

# Standard lease and licence templates for reserve trusts

The *Crown Lands Act 1989* enables Crown reserve trusts, with Minister's 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 to the reserve trust on legal aspects concerning the grant of the proposed tenure.

## To whom may a lease or licence be granted

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

A lease may also be required if the lessee has invested, or proposes to invest, substantial sums of money constructing 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 do not 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, 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 Minister's written consent. Application for consent is made to the Department of Lands. It is important to speak to the department 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:
  - o the termination of the lease or licence in the event of a revocation of the reserve
  - o the indemnification of the reserve trust, the Crown and the NSW Government against claims for compensation
  - o 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.

## Lease and licence templates

The department has prepared a standard lease conditions template and a licence agreement template. These are found on the department's website at [www.lands.nsw.gov.au/crown\\_land/trusts/for\\_trust\\_managers](http://www.lands.nsw.gov.au/crown_land/trusts/for_trust_managers).

The templates will need to be carefully reviewed in each case to determine which clauses should be incorporated in the final documents.

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/real\\_property\\_act\\_dealing\\_forms/manual\\_dealing\\_forms#L](http://www.lands.nsw.gov.au/land_titles/real_property_act_dealing_forms/manual_dealing_forms#L). This lease form (as amended from time to time or an updated form specific for reserve trust managers) can be used, even if the lease is not subsequently registered on title.

A template for a temporary licence can be found in Appendix H of the *Trust Handbook* ([www.lands.nsw.gov.au/crown\\_land/trusts/for\\_trust\\_managers](http://www.lands.nsw.gov.au/crown_land/trusts/for_trust_managers)).

## 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 must be registered at Land & Property Information NSW (see [www.lands.nsw.gov.au/land\\_titles/real\\_property\\_act\\_dealing\\_forms/manual\\_dealing\\_forms#L](http://www.lands.nsw.gov.au/land_titles/real_property_act_dealing_forms/manual_dealing_forms#L)). 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 relevant Department of Lands local office 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 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 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 1994*.

It should be noted that in some circumstances the *Retail Leases Act 1994* provides that a lease for less than five years (including renewals) is deemed to be for a term of five 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*, *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 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 1994* 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.

## How reserve trusts prepare a lease or licence

The procedure that should be followed is set out below.

1. The trust consults the local Department of Lands 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 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 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 department for comment and in principle consent.
7. The department notifies the trust of any amendments and its in principle approval. If the agreement is a lease for a term exceeding five 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 department, 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 department. 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 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 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 Department of Lands office should be advised of any proposed tendering for a new lease or licence.
- a lease for a term that, by the exercise of an option, could exceed five 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 Department of Lands 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 \$376.00 plus GST) 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 an 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.

### 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 five years (or

- 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

Contact your local office of the Department of Lands or [www.lands.nsw.gov.au](http://www.lands.nsw.gov.au).

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