

CROWN LANDS NSW
BUSINESS DIRECTIVE
FOR COMMERCIAL LEASES AND LICENCES

AS APPROVED BY DIRECTOR GENERAL

DEPARTMENT OF LANDS

ON 7 SEPTEMBER 2004

Business Directive 2004 **Commercial Lease & Licences**

Introduction

The Crown Lands NSW Business Directive 2004 for Commercial Leasing & Licensing of Crown land consolidates existing government and departmental policy and guidelines to provide clear direction and transparency for commercial leasing & licensing of Crown land.

Government policies and guidelines underpin the following principles, which need to be followed for commercial leasing & licensing of Crown land.

- The standards of probity, ethics and integrity expected from all parties in the supply & dealings of Crown land.
- Fair opportunity for all prospective parties to compete for state owned assets.
- Accountability and consistency for all Crown Lands NSW dealings in Crown land.
- Obtaining the full market value for the highest and best use of Crown land for the benefit of the whole community.
- Provide a rigorous and transparent decision making regime for commercial leasing & licensing of Crown land.

Application of the Directive

The Crown Lands NSW Business Directive 2004 for the commercial leasing & licensing of Crown land apply to all new commercial leases & licenses granted by Crown Lands NSW under the provision of the Crown Lands Act, 1989.

The term "leases" used in this document also includes licences under that Act.

Objectives of the Directive

The objectives of this document are to provide a consistent framework and clear direction to Crown Lands NSW management, staff and clients for the commercial leasing of Crown land to ensure:

- Compliance with legislative obligations, and government policies.
- Leasing of Crown land occurs through an open, fair and impartial process.
- The NSW community benefits from leasing in terms of improved social, economic and environmental outcomes.
- Leasing is carried out on equitable terms and conditions consistent with probity standards in line with government policy, National Competition Policy (NCP) principles and Independent Commission Against Corruption (ICAC) guidelines.
- Improved client awareness of government policy.
- The process of leasing Crown land is based on sound business and commercial principles.

DIRECTIVE

The business directive applies to the granting of all new commercial leases under the provisions of the Crown Lands Act 1989 whether in respect to new sites or sites with existing leases.

Application of the directive is dependent on all statutory obligations under the Crown Lands Act 1989 and all associated and pertinent Acts being addressed and relevant approvals relating to the allocation of Crown land being obtained in the first instance.

Crown land will only be made available for lease after land assessment requirements of Part 3 of the Crown Lands Act 1989 have been considered.

Principles of Commercial Leasing

A commercial lease is defined as any lease, the purpose &/or effect of which provides the opportunity for the holder to generate an income.

The same principles in terms of rent, premium and improvements will apply to both private treaty and public competition leases. A full examination and investigation of the proposal is required, both within Crown Lands NSW and by an external evaluator, to identify any undisclosed costs (and benefits) and undisclosed exposures, including risks and costs, which may have a material impact on the decision to lease.

Essential Criteria

Notwithstanding a public interest test that is assessed favourably, there are a number of criteria which must also be satisfied, including probity and integrity, disclosure and transparency, confidentiality and the protection of intellectual property.

Project Assessment

Notwithstanding the public interest test and the essential criteria a rigorous assessment of the proposal and the proponent must be undertaken. This assessment should include the protection of Crown Lands NSW and the departments interests, a full due diligence, security, risk assessment, economic and environmental impacts, benchmarks, value for money and innovation.

Public Competition

Crown land shall only be made available for commercial leasing by way of public competition, unless otherwise authorised by specific approval of the Minister or a Ministerial executive's delegate within Crown Lands NSW to proceed by way of private treaty.

There is, and must be, a general presumption in favour of Crown Lands NSW transacting business with the private sector in an open and transparent manner in order to ensure probity, integrity and impartiality. There must also be a presumption that a competitive, rather than exclusive dealing process, ensures greatest value for money.

Crown Lands NSW however should not directly prohibit itself from exclusive private treaty dealing but should recognise and protect the purpose for which it wishes to deal, namely, achieving maximum benefits for the community.

Private Treaty (Non competitive) Dealings

Whilst national competition policies support a preference for competitive processes, they do not exclude direct private treaty dealings where this is consistent with the public interest.

Private treaty commercial lease proposals may be considered. However it must be clearly demonstrated that there are sound reasons for proceeding outside of the public competition process.

Assessment of the appropriateness for a direct dealing should cover:

- A public interest (see Attachment 1);
- Essential criteria relating to the proponent; and,
- Assessment of proposals viability and social, economic and environmental impacts.

There should be an obligation on the proponent to adequately justify the threshold public interest test. This should be done at the proponent's cost and risk, with no prior or resultant obligation on Crown Lands NSW.

A flow chart detailing the steps through which a proposal should be treated is at Attachment 2.

Public/ Industry Interest

Consideration should be given to measures which will return to the people of NSW a future financial benefit, or at least recover the cost of concessions that may be required to be initially granted, (*to promote benefits in the public interest*).

All commercial lease proposals shall be subject to advertising to gauge any public or competing interests, and advertising should be the primary test to be satisfied prior to any consideration of direct dealing through private treaty.

Requests for Renewal of Current Leases

Requests for renewal of existing leases by private treaty prior to expiry of the current term may be considered, but should be subject to full application of the Crown Lands NSW Business Directive.

Term

The term of any lease for commercial use should have regard to the specific purpose and the requirement for development costs to be amortised over the term of the lease.

Generally terms for commercial leases will be considered up to 20 years, with shorter or negotiation of longer terms, influenced by certain criteria within a proposal, such as approximate planning horizons and level of investment over term of lease.

Rents

Rent shall be the current market rent of the site plus any Crown improvements for the approved purpose.

Fixed Improvements

When conditions of any expiring lease permits, the Minister may claim fixed structural improvements as property of the Crown and may capture their value in any new lease granted.

“Payment to outgoing lessees for fixed improvements” is generally an option exercised by the Minister, only in support of good and complying tenants, to support a thorough maintenance regime throughout the term of lease to termination.

If the existing lessee is both a good and complying lessee, and is unsuccessful in obtaining a new lease through public competition, with Ministers approval the Department may:

- Determine the “fair value” of fixed improvements, by referencing Australian Accounting Standard AASB1041 and Treasury Guidelines TPP 03-02, which require reference to fair value and cost, of the improvements affected by the current lessee; and,
- Separately identify this amount in the public competition process, as payable by any new lessee to the outgoing lessee as the identified “fair value” of these improvements, on termination of current lease.

Premiums

A premium is to be paid to reflect the opportunity of securing a lease, and is not considered to be any part of the rental payments for the occupation over the term of lease.

A premium should be sought as a required payment, prior to the commencement of all commercial leases, in both private treaty and public competition circumstances.

Security Deposits

An appropriate capital security for all commercial leases is required. Two forms of security only are acceptable to the Department, as follows:

- A formal Bank Guarantee, for an agreed (yet variable over term of lease) sum; or,
- A registered equitable interest, for whatever the cost of removal of structures and rehabilitation of adjoining foreshore/wetlands may be at termination of lease, against an acceptable freehold ownership/title of the lessee.

Under terms of lease, a lessee has an obligation to comply with all conditions regarding the use and occupation of the site, which would generally include the construction and maintenance of site improvements, and as required, the removal of all or some of these improvements, plus as required by the Department or a Statutory Authority, the rehabilitation of the site.

A security for non performance of these conditions is required.

Triple Bottom Line Considerations

In considering any commercial lease proposal the Minister will have regard to the social, economic and environmental benefits to be provided by the proposal.

Life of Directive

This directive may and shall be reviewed at any time within a three (3) year period following adoption.

Public Interest Test

Benefits identified by the ACCC as being appropriate to consider in a public interest test include:

- fostering business efficiency, especially when this results in improved international competitiveness;
- expansion of employment or prevention of unemployment in efficient industries or employment growth in particular regions;
- promotion of industry cost savings resulting in contained or lower prices at all levels in the supply chain;
- promotion of competition in industry;
- promotion of equitable dealings in the market;
- assistance to efficient small business;
- industrial harmony;
- improvement in the quality and safety of goods and services and expansion of consumer choice; and
- supply of better information to consumers and business to permit informed choices in their dealings.

Source: Trade Practices Act, S90 [1540.25]

Process for Consideration of Direct Dealing

Attachment 2

