



Byron Shire Council



Agenda

Byron Shire Reserve Trust Committee Meeting Thursday, 21 March 2013

held at Council Chambers, Station Street, Mullumbimby
commencing at 5.00pm

Public Access relating to items on this Agenda can be made at 3.00pm on the day of the Meeting. Requests for public access should be made to the General Manager or Mayor no later than 12.00 midday on the day prior to the Meeting.

A handwritten signature in black ink, appearing to read 'Ken Gainger'.

Ken Gainger
General Manager

CONFLICT OF INTERESTS

What is a “Conflict of Interests” - A conflict of interests can be of two types:

Pecuniary - an interest that a person has in a matter because of a reasonable likelihood or expectation of appreciable financial gain or loss to the person or another person with whom the person is associated.

Non-pecuniary – a private or personal interest that a Council official has that does not amount to a pecuniary interest as defined in the Local Government Act (eg. A friendship, membership of an association, society or trade union or involvement or interest in an activity and may include an interest of a financial nature).

Remoteness – a person does not have a pecuniary interest in a matter if the interest is so remote or insignificant that it could not reasonably be regarded as likely to influence any decision the person might make in relation to a matter or if the interest is of a kind specified in Section 448 of the Local Government Act.

Who has a Pecuniary Interest? - a person has a pecuniary interest in a matter if the pecuniary interest is the interest of the person, or another person with whom the person is associated (see below).

Relatives, Partners - a person is taken to have a pecuniary interest in a matter if:

- The person’s spouse or de facto partner or a relative of the person has a pecuniary interest in the matter, or
- The person, or a nominee, partners or employer of the person, is a member of a company or other body that has a pecuniary interest in the matter.

N.B. “Relative”, in relation to a person means any of the following:

- (a) the parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descends or adopted child of the person or of the person’s spouse;
- (b) the spouse or de facto partners of the person or of a person referred to in paragraph (a)

No Interest in the Matter - however, a person is not taken to have a pecuniary interest in a matter:

- If the person is unaware of the relevant pecuniary interest of the spouse, de facto partner, relative or company or other body, or
- Just because the person is a member of, or is employed by, the Council.
- Just because the person is a member of, or a delegate of the Council to, a company or other body that has a pecuniary interest in the matter provided that the person has no beneficial interest in any shares of the company or body.

Disclosure and participation in meetings

- A Councillor or a member of a Council Committee who has a pecuniary interest in any matter with which the Council is concerned and who is present at a meeting of the Council or Committee at which the matter is being considered must disclose the nature of the interest to the meeting as soon as practicable.
- The Councillor or member must not be present at, or in sight of, the meeting of the Council or Committee:
 - (a) at any time during which the matter is being considered or discussed by the Council or Committee, or
 - (b) at any time during which the Council or Committee is voting on any question in relation to the matter.

No Knowledge - a person does not breach this Clause if the person did not know and could not reasonably be expected to have known that the matter under consideration at the meeting was a matter in which he or she had a pecuniary interest.

Participation in Meetings Despite Pecuniary Interest (S 452 Act)

A Councillor is not prevented from taking part in the consideration or discussion of, or from voting on, any of the matters/questions detailed in Section 452 of the Local Government Act.

Non-pecuniary interests - Must be disclosed in meetings.

There are a broad range of options available for managing conflicts & the option chosen will depend on an assessment of the circumstances of the matter, the nature of the interest and the significance of the issue being dealt with. Non-pecuniary conflicts of interests must be dealt with in at least one of the following ways:

- It may be appropriate that no action be taken where the potential for conflict is minimal. However, Councillors should consider providing an explanation of why they consider a conflict does not exist.
- Limit involvement if practical (eg. Participate in discussion but not in decision making or vice-versa). Care needs to be taken when exercising this option.
- Remove the source of the conflict (eg. Relinquishing or divesting the personal interest that creates the conflict)
- Have no involvement by absenting yourself from and not taking part in any debate or voting on the issue as if the provisions in S451 of the Local Government Act apply (particularly if you have a significant non-pecuniary interest)

RECORDING OF VOTING ON PLANNING MATTERS

Clause 375A of the Local Government Act 1993 – Recording of voting on planning matters

- (1) In this section, **planning decision** means a decision made in the exercise of a function of a council under the Environmental Planning and Assessment Act 1979:
 - (a) including a decision relating to a development application, an environmental planning instrument, a development control plan or a development contribution plan under that Act, but
 - (b) not including the making of an order under Division 2A of Part 6 of that Act.
- (2) The general manager is required to keep a register containing, for each planning decision made at a meeting of the council or a council committee, the names of the councillors who supported the decision and the names of any councillors who opposed (or are taken to have opposed) the decision.
- (3) For the purpose of maintaining the register, a division is required to be called whenever a motion for a planning decision is put at a meeting of the council or a council committee.
- (4) Each decision recorded in the register is to be described in the register or identified in a manner that enables the description to be obtained from another publicly available document, and is to include the information required by the regulations.
- (5) This section extends to a meeting that is closed to the public.

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BUSINESS OF MEETING

1. APOLOGIES

2. DECLARATIONS OF INTEREST – PECUNIARY AND NON-PECUNIARY

3. EXECUTIVE MANAGER'S REPORT

Corporate Management

3.1. Byron Bay War Memorial Swimming Pool - Lease and Management Contract.....2

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CORPORATE MANAGEMENT – EXECUTIVE MANAGER'S REPORT

Report No. 3.1. Byron Bay War Memorial Swimming Pool - Lease and Management Contract

Executive Manager: Corporate Management

5 **Report Author:** Trish Kirkland, Manager Property, Contracts and Information Systems

File No: #E2013/11401

Theme: Corporate Management, Property, Procurement and Contract Services

Summary: The current agreement between Crown Lands, Council and Fishheads@Byron Pty Ltd for the lease and management of the Byron Bay War Memorial Pool Complex (which includes the Café) expires on 30 June 2013. There is no provision for a further term, and the agreement requires Fishheads to vacate the premises at that time.

The tenure of the land on which the Complex is located, involves four land parcels being part Crown Reserve R82000 (part Lot 10 DP 1049827), part Road Reserve and part Council owned Operational Land (part Lot 4 DP 827049 and part Lot 5 DP 827049).

Negotiations between Council and Crown Lands are continuing in accordance with resolution **(12-689)**, however, the rationalisation of the land tenure remains unresolved.

Due to the long and complex legislative process to establish any new lease/management agreement, it is necessary for the Reserve Trust Committee as Crown Reserve R8200 Trust Manager, to again determine the future arrangements for lease/management of the Complex from 1 July 2013.

A report, in relation to part Road Reserve and part Council owned Operational Land (part Lot 4 DP 827049 and part Lot 5 DP 827049, is included in the Agenda for the Extraordinary Meeting scheduled for 21 March 2013.

10 **RECOMMENDATION:**

1. **That the Byron Shire Reserve Trust Committee recommend to Council, as the Reserve Trust Manager, that Council:**

15 **Not call for tenders for the proposed lease/management agreement of the Byron Bay War Memorial Swimming Pool Complex (the Complex) for the following reasons:**

- 20
- a) **that Crown Lands (as Lessor) has refused to provide its consent to the calling of tenders to establish a new lease/management agreement;**
 - b) **the specialised nature of pool management means that there are limited persons with sufficient experience and skill; and**
 - c) **a tenure of two (2) years would be unlikely to result in commercially acceptable tenders.**
- 25

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2. Delegate the General Manager to negotiate a new lease/management agreement for the Complex with the current lessees/managers (Fishheads@Byron Pty Ltd) on a “without admission”, “without prejudice” and “without obligation” basis and subject always to all necessary approvals from external agencies and resolutions of the Reserve Trust and Council being obtained.

3. Endorse the proposed lease/management agreement for the Complex be on the same basis of the existing deed of agreement, refer Annexure 1 (#E2013/10817) with the following changes:

- a) a 24 month period commencing 1 July 2013 and terminating on 30 June 2015;
- b) the Rent and Management Fee will be indexed where necessary;
- c) inclusion of a clause that has the effect of terminating the lease/management agreement without fault or liability to any party should the swimming pool filtration system or associated infrastructure fail during the term of the agreement.

subject to meeting all statutory requirements relating to any new lease including public notice and public consultation processes, obtaining approval of the Minister of Lands, as well as the Minister for Local Government if necessary.

4. That the lease/management agreement be subject to the following:

- a) the lessees releasing Council, as Reserve Trust Manager, from all (real or perceived) claims, damages, liability, actions or the like, arising from anything to do with the tender of the Complex, leases or generally their occupation of the Byron Bay War Memorial Swimming Pool Complex at any time, such release to be in writing to the satisfaction of the General Manager and Council’s solicitors; and
- b) the lessees personally guaranteeing that they will vacate the premises by the end date of the proposed new lease, namely 30 June 2015, and indemnifying Council as the Reserve Trust Manager, from all claims, damages, actions, liability or the like in the event that they do not so vacate the premises.

Attachments:

- Draft lease and management agreement #E2013/10817 [56 pages] **Annexure 1**

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Report

5 The current agreement between Crown Lands, Council and Fishheads@Byron Pty Ltd (Fishheads) for the lease and management of the Byron Bay War Memorial Pool Complex (which includes the Café) expires on 30 June 2013. There is no provision for a further term, and the agreement requires Fishheads to vacate the premises at that time.

10 The tenure of the land on which the Byron Bay War Memorial Swimming Pool Complex (the Complex) is located, involves four land parcels being part Crown Reserve R82000 (part Lot 10 DP 1049827), part Road Reserve and part Council owned Operational Land (part Lot 4 DP 827049 and part Lot 5 DP 827049).

15 A separate report titled Byron Bay War Memorial Swimming Pool – New Lease and Management Contract is included in the Agenda papers for the 21 March 2013 Extraordinary Meeting. It contains the history and provides recommendations in relation to part Road Reserve and part Council owned Operational Land (part Lot 4 DP 827049 and part Lot 5 DP 827049).

20 Due to the long and complex legislative processes to establish any new lease/management agreement, it is necessary for the Reserve Trust Committee as Crown Reserve R82000 Trust Manager, to again determine the future arrangements for lease/management of the Complex from 1 July 2013.

25 This report provides recommendations to enter into new lease/management arrangements with the incumbents for consideration by the Reserve Trust Committee.

The terms and conditions of the lease/management agreement are exactly the same as previous agreements; refer Annexure 1 with the following exemptions:

- 30 • a 24 month period commencing 1 July 2013 and terminating on 30 June 2015,
- the Rent and Management Fee will be indexed where necessary,
- 35 • inclusion of a clause that has the effect of terminating the lease/management agreement without fault or liability to any party should the swimming pool filtration system or associated infrastructure fail during the term of the agreement.

Proposed Rent and Management Fees are:

40 Management Fee:	\$184,634.34 ex GST,	\$203,097.77 inc GST
Rent:	\$206,389.00 ex GST,	\$227,027.90 inc GST

Plus CPI (all groups Sydney June 2013)

45 Financial Implications

Current lease rental and management fees are set out below:

50 Management Fee:	\$184,634.34 ex GST,	\$203,097.77 inc GST
Rent:	\$206,389.00 ex GST,	\$227,027.90 inc GST

Plus CPI (all groups Sydney June 2013)

55 The proposed agreement will retain the same rental and management fee values, which will result in no impact to the draft 2013/2014 budget for these items.

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Council has been requested by the Crown from 1 July 2013 to separate the rental payable for the kiosk lease from the General Fund. In 2012/2013 financial year and in previous financial years, Council had used the rental revenue within the General Fund as a means to offset the running costs of the Byron Bay Memorial Swimming Pool. In preparing the draft 2013/2014 budget estimates, the separation of the rental income requested by the Crown has been done on the following basis:

- The estimated rental revenue for the kiosk will continue to be transferred to the Crown Reserve for the Main Beach Reserve.
- The estimated revenue for the Byron Bay Memorial Pool will no longer be transferred to the Crown Reserve for the Main Beach Reserve.
- The estimated operating expenditure of the Byron Bay Memorial Swimming Pool will no longer be transferred from the Crown Reserve for the Main Beach Reserve.
- The estimated operating expenditure for maintaining public toilets on the Main Beach Reserve funded by the General Fund will now be funded from the Crown Reserve for the Main Beach Reserve.

The indicative draft 2013/2014 budget results for Council are based on the above separation and as such the requested separation of the kiosk rental from the General Fund by the Crown has been accounted for from 1 July 2013.

Statutory and Policy Compliance Implications

Crown Lands Business Directive 2004

National Competition Policy was introduced by the Federal Government in 1995. The *Competition Policy Reform Act 1995 (Cth)* amended the competitive conduct rules (Part IV) of the *Trade Practices Act 1974 (Cth)* (now Consumer and Competition Act 2012), and extended their coverage to State, Territory, Local Government businesses and unincorporated bodies. This was endorsed through a package of intergovernmental agreements, signed by all heads of government and included:

- The Commonwealth *Competition Policy Reform Act 1995*
- The National Competition Policy Agreement incorporating
- The Competition Principles Agreement
- The Conduct Code Agreement
- The agreement to implement the National Competition Policy and Related Reforms

The Competition Principles Agreement states in Clause 5:

“The guiding principle is that legislation (including Acts, enactments, Ordinances or regulations) should not restrict competition unless it can be demonstrated that:

- (a) *the benefits of the restriction to the community as a whole outweigh the costs; and*
- (b) *the objectives of the legislation can only be achieved by restricting competition.*

As part of the commitment to the National Competition Policy the *Competition Policy Reform (New South Wales) Act 1995* was enacted as law in New South Wales which is, in effect, the restrictive trade practices provisions in Part IV of the *Trade Practices Act 1974*.

As a result of the Commonwealth, State and Territory Governments adopting the National Competition Policy reform package, the Crown Lands Division of the NSW Land and Property Management Authority adopted a Policy in respect of commercial leasing and licensing of Crown Land. The Policy is known as the Crown Lands NSW Business Directive 2004 which states:

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

- 5 - *The standards of probity, ethics and integrity from all parties in the supply & dealings of Crown Land.*
- *Fair opportunity for all prospective parties to compete for state owned assets.*
- 10 - *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*
- 15 - *Provide a rigorous and transparent decision making regime for commercial leasing and licensing of Crown Land.”*

A commercial lease is defined in the Directive as *“any lease, the purpose and /or effect of which provides the opportunity for the holder to generate an income.”*

20 The objectives of the Directive include ensuring that:

- Leasing of Crown land occurs through an open, fair and impartial process.
- 25 - Leasing is carried out on equitable terms and conditions consistent with probity standards in line with government policy, National Competition Policy, and Independent Commission Against Corruption (ICAC) guidelines.

Crown Lands Act 1989

30 As part of the site is located on Crown Reserve certain statutory requirements and obligations under the *Crown Lands Act 1989* must be met in order to issue a valid lease as noted below. (Part of the site is also on operational and road reserve land and the relevant statutory requirements are addressed in a separate report to the Strategic Planning Committee Meeting of 28 March 2013).

35

Crown Lands Act 1989

• Statutory Power:

40 Council has the power to issue a lease of less than 5 years over Crown Reserve land subject to Minister’s consent (sections 102(2)(b)).

• Public Consultation Requirements:

45 There are no public consultation requirements for Council, as Reserve Trust Manager, in relation to the proposed 24 month Deed/Lease.

50 However, if the proposed lease is *“a lease for a term that, by the exercise of an option, could exceed 5 years”*, the Minister must publish a notice of an intention to give consent to such a lease at least 14 days before giving such consent (s102(2)). By inference, this is a type of public consultation obligation on the Minister in certain circumstances. Staff will write to the Department of Lands asking them to consider whether this public consultation process is necessary in relation to the proposed 24 month Deed/Lease and, if so, for the necessary notice to be published in a timeframe which would permit Minister’s approval to

55 be granted prior to 30 June 2013.

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- Mandatory Considerations prior to Determination:

5 There are no mandatory considerations which Council as Reserve Trust Manager must have regard to prior to resolving whether to issue a Deed/Lease.

10 Minister's approval of the Deed/Lease is of course necessary but this is not a prohibition against the Reserve Trust resolving to issue a Deed subject to Minister's approval being obtained.

- Determination

15 Section 102(1)(a) requires the Council, as Reserve Trust Manager, to resolve to issue a lease "*on the terms and conditions specified in the decision*". That is, the wording of the resolution must be something like "Council resolves to grant a Deed/Lease to the current managers of the Pool Complex on the terms and conditions contained in the Deed/Lease.

- Post Determination Requirements:

20 Post any resolution of the Council to grant a lease, Minister's approval must be sought, if it has not already been provided, and staff would address this requirement if necessary.

102 Consent of Minister to sale, lease, easement, licence or mortgage

25 (1) A reserve trust may not sell, lease or mortgage land, or grant an easement or a licence (except a temporary licence) in respect of land, comprising the whole or any part of the reserve unless:

- (a) the trust has decided that it is desirable to do so on the terms and conditions specified in the decision,
- 30 (b) in the case of a proposed sale, the trust has caused a notice to be published in a newspaper circulating in the locality of the land setting out the date and the terms and conditions of the trust's decision, the location of the land and other prescribed particulars,
- (c) the trust has (in the case of a proposed sale, not earlier than 14 days after the publication of the newspaper notice) applied to the Minister in writing for consent,
- 35 (d) the Minister has consented in writing to the proposal.

(2) The Minister may not give a consent under subsection (1) (d) to:

- 40 (a) a sale,
- (b) a lease for a term exceeding 5 years, or
- (c) 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 the 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.

45 (3) The Minister's consent may relate to the whole or part only of the land with which the application is concerned.

50 (4) If the application for consent proposes a sale, lease, easement or licence, the Minister's consent:

- (a) may be general, authorising the proposal subject to such conditions, restrictions, reservations and covenants, and in such manner and within such time, as the Minister thinks desirable, or
- (b) may be specific, approving of a particular contract of sale, lease or licence.

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- (5) If the application for consent relates to a mortgage, the Minister's consent can only be given to the specific terms of the mortgage.
- 5 (6) In giving consent, the Minister may:
- (a) vary the terms and conditions to which the sale, lease, easement, licence or mortgage is to be subject, and
 - (b) impose such other terms and conditions as the Minister thinks desirable.
- 10 (7) The Minister may, at any time, wholly or partly withdraw the consent or vary its terms, but only if to do so would not prejudice the rights of third parties.

ICAC Guidelines

15 An open competitive selection process such as a tender or expression of interest process enables Council to demonstrate accountability and transparency and makes it difficult for private interests to influence, or be seen as influencing the outcome of a contract.

The "ICAC Guidelines for managing risks in direct negotiations, May 2006", states

20 *It is not acceptable to automatically reappoint an incumbent whose fixed term contract is about to expire.*

25 *...however, there are scenarios where it may be impossible to test the market or to use a competitive process. In other cases, a competitive process may be possible but for various reasons may be so impractical or expensive that direct negotiations are the most acceptable way to fulfil a contract. In these cases, direct negotiations can be justified.*

30 *Agencies should also ensure that they fully examine claims that direct negotiations are the most suitable course of action and that they explore any alternative courses of action. ... agencies should also rely on common sense and the general principles outlined in "First principles" ...to guide their decisions.*

First principles are set out below.

35 *Doing business with government is a key driver of economic activity and many private firms and not-for-profit organisations rely on access to government contracts in order to stay in business. Direct negotiations can unfairly exclude capable firms and employ staff, pay taxes and contribute to the economy.*

40 *Obtaining best value for public money is a fundamental principle of public sector work. When it is known that there are other proponents who could feasibly compete for a contract, agreeing to direct negotiations with a single proponent increases the risk that the agency may not obtain best value for money. When a proponent does not have to compete for contracts there is a higher risk that the proponent may unjustifiably increase profit margins, exaggerate expenses or otherwise boost returns on the contract.*

45 *Accountability and transparency are related concepts. Accountability involves agencies being able to demonstrate and justify to an appropriate authority how public resources are used. This involves allocating and taking responsibility for past and expected future performance. This necessarily involves keeping good records that leave an audit trail.*

50 *Transparency means an agency must be prepared to open a project and its processes to scrutiny and possible criticism. This also involves providing reasons for all decisions that are taken and providing appropriate information to relevant stakeholders.*

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Demonstrating accountability and transparency gives proponents and taxpayers additional confidence in the decisions being made, and also reduces the opportunities for corrupt conduct and fraud.

- 5 *The selective and closed nature of direct negotiations can create suspicions of favouritism and bias, consequently making it difficult for public agencies to justify the decisions they make. Exclusive negotiations that are underpinned by commercial-in-confidence provisions are more vulnerable still to perceptions of a lack of accountability and transparency.*
- 10 *Direct negotiations (or the possibility of direct negotiations) can create an environment where private interests could influence or be seen to influence the outcome of the contract. In contrast, an open, competitive selection process, with a predetermined business plan and selection criteria and an accompanying audit trail, make it difficult for private interests to influence, or be seen to influence, the outcome of a contract.*