

CROWN LANDS POLICY FOR MARINAS AND WATERFRONT COMMERCIAL TENURES

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1 BACKGROUND

Marinas and associated foreshore commercial landuses are important features of the tidal and non-tidal waterways of New South Wales. These developments are often on or adjoin Crown land. This Policy is consistent with the commercial policies, business rules and operations applied to these waterfront and maritime activities/structures following the formation of the Department of Lands. It has been developed to further explain the framework and practices applied, and to strengthen the partnership between the Crown, which is the owner of the land, and private and public sector organisations that develop, operate and maintain these facilities. In many cases, the use of the foreshore covers both freehold and Crown land. Accordingly, this Policy recognises the complex history behind the development of these facilities and the resultant land ownership pattern.

The New South Wales Department of Lands is responsible for the administration of all Crown land in New South Wales under the provisions of the *Crown Lands Act 1989*. Under the *Crown Lands Act* Crown land resources are to be shared equitably in accordance with the principles of environmental protection, conservation and ecological sustainability, public use and enjoyment, as well as encouraging multiple use of the land.

The *Crown Lands Act 1989* contains the following principles for managing Crown land:

- environmental protection principles are observed in the management and administration of Crown land;
- natural resources of Crown land (including water, soil, flora, fauna and scenic quality) are conserved, wherever possible;
- public use and enjoyment of appropriate Crown land is to be encouraged;
- multiple use of Crown land is to be encouraged, where appropriate;
- Crown land should be used and managed so its resources are sustained in perpetuity, where appropriate; and
- Crown land is to be occupied, used, sold, leased, licensed or dealt with in the best interests of the State, consistent with the above principles.

This Policy has been developed to guide the creation of new and renewed tenures for marinas and waterfront commercial facilities in accordance with the requirements of the *Crown Lands Act 1989*, the principles of Crown Land Management, and the wider policy considerations reflected in ICAC guidelines and government business directives such as the National Competition Policy.

The Policy applies to Crown land above and below Mean High Water Mark (M.H.W.M) and to the non-tidal waterways of the State where Crown land is involved. The Policy also addresses issues associated with the development or redevelopment of such lands. In this regard, under current planning controls in New South Wales, where a new marina, or a major redevelopment or a change to an existing marina is proposed, the development may be considered a State significant development and in such cases the Minister for Planning is the Consent Authority.

Holders of Crown tenures will continue to be subject to legislative controls exercised by other state government agencies and local government for activities, including the protection of the environment, the maintenance of a safe workplace, and orderly development. The Department will encourage the industry to develop and implement codes of best practice.

This Policy does not relate to private boat sheds, jetties, and reclaimed land used for a private (domestic) purpose by the adjoining landowner(s), or the temporary use of waterfront Crown land. However, waterfront structures (above or below M.H.W.M) linked to a strata plan (by whatever means) may be regarded as a commercial lease.

2. INTENT OF THE POLICY:

The State Government recognises the economic and social importance of the marina and boating industry and other waterfront commercial uses. The on-going need to improve existing facilities and to provide new facilities for the industry, the boating public and for public recreation is also recognised. Waterfront industries provide a range of valuable public services and facilities and often provide the only practical access to the foreshore.

The intent of this Policy is to provide benefits to New South Wales by:

- Ensuring that the commercial leasing and licensing of Crown lands is consistent, transparent, fair and impartial;
- Encouraging the sound environmental management of New South Wales' waterways and foreshores;

- Encouraging the ongoing development and improvement of existing and new waterfront sites to ensure the availability of high quality infrastructure for the storage, maintenance, repair and use of watercraft by the boating public;
- Encouraging the use of waterfront land for public use and enjoyment;
- Securing a market return from the commercial use of Crown land and the best outcome for the State;
- Providing certainty for the holders of Crown tenures in a commercially secure environment; and
- Promoting and encouraging the operation of market forces in the development and operation of Crown tenures.

Within this policy, individual provisions are contained within sections. However there are inter-relationships between provisions and sections. Therefore, the policy needs to be read as a whole.

3. THE CROWN LANDS ACT 1989

The Crown Lands Act 1989 (the Act) regulates the manner in which Crown land is dealt with (occupied, used, sold, leased, or licenced). The Act empowers the Minister, in achieving the objects of the Act, to sell, lease or licence Crown land. As a general principle, waterfront Crown land will not be sold and accordingly this Policy relates to provisions of the Act relating to creation and administration of leases and licences of Crown land.

The Act contains provisions which establish the powers of the Minister to address the following matters:

- The term and conditions of a lease or licence (S34).
- The transfer, sub-leasing or other dealing of leases and licences (S44).
- The forfeiture of a lease or licence if the holder fails to comply with a provision of the Act, any other Act, or a condition of the holding (S129 & S174).
- The withdrawal of land from a lease or licence for a public purpose (S136).
- The removal or alteration of conditions (S139 & S140).
- The principles of rent determination and redetermination (S143).

This Policy provides guidance for the industry and the Department on the manner in which tenures of marinas and other waterfront Crown land will be created and administered under the provisions of the Act.

4. PROBITY REQUIREMENTS

The Department requires the highest standard of probity from its staff and those it does business with. Accordingly, the Department may engage an independent probity auditor to assist the Department in ensuring compliance with relevant ICAC and Government guidelines.

5. DEFINITIONS

In this Policy

Crown land has the same meaning as in the *Crown Lands Act 1989*.

Department means the Department of Lands

Land Assessment is the evaluation of Crown land to determine the land's capability, and includes the identification of suitable and preferred uses of Crown land under Part 3 of the Crown Lands Act 1989.

Lease and Licence has the same meanings as in the Crown Lands Act 1989.

Marinas means facilities that moor, berth or store vessels at fixed or floating berths, at freestanding moorings, alongside jetties or pontoons, within dry storage stacks or cradles in hardstand areas.

Public interest test includes (but is not limited to) consideration of the following matters, and at the discretion of the Crown, may include advertising before a decision is made:

- Whether the proposal is consistent with the Principles of Crown Land Management;
- Whether the proposal will provide improved public access to the foreshore and coastal waterways, particularly for the disabled.
- Whether the proposal will facilitate the introduction of new skills, technology or services.

- Whether the proposal represents value for money – including improved risk management, whole-of-life costing, innovation, costs to government and improvements to whole-of-government outcomes.
- Whether the proposal will lead to an undesirable increase in market dominance.
- Whether the proposal would unreasonably interfere with other current or future uses of adjoining Crown land or Crown land within the immediate area.
- Whether the proposal provides positive initiatives to improve environmental protection and management.
- Whether alternative uses or designs of the proposal should be contemplated before the proposal is accepted by the Crown.
- Whether the proponent has the required probity, financial and operational capacity.

Residual Value of Improvements means the value of improvements at the end of the tenancy, determined in accordance with established accounting and valuation practices, or as otherwise agreed between the parties.

Tenure includes a lease or a licence.

Waterfront Commercial Uses includes, but is not limited to, marine industries or other related land or water shoreline facilities and may include clubs, commercial premises, retail outlets, kiosks and restaurants, tourist and recreation facilities but does not include caravan parks.

6. EXISTING CROWN TENURES

In renewing existing tenures, the Department will reference industry best practices in seeking not only a viable commercial arrangement but one which protects the environment and meets broad community needs.

The following specific considerations will apply to existing Crown tenures under this Policy.

6.1 Renewal of Existing Tenures

Subject to the Act's requirement for a land assessment, which addresses the capability and suitability of the land for a continuation of existing and/or alternative

uses, all existing Crown tenures covered by this Policy may be renewed on or before expiry without public competition. This provision should be read in conjunction with Sections 6.2 and 6.5. Such consideration, through a Land Assessment generally will take place not less than 2 years prior to the expiry of the lease.

The renewed tenure will generally be offered under the same conditions as the Crown tenure it replaces except where altered or modified conditions are required to provide a more up-to date tenure to achieve environmental, statutory or commercial objectives. It is intended that all renewed tenures will be commercially based.

The Crown reserves the right **not** to renew an existing tenure if:

1. Rent is substantially in arrears; or
2. A breach(es) of a condition(s) has occurred during the tenure. In all new tenures the particular conditions which are considered to be significant enough to lead to a substantial breach if not adequately observed will be flagged; or
3. The holder has been previously advised that the tenure will not be renewed.

In the case of (3) above, compensation will be provided for the residual value of improvements (if any) at the end of the term if the tenure is not renewed. The only basis that a tenure would not be renewed (or a licence terminated), other than as a result of a breach of the tenant's obligations, would be because the land is required in the public interest as determined through Land Assessment and the principles of Crown land management

Where an enterprise operates at a particular location under multiple Crown tenures (eg, Crown lease(s) and/or Crown licence(s)), consideration will be given to replacing these multiple tenures with a single tenure when the primary tenure comes up for renewal.

6.2 Term of New Tenures

All new tenures will be negotiated on a site by site basis and provide for a term which is reflective of the nature, size and complexity of the development and the need for the lessee to amortise any new investment, to receive a commercial return having regard to the value of the existing site, and any agreed initiatives to provide particular public benefits, services or facilities. Where a land assessment of the land indicates that a change of use or a significant intensification of use should occur in the foreseeable future, the new term may be limited to reflect the timing of the proposed planning horizon. Section 6.6 deals with issues associated with the ownership of capital improvements at the end of a tenure.

6.3 Purpose of Leases and Licences

All future tenures will be for *business purposes* with separate condition(s) to define the limits (if any) to the use(s) of particular holdings.

6.4 Rental Determination

All rentals will be market based and reflect and reference the value of the Crown's improvements, the purpose of the tenure, the area of the premises and other relevant rental determination matters as provided by Section 143 of the Crown Lands Act. Valuations for rent determinations will be established on a basis that reflects a fair and equitable return for the lessor and lessee and could include the use of turnover, UCV or other appropriate methodologies.

6.5 Development / Redevelopment or Change of Use

All development/ redevelopment of Crown tenures involving a change of use or an intensification of use may involve a public interest test. Applicants will be required to meet the Department's reasonable costs in assessing development/redevelopment proposals.

The Crown reserves the right to determine whether a development/redevelopment proposal constitutes a new development based on the scale and nature of the proposed development. Such sites will be dealt with as a New Development Site under this Policy (see Section 7). However, the requirement for a public interest test will not be applied where redevelopment is undertaken to meet new statutory requirements imposed on the holder or to achieve industry wide reforms agreed to by the government.

Owner's consent must be obtained from the Department for the lodgement of a development application where development consent is required. Approval condition(s) for a change of use(s) or to the term(s) of tenure may include a rent reappraisal.

Without being prescriptive, the Department will seek to ensure that priority is given to retaining and improving water dependant uses such as dockyard and repair facilities, or fuel and emergency service access points. Ancillary developments such as restaurants, cafes and brokerage services will be considered in light of likely impacts on surrounding properties and within the context of existing statutory planning controls. Wherever possible, enhanced public access to the foreshore will be encouraged.

6.6 Ownership and Maintenance of Existing and New Improvements

All improvements on the land, unless otherwise provided by a condition of the tenancy, are the property of the Crown at the end of the tenure if it is not renewed. Tenures may require the removal of some or all structures and improvements at or before the end of the tenure.

Where the available or remaining term of tenure is insufficient to allow the full amortisation of a proposed capital improvement, an agreed residual value of the improvements may be determined to reflect the holder's interest at the end of the tenure. This residual amount would be taken into account in subsequent rental determinations or for compensation purposes if the tenure is not renewed.

All structures are to be maintained to the Department's satisfaction by the holder during the term of the tenure as prescribed by the tenure conditions.

6.7 Power to Sub-let

All sub-leases, sub-licences or agreements will require the consent of the Department. However, licences or agreements for non-commercial activities or short-term activities as permitted by conditions of the tenure will not require separate approval from the Department.

All sub-leases, sub-licences or agreements must be consistent with the purpose and conditions of the head-lease/licence.

6.8 Variation to the Form of Tenure

The Department may require or allow the conversion of a licence to a term lease where significant structures and/or large areas are involved. The Department will consider applications for conversion of a licence to a lease from existing holders. The holder will be required to meet the Department's reasonable costs involved.

6.9 Right to Transfer or Assign

All transfers or assignment of a lease or the issue of a new licence to a new holder will require the consent of the Department and the proposed holder must satisfy the Department in terms of financial capacity, experience and probity.

6.10 Mortgages, Other Interests and Security Deposits etc

Registered interests to third parties may be approved by the Department but such interests will be limited to an agreed value based on the remaining term of the lease. All such interests will merge at the end of the lease.

A suitable security deposit may be required that reflects the tenant's obligation to comply with removal of improvements at the end of the tenure.

7 NEW DEVELOPMENT SITES

The Department from time to time may identify new areas of Crown land for lease or licence for marina or waterfront commercial development. As indicated in Sections 6.1 and 6.5, a land assessment and/or a public interest test may also establish that the development/ redevelopment of the site of an existing tenure should also be treated as a new development site.

7.1 Public competition

All new development sites will be subject to public competition and a registration of interest and/or a tender process. The Department may engage an independent probity auditor and other expert assistance to assist the Department in ensuring compliance with relevant ICAC and Government guidelines.

7.2 Private Treaty Negotiations

Direct negotiations for a commercial tenure of a new development site will only be considered where the only practical access is available from the adjoining land, or a significant public benefit can be demonstrated in accordance with government Policy. In all cases a public interest test will be applied.

7.3 Crown Improvements

Where a development site has been materially improved by the Crown, or contains fixtures owned by the Crown, the incoming tenant may be required to pay to the Crown an agreed amount for these improvements.

7.4 Previous Tenant's Improvements

Where the site of an existing holding is treated as a new development site, the former tenant may, subject to conditions of previous tenure and compliance with the conditions of that tenure, be entitled to the amortised value of the tenant's improvements (if any) reflecting the nature of the improvements and residual term of the lease, or some other previously agreed value, for example as determined, by a condition of a lease arising from a redevelopment of the property under Section 6.5.