

14 Leases, Licences and External 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, as the trust is not conducting the activity, it 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.

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 (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 can't do should be clearly stipulated in the lease, along with other requirements such as insurance, weed control, payments and so on.

A **licence holder** does not have sole rights to an area of the reserve, but has a form of personal permission to use the reserve 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, seeking to achieve various environmental outcomes, are now being offered in exchange for direct funding or tradeable credits (e.g. carbon credits or biodiversity credits). The conditions and requirements for entering into these agreements on Crown land are explained in 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 purposes stated when the reserve was dedicated or reserved.

Temporary licences (for up to one year) can be granted for certain purposes permitted under clause 31 of the *Crown Lands Regulation 2006* (the Regulation).

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 renegotiating existing arrangements, reserve trust managers should refer to Chapter 12 and, if appropriate, consult their local Land and Property Management Authority office to clarify any possible native title issues before proceeding (see Appendix A for a list of local offices and their contact details).

When a lease should be used

A lease should be used when the lessee 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 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 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 to a local government body.

A licence may be granted to any of the above and, in addition, consideration could be given to the granting of short term or temporary licences to persons

representing unincorporated associations and schools (where not incorporated).

Minister's power to grant leases

The Minister for Lands can now, in addition to licences, grant leases, permits, easements and rights of way over Crown reserves where a reserve trust manager has been appointed.

The Minister for Lands may, for example, wish to issue leases or licences with consistent terms and conditions to infrastructure providers across an industry without the need 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 for Lands 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 for Lands must specify, by notice published in the Government Gazette, the purposes for which the Crown reserve is to be used or occupied.

Funds received by the Minister for Lands 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 or ancillary to the purposes for which the reserve was dedicated or reserved.

Examples of commercial activities that may be connected to an allowable 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 be consistent with the purpose 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 and clubs.

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 your local Land and Property Management Authority office 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/licences

When negotiating leases or licences for commercial activities such as food outlets, the board should invite competitive tenders or proposals in order to attract the best operator and financial return for the trust.

Leases or licences for non-commercial users

A user of the reserve may need the security of a long-term lease or licence because they have an ongoing 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 licenses, a lease or licence cannot be granted for a purpose which is inconsistent with the permitted purposes of the reserve.

Temporary licences

Temporary licences allow the trust to permit short-term and generally low impact activities on the reserve without the Minister's consent. Under section 108 of the *Crown Lands Act 1989* (the Act), a reserve trust can grant temporary licences for purposes which may not always fall strictly within the permitted purposes for that reserve.

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 temporary licences are listed in clause 31 of the Regulation, and are set out in Figure 14.1.

Figure 14.1 - Purposes for which temporary licences may be granted

access through a reserve	exhibitions	meetings
advertising	filming (this term is defined in detail in the <i>Local Government Act 1993</i>)	military exercises
camping using a tent, caravan or otherwise	functions	mooring of boats to wharves or structures
catering	grazing	sales
emergency occupation	hiring of equipment	shows
	holiday accommodation	sporting and organised recreational activities

entertainment equestrian events	markets	stabling of horses storage
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Leases for resident employees

Where a proposed employee's employment terms include them residing on a part of the reserve (e.g. a resident caretaker), care should be taken to document their employment contract and any lease of premises separately. Such a lease, like other leases, will require the consent of the Minister before it is granted.

Leases and Licences for filming on Crown Reserves

The *Filming Related Legislation Amendment Act 2008* commenced on 30 March 2009. The Act amended the *Crown Lands Act 1989* to allow a reserve trust to grant a lease or licence to enable a filming project whether or not this use is consistent with an adopted plan of management or the purpose of the reserve.

A *filming project* is defined as a project (such as a film, a documentary, an advertisement, a television program or a specified set of television programs) involving filming.

Reserve trusts will still need to seek the Minister for Land's consent to these licences (other than temporary licences of less than 12 months term) and leases.

Consistent with the policy position of the New South Wales Government to "make NSW film friendly", reserve trusts are encouraged to ensure that in relation to proposals for filming projects on reserves managed by a reserve trust:

- there is a responsive and cooperative attitude in dealing with filming requests for the Crown reserves they manage;
- applications for access to Crown reserves are processed promptly;
- access to Crown reserves are supported wherever possible and should not be unreasonably withheld;
- where an application is refused, clear reasons for refusal should be provided, and alternative arrangements for sites offered if possible;
- fees are kept to a minimum and should only reflect costs.

Proposed filming locations could potentially have significant environmental values or constraints on that location. The proper consideration of such issues through some form of environmental assessment undertaken by a film maker, as part of the application process, would assist reserve trusts in ensuring the sustainable use of these locations for filming.

Reserve trust managers who are local government councils should also refer to the *Local Government Filming Protocol 2009*. The protocol applies to both council owned land and land that a council is the steward for, such as Crown land. The Protocol provides general information relating to the film industry and location filming that would be of assistance to all trusts. The *Local Government Filming Protocol 2009* can be accessed at:

www.fto.nsw.gov.au/content.asp?content=3&id=582

14.3 Minister's consent

A lease or licence is an important contract which regulates the use of the leased/licensed area and sets out the rights and responsibilities of both the trust and the lessee/licensee. It therefore requires a formal agreement.

The importance of formal agreements is reflected in the need for the Minister's consent and the early involvement of the Land and Property Management Authority. Together, these ensure that the agreement is properly structured and meets the requirements of the State and local governments, as well as the community.

Devolution of care, control and management of reserves under the provisions of Section 48, Local Government Act, 1993 does not empower Local Government Authorities to enter into lease/licence agreements.

Exemption

The Minister's consent does not need to be obtained from the Land and Property Management Authority before a lease or licence is signed if:

- it is a temporary licence provided it comes within one of the permitted purposes under clause 31 of the Regulation and the term is for not more than one year; or
- a local council as trust manager has obtained prior written consent under section 102A of the *Crown Lands Act 1989* to enter into certain leases and licences.

Considerations with respect to Minister's consent

Application for consent is made to the Land and Property Management Authority. It is important to speak to the LPM Authority when consideration is first given to the leasing or licensing of reserve assets particularly if the reserve has not been used for the proposed purpose before.

In considering whether or not 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
- 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 the use of the public land
- whether the proposed lease or licence will contain provisions for the periodic updating or review of the rent
- 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 Land and Property Management Authority 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.

14.4 Leases and licence templates

The Land and Property Management Authority has a number of requirements which must be incorporated in any lease or licence agreement. To ensure these requirements are included standard lease and licence templates as well as a temporary licence template have been prepared for use by all reserve trusts. These templates are for use with commercial operators as well as other users of the reserve.

The lease and licence templates can be downloaded from the Land and Property Management Authority's website www.lands.nsw.gov.au/crown_land/trusts/trust_managers/lease_and_licence_templates. The template for a temporary licence is also found at Appendix H2 and H3.

The standard lease or licence templates do not negate the need for the reserve trust to seek Minister's consent from the Land and Property Management Authority before the lease or licence is signed (unless a local council has prior consent under s.102A of the *Crown Lands Act 1989* to enter into certain leases/licences or a temporary licence is being granted).

The templates also do not negate the need for trusts to use a solicitor. In granting leases and licences (other than temporary licences) reserve trusts are encouraged to engage the services of a solicitor to provide advice to the reserve trust on legal aspects concerning the grant of the proposed tenure.

You will need to work through the templates and use whichever clauses are appropriate.

It should be noted that the lease conditions template is an attachment to the Real Property Lease Form 07L found at www.lands.nsw.gov.au/land_titles/dealing_forms/manual_dealing_forms#L. This lease form (as amended from time to time or an updated form specific for reserve trust managers) should be used.

Leases

All leases submitted for the Minister's consent should be in the form of a Real Property Act 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 should generally be registered at Land & Property Information NSW (see www.lands.nsw.gov.au/land_titles/dealing_forms/manual_dealing_forms#L). If there is no Real Property Act (Torrens) Title and a lease is proposed to be registered, then early contact needs to be made with the relevant Land and Property Management Authority local office to arrange for the creation of a title or registration in the General Register of Deeds.

Leases for less than 3 years are also not required to be registered although it is desirable that the lease is registered if there is some other competing interest in the land.

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 lease template. 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 1987* 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 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 the *Residential Parks Act 1998*, *Holiday Parks (Long Term Casual Occupation) Act 2002*, *Retirement Villages Act 1999*, *Liquor Act 1982*, and *Registered Clubs Act 1976*.

Licences (other than temporary licences)

Reserve trusts are encouraged to use the licence template 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.

14.5 How reserve trusts prepare a lease or licence

The procedure that should be followed is set out below:

1. The trust consults the local Land and Property Management Authority office 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 Land and Property Management Authority 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 trust's solicitor prepares a draft lease or licence as far as practicable using the **standard lease conditions template or licence template**.
4. The trust's solicitor provides the draft lease/licence to the lessee/licensee.
5. If the lessee/licensee requests any amendments that the trust proposes to agree to, the amendments are incorporated into the draft agreement.
6. The trust sends the final draft to the Land and Property Management Authority for comment and in principle consent.
7. The Land and Property Management Authority notifies the trust of any amendments and its' in principle approval. 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 Minister's intention to give consent in accordance with Section 102(2) of the *Crown Lands Act 1989*. Provided any concerns that may be received from 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 Land and Property Management Authority, the trust's 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 Land and Property Management Authority. When the reserve trust is executing the agreement it needs to be in accordance with Section 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 Land and Property Management Authority. The Minister's consent is then added to the documents.
11. One copy is retained by the Land and Property Management Authority and two copies are returned to the trust's 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 terminating date of the lease or licence. The local Land and Property Management Authority office 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 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 local Land and Property Management Authority office 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 (currently \$400.00 plus GST – effective 23 April 2009) 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 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 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 and the documentation should reflect this. Clauses conferring a right to compensation for improvements are generally 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 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.

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 the Land and Property Management Authority.

Options for renewal or lengthy 'holding over' rights at the end of a lease/licence will also not normally be approved. If there is still a need for the activity at the end of the term, a new lease/licence can be negotiated. This

gives the trust the opportunity to review the arrangement in the light of current and anticipated community needs.

Rent and rent review

The rent or licence fee should normally be a commercial market rent.

Relevant factors to consider include:

- the permitted use under the lease/licence
- the value of the part of the reserve being used
- who owns the building or improvements to be used by the lessee/licensee
- costs to be incurred by the trust.

Nominal rents

Where a trust wishes to charge a rebated rent because the lessee is a charitable or non-profit organisation, the trust should contact the local office of the Land and Property Management Authority to discuss whether a rebate from market rent is appropriate, and if so, the level of the rebate.

Rent reviews

Leases and licences should provide for regular rent reviews.

Rent should be reviewed annually by reference to the Consumer Price Index or some other agreed factor (e.g. a fixed percentage).

With longer leases, in addition to the annual Consumer Price Index reviews, the rent should be reviewed to market rent at least every three years. There should be a mechanism to have the market rent determined by an independent expert such as a valuer, if the trust and the lessee cannot agree on the market rent.

Payment of part of rent to Public Reserves Management Fund

Under section 106 of the Act, the Minister can direct where rents received are to be applied. This can include requiring that a proportion of the rent received under a lease or licence be paid into the Public Reserves Management Fund.

This will be specified in the Minister's consent to the grant of the lease or licence.

Buildings and improvements

Where the agreement requires the lessee/licensee to undertake building or development works, the lease/licence should specify that no work is to be undertaken until:

- plans have been approved by the trust and the Minister

- any necessary development consents or construction certificates have been obtained from the local council.

At the end of a lease/licence, any improvements become the property of the trust. A lease or licence should not give the lessee/licensee a right to receive compensation for buildings or other improvements installed by them. In appropriate cases, the lessee/licensee should be required to clear and restore the reserve to the satisfaction of the trust and the Minister.

Consents and approvals

The lessee/licensee must obtain all consents or approvals it needs to use the reserve and buildings or to operate its business. This may include:

- development consent from the local council, to permit the reserve or a building to be used for the purpose proposed by the lessee/licensee
- construction certificate (previously called Building Approval) from the local council or an accredited certifier for any building works or renovation works
- occupation certificate from the local council or an accredited certifier if this is required in connection with any approved building works or renovation works
- notification to the relevant authority that a food business is being operated (notification under section 100 of the *Food Act 2003*)
- any other approvals which are particular to the lessee/licensee's type of business or operations.

The lease or licence should make the lessee/licensee responsible for obtaining all necessary consents, approvals and notifications, and for keeping them current.

Liquor licences

Significant changes to liquor licensing laws came into effect on 1 July 2008 with the commencement of the *Liquor Act 2007* and the *Liquor Regulation 2008*. A licence is required to enable the sale and supply of liquor, and there are six types of licences available under the legislation.

When considering whether to grant a lease or a licence that will permit the lessee/licensee to apply for a liquor licence, trusts must consider the suitability and appropriateness of permitting licensed premises on Crown land. This will require consideration of factors such as the declared reserve purpose, the site context, location and surrounds, existing tenure conditions, commercial potential of the site and competition policies, community amenity and safety, insurance/indemnity requirements and the greater public interest.

Applicants that apply for a liquor licence for premises that are located on Crown lands, must within 2 working days of making the application notify the Minister for Lands that the application has been made. It is strongly recommended that Trusts consult with the local office of the Land and Property Management Authority before making an application or before

granting a lease or licence that will permit a lessee/licensee to make a liquor licence application.

Changing the use of a premises to a licensed premises may also require development consent from the local consent authority. Lessee/licensees should make enquiries to the local council to ascertain this, and the lease or licence should make the lessee/licensee responsible for obtaining all necessary consents.

Further information regarding the legislative changes and the new types of liquor licences is available from the NSW Office of Liquor, Gaming and Racing www.olgr.nsw.gov.au/liquor_fact_sheets.asp.

14.7 Managing lessees and licensees

Tenancy management

The rents received under leases and licences often represent a significant part of a reserve's income. It is therefore important that the trust makes sure the lessee or licensee is:

- obeying the terms of its lease/licence
- paying rent and other money on time
- not doing anything that is inconsistent with the lease/licence or the permitted purposes of the reserve.

Regular inspections

The trust should regularly inspect the area occupied by the lessee/licensee, as a part of its general inspection program. Any breaches of the lease/licence or other matters of concern should be communicated to the lessee/licensee promptly, rather than 'letting things slide'. A lessee/licensee is less likely to respond to the board's concerns if known breaches have been left unmentioned for any length of time.

Where a lessee/licensee appears to be doing something that goes beyond the permitted use, the board must act promptly to either have the activity stopped, or to review the activity and renew the agreement to permit the activity if appropriate.

Monitoring of rent payments

The trust's treasurer must monitor payments of rent or any other money payable under the lease/licence, and report any arrears or irregularities to the board as soon as they become apparent.

Dates for rent reviews and the expiry of leases and licences should be diarised and be reviewed at the annual general meeting or at other appropriate meetings during the year.

Resolving user conflicts

A trust will sometimes grant more than one lease or licence over its reserve.

When negotiating leases or licences, the board must take into account any other arrangements that have already been entered into, to avoid overlap or conflict over:

- leased or licensed areas
- times for use of particular facilities
- uses which are inconsistent with each other (for example noisy activities occurring at the same time as activities where quiet is desired).

Where a reserve is regularly used by a number of different users, it may help if specific provisions to deal with the resolution of these types of conflict are included in the reserve's plan of management. See Chapter 5 for more information about plans of management.

If a dispute should arise between users, the board must not favour one user over another when seeking to resolve it, and must act fairly and in accordance with the leases, licences or other agreements it has entered into.

14.8 Land Management Agreements

A number of mechanisms have recently been introduced to impose long-term management obligations on land in exchange for direct funding or for tradeable credits. These land management agreements include the following:

- Property Vegetation Plans (**PVPs**);
- Covenants in support of Carbon Credits under the NSW Greenhouse Gas Abatement Scheme (**GGAS**) or a future national scheme; and
- Biodiversity Banking (**Biobanking**) Agreements.

Catchment Management Authorities (CMAs) may provide incentive funding to landholders (including trust managers) to undertake certain vegetation and biodiversity enhancements on the land. This is usually undertaken through the preparation of a Property Vegetation Plan (PVP) by CMA staff with input from the land owner. The term of the obligation imposed on the land as part of these agreements can vary from several years to in-perpetuity. Generally long-term commitments attract a higher level of initial funding. Most CMAs have agreed funding thresholds, so that grants above a defined threshold requires a minimum period of commitment. Overall administration of the PVP scheme, including compliance with PVP agreements, is the responsibility of the Department of Environment and Climate Change (DECC).

Plantations for the purpose of carbon sequestration can also generate tradeable carbon credits under the NSW Greenhouse Gas Abatement Scheme (GGAS). The GGAS scheme commenced in 2003, however legislative amendments to the *Crown Lands Act 1989* and the *Western Lands Act 1901* were introduced in 2006 to remove uncertainty about the eligibility of

Crown land to participate in the scheme. To generate income from carbon sequestration, the land owner needs to enter into an agreement with an accredited carbon credit provider. This could be a commercial provider or an accredited not-for-profit organisation such as Greening Australia. IPART (the Independent Pricing and Regulatory Tribunal) is the scheme administrator.

The GGAS scheme is expected to go through a transition phase and become incorporated into a national carbon trading scheme around about 2011.

The Biodiversity Banking (Biobanking) and Offsets Scheme seeks to encourage conservation on land outside the formal reserve system through the creation of tradeable biodiversity credits which can be purchased by developers to offset the impact of development activities.

BioBank credits can only be created if the management actions are additional to any biodiversity conservation measures, or other actions, that are already being carried out on the land, or are required to be carried out under existing agreements or management arrangements. This “principle of additionality” means that credits generated on Crown land will be subject to discounting to take account of existing management actions and obligations.

When are external land management agreements appropriate on Crown reserves?

In relation to Crown reserves managed by a reserve trust, the key issues associated with any long-term legally binding external commitment are:

- consistency with the reserve’s public purpose and any relevant Plans of Management;
- the impact on future reserve use options; and
- funding of ongoing maintenance responsibilities under the land management agreement (and their relationship with maintenance obligations under the Crown Lands Act).

Where Crown land has been reserved for a specific public purpose, or a number of public purposes, the objective of any proposed land management agreement (e.g. habitat rehabilitation or carbon sequestration) must be consistent with the public purpose of the reserve. The impact on the public’s use and enjoyment of the reserve, particularly any existing uses, should be considered. See section 1.3 of the Trust Handbook for information on changing the purpose of a reserve. Where a *Plan of Management* is in place, this also needs to be taken into consideration, and may need to be amended to enable a land management agreement to be established.

Where a reserve, or part of a reserve, is subject to a land management agreement, alternative future use options for the land will be significantly constrained. The term of the land management agreement will be a major factor, with current options usually ranging from 15 years to in-perpetuity. In some cases shorter agreements may be an option, but these are generally not recorded on the title of the land.

Where a binding commitment for conservation (or any other purpose) is made in perpetuity, an adequate ongoing income stream also needs to be identified

to cover the future maintenance cost associated with this obligation. These future maintenance costs may be difficult to estimate and there is a risk of creating unfunded liabilities for future trust managers.

Catchment Management Incentive Funding via Management Agreements

Management contracts that are not part of a Property Vegetation Plan (PVP) are not formally tied to the land but to the individuals that enter into the contract or agreement. CMAs use common law management contracts to secure funding for improved land management and revegetation programs.

The term of the management contract is linked to the environmental outcome and the amount of funding. Management contracts are generally for 5-10 years but shorter terms can be negotiated and these arrangements vary between CMAs.

As the land owner, the Land and Property Management Authority, on behalf of the Minister for Lands, must consent in writing to a reserve trust applying for funding as part of a management contract (see section below on Minister's consent for more information).

Property Vegetation Plan (PVP) Incentive Funding

A PVP is a voluntary, legally binding agreement between a landholder and the local CMA, and may be obtained for a number of reasons, including:

- applying for native vegetation incentive funding
- to confirm that native vegetation on a property is regrowth, providing a landholder with assurance that they will not need future clearing approval [NB: This would only very rarely be relevant to reserve trust management]
- to change the regrowth date of native vegetation to an earlier date, provided that proof can be supplied illustrating two previous clearing events associated with rotational farming [NB: This is generally not relevant to reserve trust management]
- to confirm whether existing rotational farming, grazing or cultivation practices meet the definition of these in the *Native Vegetation Act 2003* (NVA) so that clearing approval is not required [NB: This is generally not relevant to reserve trust management]
- to obtain clearing approval and to secure any offsets associated with that clearing.

Issues associated with the approval of vegetation clearing are addressed in Chapter 11: *Environmental responsibilities and land management*. PVPs for the purpose of defining areas of post 1990 regrowth are unlikely to be needed on Crown reserves, but where required they also would be related to environmental and land management responsibilities.

It is anticipated that reserve trusts are most likely to consider entering into a PVP in order to seek CMA incentive funding. The Land and Property

Management Authority, on behalf of the Minister for Lands, must consent to the PVP in writing because of the long-term maintenance obligations and the impact on future use options associated with these agreements.

The term of the PVP is linked to the environmental outcome and the amount of funding. Long-term commitments attract a higher level of initial funding but also carry a much higher ongoing unfunded maintenance obligation. Most CMAs have agreed funding thresholds, so that grants above a defined dollar value requires a minimum period of commitment. The largest grants require a management commitment in perpetuity. These management commitments (contained in the PVP) run with the land and apply to future owners if the land is sold. They are recorded by local government and included in a planning certificate issued under section 149 of the *Environmental Planning and Assessment Act 1979*.

Overall administration of the PVP scheme, including compliance with PVP agreements, is the responsibility of the Department of Environment and Climate Change (DECC).

As noted above, incentive funding provided via the CMAs covers the initial work but not the ongoing maintenance costs, therefore careful consideration should be given to any proposal to enter into a management contract that binds the Crown to long-term environmental outcomes or where large amounts of funding are sought. PVPs beyond a fifteen year term are not generally encouraged on reserve trust managed land because of the unfunded ongoing maintenance obligation and the difficulty in identifying long-term future use requirements.

For further details on PVPs and CMA incentive funding, contact your local CMA or go to:

www.environment.nsw.gov.au/vegetation/index.htm

NB: PVPs that propose offsets on Crown land associated with clearing on adjoining private land would generally not be supported as they result in an off-reserve private benefit and on ongoing public reserve management financial obligation.

Carbon Sequestration

Under the NSW Greenhouse Gas Abatement Scheme (GGAS), maintenance obligations for carbon sequestration plantations would extend to around 130 years after commencement of the agreement (100 years from the date when the final carbon credit is claimed – see *Electricity Supply (General) Regulation 2001* clause 73ID). Generally this arrangement would not be appropriate on reserve trust managed land, however any proposal seeking the Minister's approval would need to make allowances to set aside adequate cash reserves, or establish an income stream, to meet the ongoing maintenance obligation beyond the period where the additional carbon sequestration is

generating income (up to about 30 years depending on the tree growth rate). This will be influenced by species selection and climatic zone.

Provision would also need to be made (via insurance, or bank guarantee etc.) to protect the reserve trust and the Government from financial liability in the case of an adverse event such as a bushfire that may require the purchase of carbon credits to cover the shortfall.

The *Crown Lands (Carbon Sequestration) Act 2006*, which commenced on 9 February 2007, enables Crown land in NSW to be used as a carbon sink in the same manner as freehold land, where the Minister has granted carbon sequestration rights. It is anticipated that these new provisions will more commonly be applied on tenured Crown land. However, in the short term, uncertainty about transitional arrangements to a national carbon trading scheme, (expected to commence in 2011, subject to the legislation passing through both houses of Federal Parliament) has substantially increased the risk associated with this type of management agreement. The proposed national trading scheme is known the *Carbon Pollution Reduction Scheme* (CPRS).

For further details on how the NSW Greenhouse Gas Reduction Scheme operates go to:

www.greenhousegas.nsw.gov.au

For details of the proposed national Carbon Pollution Reduction Scheme (CPRS) go to:

www.climatechange.gov.au/emissionstrading/index.html

Where carbon sequestration proposals are not under the GGAS or the CPRS (such as off-sets that are marketed to voluntary purchasers to off-set their personal or corporate “carbon footprint”), each case will be considered on its merits based on the general criteria outlined above.

Biobanking

The Biodiversity Banking and Offsets Scheme (BioBanking Scheme) has been established under Part 7A of the *Threatened Species Conservation Act 1995*. Its main aim is to help address the loss of biodiversity in NSW by establishing a market for biodiversity credits.

Principle of Additionality: Clause 4 of the Threatened Species Conservation (Biodiversity Banking) Regulation 2008 addresses the creation of BioBank credits in respect of land with existing conservation obligations. Cl. 4 states that credits may only be created “if the management actions are additional to any biodiversity conservation measures, or other actions, that are already being carried out on the land, or are required to be carried out” under various existing agreements. This is referred to as the “principle of additionality”.

Land excluded from being designated as BioBank site: Under cl 11 of the Regulation, certain land is excluded from being designated as a BioBank site by a biobanking agreement. Land reserved under Part 4 or Part 4A of the *National Parks and Wildlife Act 1974* and land identified as a flora reserve

under the *Forestry Act 1916* is explicitly excluded from the scheme. Land that is subject to existing off-set requirements or environmental requirements is also excluded. Some excluded categories (that could be relevant to reserve trusts) are:

- land subject to off-sets under a property vegetation plan (approved under the *Native Vegetation Act 2003*);
- land subject of a requirement to carry out biodiversity conservation measures of an ongoing nature under a condition of an approval or consent granted under Part 3A, 4 or 5 of the *Environmental Planning and Assessment Act 1979*; and
- any other land where the Minister (DECC) is of the opinion that biodiversity conservation measures are already being carried out; or are required to be carried out, on the land under an offset arrangement made for the purpose of complying with requirements imposed under any Act.

Land is also excluded where the land use (past, present or proposed future) is inconsistent with biodiversity conservation or where adjoining land use (past, present or proposed future) would impact on biodiversity conservation management actions on the land. The complete list is contained in clause 11 of the *Threatened Species Conservation (Biodiversity Banking) Regulation 2008*.

Crown land is not explicitly excluded from participation in BioBanking except where the above conditions apply.

Discounting or BioBank Credits: The Director-General of DECC may, by order published in the Gazette, determine the discount rate or rates to be applied for the purpose of determining the credits generated by the BioBanking site. This is the mechanism by which “additionality” is determined. These discounting rates will apply in relation to BioBank credits generated on reserved Crown land. This is to recognise any pre-existing funding and obligations to manage the land for biodiversity conservation. The extent of discounting that will apply is likely to be influenced by the reserve purpose and DECC’s interpretation of what management obligations are implied as a result of the land being reserved for a particular public purpose. Any funding received for biodiversity conservation or related activities will also be taken into account in determining the discount that should be applied to any BioBank credits generated. Guidelines to the BioBanking regulation set out a range of possible existing management obligations and the discount that will apply where these obligations are already in place. These are detailed in Table A6 and A7 of the BioBanking Operational Manual (BioBanking Assessment Methodology and Credit Calculator). Existing management actions or obligations that attract a discount on the BioBank credit that would otherwise be available include management of grazing, weed control, feral animal control, nutrient control, erosion control, retention of dead timber, retention of bush rock etc.

www.environment.nsw.gov.au/resources/biobanking/09181bioopsman.pdf

The viability of entering into a BioBanking agreement over reserved Crown land may be dependent on the extent to which the potential BioBank credits are discounted.

All Biobanking agreements require a commitment in perpetuity and therefore entering into such a commitment prevents any future change in use. For this reason the consent of the Minister for Lands is required. However the Biobanking scheme does make provision to set aside sufficient funding to cover ongoing maintenance in a trust fund managed by the Department of Environment and Climate Change (DECC).

For further details on Biobanking, go to:

www.environment.nsw.gov.au/biobanking/

When is the Minister's Consent Required?

Entering into a land management agreement that is registered as a covenant on the title of the land or as some other form of legally binding agreement is an important decision with long-term implications for future use and management of the land.

As for leases, licences and land sales, the importance of binding management agreements is reflected in the need for the Minister's consent (which can be given under delegated authority by the Land and Property Management Authority). The early involvement of the LPM Authority is essential in the development of these management agreements. LPM Authority staff should be involved throughout the scoping of the project and any ongoing negotiations.

In considering whether or not consent will be given to agreements of this nature, the following issues will be considered:

- Whether the proposal is in the public interest and is equitable for current and future generations.
- Whether the agreement is consistent with the reserve's public purpose and any relevant Plans of Management.
- Any environmental impacts of the proposal.
- The term of the covenant or legally binding agreement.
- Whether the granting of tradeable credits, a one-off grant, or an income stream represents a reasonable return to the public in exchange for the forgone use opportunities (opportunity cost).
- Whether the proposal includes adequate financial provision for ongoing maintenance after the initial payment or the period of income generation.
- Whether the agreement contains provisions to:
 - allow flexibility of land use and management should matters arise that are of public or environmental significance;
 - indemnify the reserve trust, the Crown and the NSW Government against claims for compensation;
 - provide appropriate insurance (e.g. against fire resulting in the loss of sequestered carbon and the obligation to purchase the equivalent credits at current market rates).

It should not be assumed that the Minister's consent will be forthcoming.

As is the case in relation to the sale of a reserve or a part of a reserve; a legally binding land management agreement in perpetuity over reserve land will only be considered in exceptional circumstances. Generally the land management agreement should be consistent with the reserve purpose, or purposes and a strong case presented that the land will not be required for any other public purpose in the foreseeable future.

Regulatory requirements

- Consent of Minister:
Crown Lands Act 1989 – section 102(1)(d)
- Advertising leases longer than five years:
Crown Lands Act 1989 – section 102(2)(b) & (c)
- Temporary licences:
Crown Lands Act 1989 – section 108
Crown Lands Regulation 2006 – clause 31
- Retail uses:
Retail Leases Act 1994
- Liquor licences:
Liquor Act 1982
- Food businesses:
Food Act 2003
- Lease or licence granted by Minister
Crown Lands Act 1989 – Section 34A

Further guidance

Liquor Licensing [Fact Sheets](#) from the NSW Office of Liquor, Gaming and Racing