or is proposed to be, selected by public competition or, if not, the circumstances relating to the selection of the proposed lessee or licensee
- whether the proposed rent represents a proper return to the public for use of the public land,
- whether the proposed lease or licence will contain provisions for the periodic updating or review of the rent, and
- whether the proposed lease or licence contains clauses relating to:
 - the termination of the lease or licence in the event of a revocation of the reserve
 - the indemnification of the reserve trust, the Crown and the NSW Government against claims for compensation
 - appropriate insurance provisions.

A trust does not need approval from the Minister or the Department to grant a temporary licence but it should apply similar consideration (as may

be appropriate) to the above in deciding whether or not to grant such a licence.

LEASES

All leases submitted for the Minister's consent should be in the form of a *Real Property Act 1900* lease. The lease document will comprise the standard Real Property Lease format (amended as necessary) plus a schedule of conditions comprised from the lease template. Leases for more than three years must be registered at Land & Property Information NSW (see http://www.lpi.nsw.gov.au/land_titles/dealing_forms).

If there is no *Real Property Act* (Torrens) title for the reserve (or for that part to be leased) early contact needs to be made with the Department to arrange for the creation of a title. Leases for less than three years are not required to be registered although it is desirable that the lease is registered.

Reserve Trusts should note that in some circumstances the grant of a lease over part of a reserve may require subdivision consent from the local council under the *Environmental Planning and Assessment Act 1979*. A lease of a building only or part of a building would not generally constitute a subdivision.

Reserve Trusts should use the Department's lease template wherever practical and appropriate. It is designed to allow flexibility and the addition of special conditions (clause 69).

However, Reserve Trusts should note that the template is not suitable for use without significant amendment where the lease is for a purpose to which the *Retail Leases Act 1994* or *Residential Tenancies Act 2010* apply. Both these Acts contain provisions which imply or import special provisions into leases or prohibit certain provisions or requirements in a lease. In both cases the legislation requires certain documents to be served and actions taken before a lease may be granted.

Reserve Trusts should ensure that their legal advisors address these issues. Examples of the purposes where the *Retail Leases Act 1994* would apply to leases of reserves include amusements and entertainment services, food shops of many types (including fast food and beverages, convenience and tea and coffee), chandlers, mixed businesses, restaurants, cafes etc, seafood shops, equipments hire. [For more detail see Schedule 1 of the *Retail Leases Act*.] It should be noted that in some circumstances the *Retail Leases Act* provides that a lease for less than 5 years (including renewals) is deemed to be for a term of 5 years (Section 16); see however Section 6A which deals with the application of the Act to short term leases.

Reserve Trusts should also be aware that in some cases other legislation may also apply requiring clauses in the template to be amended or special conditions modified. Examples of such legislation include:

- *Residential Parks Act 1998*;
- *Holiday Parks (Long Term Casual Occupation Act) 2002*;
- *Retirement Villages Act 1999*;
- *Liquor Act 2007*; or
- *Registered Clubs Act 1976*.

A number of clauses in the lease template (clauses 1.1, 1.2, 44, 45 and 47) should be included in every lease unless a special statute provides otherwise. A request for the Minister's consent to a lease which does not include these clauses must be supported with appropriate reasons.

LICENCES (OTHER THAN TEMPORARY LICENCES)

Reserve Trusts should use the licence template wherever practical and appropriate but, as in the case of leases, trusts should be aware that other legislation may require the template to be significantly amended, for example, the *Retail Leases Act* treats a licence as a retail lease for the purposes of the Act; but note Section 6A (short term leases) referred to above.

Where it is proposed that other persons or the public as well as the licensee are to be entitled to use the land subject to the licence (whether at the same time or at different times for the same purpose or for different purposes) care needs to be taken to ensure that the relevant arrangements are clearly set out in the licence document.

As in the case of the lease template, a number of clauses in the licence template (clauses 1.1, 1.2, 35, 38, 39, 41 and 42) should be included in every licence unless a special statute requires otherwise. A request for the Minister's consent to a licence which does not include these clauses must be supported with appropriate reasons.

STANDARD LEASE AND LICENCE TEMPLATES

The Department has a number of requirements which must be incorporated in any lease or licence agreement. To ensure these requirements are included, separate templates for licences, temporary licences, and conditions to be attached to leases, have been prepared for use by all reserve trusts. These templates are suitable for use with both commercial and non-commercial operators and other users of the reserve.

Lease and licence templates can be accessed by contacting the Department's Reserves Team, who will provide a copy of the appropriate template for the trust's use. The template for a temporary licence is also found at Appendix (TBC) to this Handbook. Trust boards should ensure they use the latest available version of the lease and licence templates (as available from the Department) each time they enter into a new lease

or licence.

HOW RESERVE TRUSTS PREPARE A LEASE OR LICENCE

The procedure that should be followed is set out below:

1. The trust consults the Department as to the appropriateness of the proposed use and the leasing or licensing arrangements. Preliminary discussions should include market rent for the site, appropriate discounts for non commercial users and potential improvements.
2. The trust should generally invite competitive tenders or proposals in order to attract the best operator and financial return for the trust. The Department will advise whether it wishes to be involved in the review and selection process.
3. Once the most suitable lessee/licensee has been selected, the trusts solicitor prepares a draft lease or licence as far as practicable using the standard lease conditions template or licence template.
4. The trusts solicitor issues the lease/licence to the lessee/licensee.
5. If the lessee/licensee requests any amendments that the trust proposes to agree to they are incorporated into the draft agreement.
6. The solicitor sends the final draft to the Department for comment and in principle consent.
7. The Department notifies the trust of any amendments to the draft agreement and the approval in principle. If the agreement is a lease for a term exceeding 5 years, advertising costs will be requested and on receipt, arrangements made to advertise the Ministers intention to give consent in accordance with section 102(2) of the *Crown Lands Act 1989*. Provided any concerns that may be received by the public are resolved satisfactorily, the trust will be requested to prepare the final documents.
8. When the final form of the document is agreed to by all parties and approved by the Department, the trusts solicitor issues three copies to the lessee/licensee for signing.
9. All three copies are signed by the parties, stamped with the appropriate stamp duty (leases only) and returned to the Department. When the reserve trust is executing the agreement it needs to be in accordance with s.50 of the *Interpretation Act 1987*.
10. The three executed documents are checked to confirm that they match the approved draft and include any amendments notified by the Department. The Minister's consent is then added to the documents.
11. One copy is retained by the Department and two copies are returned to the trusts solicitor for registration and delivery to the parties.
12. With respect to leases over three (3) years, the trust is required to register the lease at Land & Property Information NSW. All leases may be registered on the title.
13. Prior to the terminating date of the agreement, the trust should undertake, where considered appropriate, a competitive tendering process for the granting of a new lease or licence if leasing or licensing arrangements are to continue. For some leases or licences the tendering process may need to commence some 12 to 18 months before the expiry date of the lease or licence. The Department should be advised of any proposed tendering for a new lease or licence.

OTHER POINTS TO BE KEPT IN MIND

- The term of any lease or licence should be as short as practicable, appropriate to all circumstances and commensurate with changing community needs. Generally terms in excess of 20 years are not favoured.
- Generally options for renewal clauses are not favoured. Consideration can be given to the granting of a new lease or licence on expiry of the old lease/licence. Any "holding over" should not exceed 12 months.
- The Minister may not consent to the granting of a lease for a term exceeding 5 years (or a lease for a term that, by the exercise of an option, could exceed 5 years) unless at least 14 days have elapsed since notice of intention to give consent has been published in a newspaper circulating in the locality in which the land is situated or in a newspaper circulating generally in the State.
- Rent should reflect a commercial approach, having regard to purpose of the lease/licence, site value and ownership of existing improvements. Reserve trusts are encouraged to seek advice from the Department or have an independent valuation undertaken to determine the market rent of the proposed lease/licence site.
- The standard templates require rent to be adjusted annually using the Consumer Price Index with market rent determinations occurring once every three years for the term of the lease.
- Where a nominal rental is imposed because the lessee/licensee is a charitable or non-profit organisation, such rental should generally not be less than the statutory minimum rental applicable to tenures under the *Crown Lands Act 1989*. The discount given to the lessee/licensee is to be specified in the agreement.
- For reserve trusts managed by council it is important to ensure a separation of council and reserve trust business. The lease/licence should only reflect the business of the reserve trust.
- In the case of sub-leases, the head lease must contain provision to sub-lease and reference should be made to the head lease in the preamble and the term of any sub-lease should not extend beyond the date of expiry of the head lease.
- The Minister may require that a sub-lease or assignment of a lease not be permitted without prior written consent of the Minister.
- Upon expiry of a lease or licence any improvements become the property of the Trust. Clauses conferring a right to compensation for

improvements are not acceptable. In appropriate cases the lessee/licensee should be required to clear and/or restore the land to the satisfaction of the Trust and the Minister.

- If part of the reserve is being leased, a diagram specifying the area involved must be annexed to the lease documents.
- Where the conditions require the lessee to undertake development works, the agreement should specify that no work is to be undertaken until plans have been approved by the trust and the Minister, and any necessary consents are obtained from the local council

FURTHER INFORMATION

Chapter 14 of the [Trust Handbook](#) provides additional information on leasing and licensing on reserve land or alternatively please contact:

Reserve Team, Department of Primary Industries - Lands

P | 1300 886 235 select option 4, then option 1

E | reserves@crowland.nsw.gov.au



Department of
Primary Industries
Lands

Trust Handbook

• handbook for trusts managing Crown land reserves
and commons, and trustees of schools of arts

14 Leases, Licences and Land Management Agreements

In many cases, the major activities that occur on reserves are not carried out by the reserve trust itself. Reserves are used by a wide range of bodies, including sporting clubs, show and agricultural societies, commercial organisations and individuals providing services for the community.

In these cases, because the reserve trust is not conducting the activity, the reserve trust should not take responsibility for the risks involved and should enter into a suitable agreement that passes the responsibilities to the lessee or licensee. A lease or licence should be granted to document the terms and conditions on which the other party may use the reserve.

Reserve trusts can enter into leases and licences with individuals, groups and organisations, schools, companies or even the local council, who may want to use all or part of the reserve on a temporary or ongoing basis. Unless it is for a short-term, low-impact use (involving a temporary licence), the Minister's consent to enter the agreement must be obtained.

A **leaseholder** has effective control of the leased area in the same way someone renting a house has sole rights to use the house. Any rules about what the leaseholder can and cannot do should be clearly stipulated in the lease, along with other requirements such as insurance, weed control, lease payments and so on.

A **licence holder** does not have sole rights to an area, but has a form of personal permission to use the reserve or a particular part of it in a limited way, that may be restricted by times or uses. Sometimes there may be a number of licences that allow use of the reserve at the same time.

This chapter explains the conditions and requirements for leasing or licensing Crown reserves.

In addition, a range of new land management agreements designed to achieve various environmental outcomes are now available for application to reserve land in exchange for direct payments or tradeable credits (e.g. carbon credits, biodiversity credits). The conditions and requirements for entering into these agreements on Crown land are explained in Section 14.8.

14.1 When can a reserve be leased or licensed?

Generally, a lease or licence of a reserve can only permit the lessee/licensee to use the reserve in a way that is consistent with the reserve purpose (as stated when the reserve was dedicated or reserved).

However, temporary licences (licences for up to one year) can be granted for purposes listed in clause 31 of the *Crown Lands Regulation 2006*.

With all leases and licences, including temporary licences, reserve trust managers must make sure that all lessees and licence holders pay rent and have appropriate insurances in place.

A proposed lease or licence may affect native title interests in the reserve. Before granting a lease or licence, or when re-negotiating existing arrangements, reserve trust managers should refer to Chapter 12 and, if appropriate, consult the Crown Lands Reserves Team to clarify any possible native title issues before proceeding.

When a lease should be used

A lease should be used when the proposed user needs *exclusive* use of part of the reserve or a building because of the type of business or activity they will be conducting.

A lease may also be required if the proposed user has invested or proposes to invest substantial sums of money installing or improving facilities on the reserve. This is usually likely to be a major user of the reserve, such as a sporting club.

A leaseholder has effective control of the leased area in the same way someone renting a house has sole rights to use the house. The lease document must contain all the provisions applicable to the use and occupation of the land by the lessee.

When a licence can be used

When the proposed user does not need exclusive use of any part of the reserve, a licence is more appropriate than a lease.

Occasional or short-term use of a reserve is usually covered by a licence; for example, the use of a showground by a show society on specific days of the year.

Licences can also provide greater flexibility of use by different users. Provided their uses don't directly conflict, licences covering the same reserve can operate at the same time. For example, a sporting club can use a playing field under licence, while food and other goods are sold on the site by a vendor under a separate licence.

A number of licences can be issued over the same area for different times or days; for example, a sporting field might have several different users on the same day or on different days.

To whom may a lease or licence be granted?

A lease may be granted to an individual, a company, an incorporated association or a local government body.

A licence may be granted to any of the above and, in addition, consideration can be given to the granting of short term or temporary licences to persons representing unincorporated associations and unincorporated schools.

Minister's power to grant leases

The Minister responsible for the Crown Lands Act can grant licenses, leases, permits, easements and rights of way over Crown reserves even where a reserve trust manager has been appointed for that reserve.

The Minister may, for example, wish to issue leases or licences with consistent terms and conditions to infrastructure providers from a particular industry across a number of reserves without having to excise the land from an existing reserve. A common example of this is telecommunication towers in rural areas where the optimal location is frequently at the highest available point in a network area, on land which may be Crown land reserved for a different purpose.

Before granting a lease, licence, permit, easement or right of way, the Minister must consult with any appointed reserve trust or other Minister who has an interest in the reserve.

If the purpose for which a lease or licence is to be granted is different from or additional to the declared purpose of the reserve, the Minister must specify, by notice published in the Government Gazette, the additional purposes for which the Crown reserve is to be used or occupied.

Funds received by the Minister from the lease or licence may be applied as the Minister directs, including to the reserve trust.

14.2 Types of leases and licences

Commercial leases and licences

Leases or licences for commercial purposes can only be granted where the commercial activity is consistent with the reserve purpose.

Examples of commercial activities that may be consistent with a reserve purpose are:

- a kiosk at a recreation reserve or at a playing field operated by a sporting club or its contractor
- a pro shop at a golf course
- the hiring of equipment at a beach reserve.

Generally, any commercial uses should also be consistent with the specific actual use of the reserve and should not overpower or dominate the reserve. On reserves for public recreation, commercial uses should not result in exclusivity for individuals or groups or clubs.

Telecommunication transmitters

The installation of mobile telephone transmitters can be a problem for reserve trusts, as the use of a reserve for such an installation may not be consistent with the purpose for which the reserve was created. In such cases, the reserve trust cannot grant a lease or licence to the telecommunications company.

Contact the Crown Lands Reserves Team as soon as possible if you have been approached regarding the installation of a transmitter tower in the reserve, or transmitters on a building or other structure already built in the reserve.

Negotiating commercial leases and licences

When negotiating leases or licences for commercial activities (e.g. food outlets), the reserve trust should invite competitive tenders or proposals in order to attract the best operator and financial return for the reserve trust.

Leases or licences for non-commercial users

A non-commercial user of the reserve may need the security of a long-term lease or licence because they have an on-going need to use the reserve, or their organisation may be making a significant financial commitment to the reserve; for example, by building or improving a clubhouse, grandstand or other facilities.

As with commercial leases and licences, a lease or licence cannot be granted for a purpose which is inconsistent with the reserve purpose.

Temporary licences

Temporary licences allow the trust to permit short-term and generally low impact activities on the reserve without the Minister's consent. Temporary licences cannot be issued for periods greater than 12 months. Under section 108 of the Crown Lands Act, a reserve trust can grant temporary licences for a use which may not always be permitted within the reserve purpose.

However, the use of the reserve through these temporary licences should not diminish the availability and use of the reserve for the purpose for which it was set aside. The purposes for which temporary licences may be issued are listed in clause 31 of the Crown Lands Regulation, and are set out in Figure 1.

date of the lease or licence. You should advise the Crown Land's Reserves Team of any proposed tendering for a new lease or licence.

Other points to be kept in mind

- The Minister may not consent to the granting of a lease for a term exceeding 5 years (or a lease for a term that, by the exercise of an option, could exceed 5 years) unless at least 14 days have elapsed from the date of a notice of intention to give consent published in a newspaper circulating in the locality in which the land is situated or in a newspaper circulating generally in the State.
- Rent should reflect a commercial approach, having regard to purpose of the lease or licence, site value, and ownership of existing improvements. Reserve trusts are encouraged to seek advice from the Crown Lands Reserves Team or have an independent valuation undertaken to determine the market rent of the site of the proposed lease or licence.
- Crown Lands has established a policy (*Policy on concessions and hardship relief for Crown lands tenures*) to guide reserve trust managers when considering applications for rental rebates, waivers and hardship relief. This policy will also be used by Crown Lands when considering any request for the Minister's consent to any concessions proposed by a reserve trust in relation to a proposed tenure. The policy can be found at: www.lpma.nsw.gov.au/crown_land/leases/concessions_and_hardship_relief.
- The standard templates require rent to be adjusted annually using the Consumer Price Index with market rent determinations occurring once every three years for the term of the lease.
- Where a nominal rental is imposed because the lessee/licensee is a charitable or non-profit organisation, such rental should generally not be less than the statutory minimum rental applicable to tenures under the Crown Lands Act. The discount given to the lessee or licensee is to be specified in the agreement. Contact the Crown Lands Reserves Team for advice on the current statutory minimum rental.
- For reserve trusts managed by a local council it is important to ensure a separation of council and reserve trust business. The lease/licence should only reflect the business of the reserve trust.
- In the case of sub-leases, the head lease must contain a provision that allows a sub-lease, reference should be made to the head lease in the preamble of the sub-lease, and the term of any sub-lease should not extend beyond the date of expiry of the head lease.
- The Minister may require that a sub-lease or assignment of a lease not be permitted without prior written consent of the Minister.
- If part only of a reserve is being leased, a diagram specifying the area involved must be annexed to the lease documents.

14.6 Content of the document

Length of term

The term of a lease/licence should be as short as possible, taking into account the particular circumstances of the reserve and the lessee's proposed use of it. Future changes in community needs should also be kept in mind when negotiating the length of term.

Terms of more than 20 years will not normally be approved by Crown Lands.

ATTACHMENT I

HuntFest Cover Letter: To Eurobodalla Shire Council

27/8/15

HuntFest was started in 2013 and has been a huge success, bringing in much needed tourist dollars to the Eurobodalla Shire in the slowest tourism period of the year. Due to HuntFest's three major sponsors' request for a five year sponsorship contract, we find we must apply for a new events licence, as the current licence is due to expire in 2017. We are applying for an events licence starting in June 2018 and running to June 2022. This new events licence guarantees access to the site which is vital to any ongoing expansion and planning of the event into the future.

Our sponsors are requesting a 5 year legal sponsorship contract which will enable them to plan financially for their own organisations. It also gives them tenure to the event and enables the South Coast Hunters Club to make long term financial and business plan strategies. Sponsorship is a huge financial boost that enables organisers to expand the advertising of the event itself, which will see more interstate visitors and exhibitors attending the show.

In 2013, HuntFest had a gate of approximately 1100 people. In 2014 some 2300 people attended the event and it brought in over \$800000 to the Eurobodalla Shire. This year, 2015, over 2400 people attended HuntFest. Over \$450000 was brought in to the local economy.

HuntFest has a proven track record in attracting visitors to the Shire, from not only NSW but interstate as well. The event organisers have a proven record that they are able to professionally manage the event which continues to grow year by year. A further 5 year licence will give the South Coast Hunters Club the ability to plan for further improvement and expansion.

The South Coast Hunters Club has also been able to donate over \$3500 in the past three years to local community groups in the Eurobodalla Shire.

Alan Millar

SCHC Secretary

