

Information Guide - Maritime Property — Establishing Community Leases

About this guide

This guide:

- Provides information to assist potential Lessees in the establishment of a community lease over Maritime Property. A Community Lease relates to the use of Roads and Maritime land for structures and uses associated with community uses including public access, Government, and Amateur Club and Community Group leases
- Is applicable to all new agreements (referred to generically as Leases) issued over Roads and Maritime land for structures and uses associated with community uses
- Will generally be applied by Roads and Maritime unless the delegated personnel determines that circumstances exist which justify a departure, including to the extent necessary to comply with its obligations at law.

Roads and Maritime staff will assist current and prospective Lessees with their enquiries and provide general information in accordance with the Roads and Maritime Customer Charter.

Note:

To avoid unnecessary duplication Lessees and Licensees will be referred to in this guide generically as Lessees and references to Roads and Maritime relate to its relationship as the property owner and Lessor of Maritime Property. Terms used in this document have the meanings given them in the [Glossary of Terms and Definitions](#).

Community Leases and Agreements

A person may not occupy Maritime Property without a fully executed agreement being in place. No Lease or Agreement for Lease (or variation of an existing lease or agreement to lease) will be legally binding unless it is in writing and is signed by authorised representatives of the parties concerned.

In the case of leases which are required to be registered, the Lessee will be required, at its cost, to create a new title via a Development Application for subdivision of Roads and Maritime land for leasing purposes. Roads and Maritime will not grant such a lease until the title is created against which the lease may be registered.

If a formal lease cannot be entered into until certain events have occurred (for example, planning approvals are obtained or Capital Works completed), Roads and Maritime, as Lessor may offer the prospective Lessee an Agreement for Lease (AFL).

Terms and conditions for any Roads and Maritime Lease need to be agreed between the parties and may vary subject to the nature of the Maritime Property, the type of use, the capital commitment required of the Lessee, current Roads and Maritime Policy, and/or the term of the proposed Lease.

No works may be conducted on Roads and Maritime land without planning approval and a suitable Lease or Licence.

All Lessee obligations will be detailed in the Lease.

Applicants for a new lease must provide the following information to Roads and Maritime when requested:

- A Business Case setting out the details of the business and operations, including details of any proposed major capital investments and/or maintenance works particular to the Maritime Property
- Details of relevant skills and experience in the operation proposed to be carried out on the land
- Evidence of capacity to satisfy the financial obligations of the lease (including rent, make-good, proposed capital works and maintenance) as well as information regarding the prospective lessee's compliance with previous leases (if applicable)
- Any other information reasonably required by Roads and Maritime for the purpose of deciding whether or not to lease land to the prospective lessee.

It is the intention that Roads and Maritime will satisfy itself that the proposed business endeavours are viable and have a reasonable prospect of success before entering into a lease or agreement to lease.

Where an existing Community Lease expires, Roads and Maritime may seek to negotiate a renewal with the existing lessee(s), or seek to market the property for a new lease.

Roads and Maritime is not obliged to offer a Lease on terms or conditions consistent with any existing or previous lease.

An indicative term for a Community Lease is 5 years or more.

Site Assessment

Prior to granting a lease, Roads and maritime will generally conduct a Site Assessment. The Site Assessment will assist Roads and Maritime in evaluating whether to grant a lease, and the most appropriate category(s) of land use to be conducted under a lease.

The determination of land use categories to be offered at any particular site will be at the discretion of Roads and Maritime. Where multiple categories of land use are proposed for a single site, these will generally be incorporated into a single lease document.

Marketing and Tendering

Prior to committing to a new lease Roads and Maritime will consider the optimal market strategy to achieve the NSW Government objectives and will need to be satisfied that the on-going business operation is viable and has a reasonable prospect of continued success throughout the proposed lease term.

Generally, there are three broad categories of marketing strategies for offering Properties for lease, being:

- Competitive Tendering Processes
- Negotiation with the market based on the appointment of a Real Estate Agent to advertise and market the property
- Direct negotiations with a single market participant.

While there is no mandatory approach for specific property use types, the most commonly applied types are listed below:

- Community Lease - tender process or via direct negotiation if existing Lessee is suitable
- Amateur Club and Community Group - tender process or via direct negotiation if existing Lessee is suitable
- Public Access, boat ramps and slipways - direct negotiation
- Community Provision of Utilities - direct negotiation.

Where a new community lease is for a site upon which there is no current or recently expired lease for that activity, Roads and Maritime will generally conduct a competitive process. However, if the adjoining landowner/occupier has exclusive legal access to the site, Roads and Maritime will conduct lease negotiations via direct negotiation with that owner/occupier.

Security and Bank Guarantee

Roads and Maritime may require some form of security in order to ensure the Lessee's compliance with rental and/or maintenance obligations under a lease. This will usually take the form of a Bank Guarantee on terms and for an amount acceptable to Roads and Maritime.

Bank Guarantee Amount

Where Roads and Maritime requires a Bank Guarantee, this will generally be for an amount equivalent to up to twelve months' rent for the property, except in exceptional circumstances where additional securities may be required.

The Bank Guarantee must:

- State Roads & Maritime Services (ABN 76 236 371 088) as the sole favouree
- Be unconditional and irrevocable with no expiry date
- Be issued by an Australian owned Authorised Deposit Taking Institution regulated by the Australian Prudential Regulatory Authority (APRA)
- Be in Australian Dollars

Exceptional circumstances where an additional Guarantee Amount may be applicable include (but are not limited to):

- Where the structures on the property have unique heritage significance or maintenance obligations such that it is reasonable to expect that additional security is required to ensure that they are adequately maintained
- Where leasing incentives have been provided to the Lessee in the form of a rent free period or any other form of financial assistance
- Where the Lessee has a history of non-compliance with previous Leases
- Where the Lease is for the temporary use of land and it is a condition of the Lease that substantial structures must be removed at the conclusion of the Lease term.

Review and Replacement of Bank Guarantee

At any time during the term of the Lease the Guarantee Amount may be reviewed if:

- The Lessee has breached any of its obligations under the agreement
- The Property(s) fall into a state of disrepair and maintenance obligations are not being met by the Lessee
- Rent is increased in accordance with the Lease
- After five years to ensure the guarantee reflects the value of the rent for the following 12 months
- There is another reasonable basis for review.

If at any time the Bank Guarantee is called upon then the Lessee must provide a replacement Bank Guarantee.

A demand for payment under the Bank Guarantee may be made if the Lessee breaches or fails to perform any of the material obligations under the Lease. In addition, the rights of Roads and Maritime to call upon the Bank Guarantee or security will be structured to survive the expiration or earlier termination of the Lease.

Release of Bank Guarantee

Where a Lessee, who's Lease is due to terminate at expiration, or earlier determination, all or part of the Bank Guarantee may only be released once all the Lessee's obligations under the Lease have been met.

Where all or part of the Bank Guarantee is called upon in accordance of the Lease, the balance will be released to the Lessee only after all such obligations have been completed and paid for.

Indemnities and Insurance

Lessee's will be required to indemnify Roads and Maritime against any action, liability or loss arising from their occupation of the Land.

Insurances

The Lessee is required to effect and maintain insurance as deemed relevant by Roads and Maritime for the duration of the term of the Lease. Proof of insurance of the leased property, the Lessee's property and third party liabilities is required prior to grant of a Lease allowing access to the property.

Policies (with the exception of Workers Compensation Insurance) must be taken out in the joint names of Roads and Maritime and the Lessee, or in the name of the Lessee with Roads and Maritime' interest noted.

Types of Insurances

The insurances required will vary dependent on the nature of the Lease but may include the following:

- Public liability insurance for quantum advised for any one occurrence or for any other amount Roads and Maritime reasonably requires, containing all provisions that are normally contained in public liability insurance policies, or as reasonably required by Roads and Maritime and expressly referring to and covering all of the Lessee's obligations under the Lease, including the obligation to indemnify Roads and Maritime, for not less than \$20,000,000, or other amount as reasonably required by Roads and Maritime
- Worker's Compensation Insurance in respect of work related injuries for all the Lessee's employees and agents at any time in, on or in the vicinity of the property
- Insurance for the leased property (if not specified in the Lease as provided by Roads and Maritime) including for any plate glass, for the full cost of reinstatement of the property (including demolition and remediation) if damaged or destroyed
- Any other insurance required by law and as Roads and Maritime reasonably requires.

Insurance Policy Requirements

All insurance policies are required to be effected and maintained in terms of the following requirements:

- Policies are taken out with insurers approved by the Australian Prudential Regulatory Authority of registered insurers (and listed under 'Insurers Authorised to Conduct New or Renewal Insurance Business in Australia') or any other insurer reasonably approved by the NSW Government as Lessor
- Policies are to be in the name of the Lessee and note the interests of Roads and Maritime and any other person who has an insurable interest relevant to the Lease
- Lessees must use all reasonable endeavours to ensure that policies are eligible insurance contracts under the Terrorism Insurance Act 2003 (Cth.) and Regulations under that Act
- Policies provide that the insurer will not cancel the insurance without first seeking Roads and Maritime approval.

Certificates of currency

Certificates of Currency must be provided to evidence the existence of all insurances required to be effected and maintained. Access to the property will not be granted until these have been provided. The Lessee must also provide copies of the insurances whenever the policies are renewed or at any time during the lease following a written request from Roads and Maritime.

Community Lease Agreement Conditions

For Community Leases a Deed of Agreement For Licence to carry out works and Licence To Use will generally be used to provide rights to build DA approved works. The grant of a lease over the completed work is subject to the satisfaction of preconditions spelt out in the Deed of Agreement.

The Deed of Agreement, once executed is binding on both parties. Typically, the Construction Licence will contain (in a schedule or annexure) details of the property design and specification, the works to be done in a development or details of the refurbishment of existing Improvements.

If entry to and use of the Maritime Property by the Lessee prior to the grant of a Lease has been agreed for 'fitting-out' or other reasons, this access and use must be governed by an executed lease or licence to protect the interest of Roads and Maritime.

Conditions and requirements of the Lease will include, but are not limited to:

- Payment of rent in accordance with rental formulae and conditions
- The Lessee is to notify the Lessor of changes or events which affect the property such as the changed development on the adjoining dry land
- All costs associated with the Lease are to be borne by the Lessee
- Permitted Uses of the property and requirements relating to the berthing of Vessels, maintenance and repairs
- The Lessee must indemnify and release the Lessor from any loss relating to occupation or use of the property
- The Lessee must fully insure the property and the Lessor against all foreseeable risks associated with the occupation and use of the property
- Upon prior written approval from the Lessor, the Lessee may assign the Lease
- Sub-leasing is prohibited unless otherwise provided in the Lease or Licence and approved in writing by the Lessor
- The Lessee is obliged to comply with all relevant work, health and safety laws and all relevant environmental laws
- The Lessee has responsibilities and obligations in relation to land contamination, pollution and land remediation
- The Lessee will be required to rectify any Defaults or breaches of the lease
- The Lessee has the right to quiet enjoyment of the property
- The Lessor has certain rights including the right of entry onto the property to undertake inspections and the right to recover costs in the event of a breach of the Lease
- Dispute resolution processes
- The Lessee may, under certain circumstances, be required to remove structures from the property in accordance with the terms of the Lease
- Provision by the Lessee of any securities required under the Lease
- The Lessee must not lodge any caveat over the property
- Holdover.

Community Lease Rental Framework

Notional or Community Rental

Community Rents are notional rentals determined by Roads and Maritime based on the Lease Agreement terms and general provisions listed at the beginning of this section relating to specific community uses such as boat ramps and slipways. The Community Rent payable will be subject to an annual adjustment to reflect movements in the Consumer Price Index relevant to the location of the property.

Public Access Leases

A Public Access Lease relates to the use of Roads and Maritime land by a community organisation, interest group, unregistered club or local councils or State Government agency for the provision of maritime facilities available to the general public for a nominal fee and as such have no or minimal realisable commercial value

Boat ramps/baths provided by local councils to the general public fall within this category. However, sites subleased by local councils for exclusive use (eg rowing clubs) are not included. Leases to Registered Clubs do not fall within this Category.

Amateur Club and Community Group Leases

Amateur Clubs and specific interest groups are non-profit organisations that undertake sporting or recreational activities and are reliant on member fees, school fees or community fundraising. The organisations do not undertake commercial activities to generate additional revenue and include schools and amateur rowing, sailing and fishing clubs.

Community Group service organisations are non-profit bodies that exist primarily to service a particular community and are generally reliant on external funding support and do not have the capacity to generate significant income. This group does not engage in any form of commercial activity and include organisations such as Scouts and Guides.

For Public Access, Amateur Club and Community Group Leases the indicative current lump-sum annual rent is subject to yearly increases in line with CPI (Sydney - AI Groups).

Community lease types

Community Leases

Leases over facilities provided by local councils and amateur clubs including rowing and fishing clubs, scouts and guides, for facilities such as public boat ramps, swimming enclosures and wharves, including public baths administered under a 'management agreement' between local council and a council, private entity for a public benefit.

Amateur Club and Community Group Leases

Lease related to community service organisations, being non-profit organisations that do not engage in commercial activity and operate primarily to service the community or an under privileged group or disadvantaged group and which is reliant on external funding support and does not have the capacity to generate significant income.

This category also includes specific interest groups; being non-profit organisations, that undertake sporting or recreational activities and rely on members' fees, school fees or community fund raising to fund its activities and do not engage in significant commercial activities to raise funds, nor have significant capacity to generate income.

Public Access

Generally means leases by community organisations, interest groups, unregistered clubs or local or state government agencies, available to the general public free of charge or for a nominal fee.

Boat ramps provided by local councils to the general public fall within this category. However, properties sub-leased by local councils for exclusive use (for example to rowing clubs) are not included within this category.

General provisions

Roads and Maritime may also take one or more of the following into consideration in determining the rent payable:

- Any significant infrastructure investment or capital works proposed to be carried out during the lease term
- the nature, size and complexity of any proposed development on the Land

- any agreed initiatives to provide particular public benefits, services or facilities
- relevant legislation
- any commercial activity that may occur on the site.

The also applies to existing leases, subject to existing lease conditions. If an offer as part of a lease review is made in accordance with the Lease but declined by the lessee, dispute resolution procedures would apply in accordance with relevant lease provisions.

Lease Duration and Capital Works

Lease duration

Community Leases have an indicative term of 5 years. A longer lease may be considered only where a major redevelopment occurs. The decision rule determining the extension based on the relationship between investment and duration is as follows:

Where capex \$0.1M - \$1.99M, lease term is 10 years Where capex \$2M - \$4.99M, lease term is 15 years Where capex \geq 5.0M, lease term is 20 years

To distinguish between capital expenditure and maintenance expenditure Roads and Maritime will require, at its discretion, evidence of the taxation treatment of expenditure and will adopt same. Expensed maintenance expenditure cannot be claimed as capital investment for the purposes of berth rental discounts or extended lease terms.

The projected capital expenditure must be for development on or over RMS land and is expenditure defined as such in the Lessee's audited financial accounts as presented to the Australian Taxation Office (ATO).

The Lessee's financial accounts submitted to the ATO and any other source of financial information reasonably required to substantiate revenue and capital expenditure conducted on RMS land must be provided to verify eligibility for a lease-term extension.

Where, prior to expiration of the current Lease, a Community Lessee seeks to expand their area of operation beyond that covered in the existing Lease, a new lease will need to be established. Consideration for the establishment of a new lease will be dependent on compliance with the existing Lease Terms and Conditions and on the Lessee obtaining Development Consent for the proposed improvements and use over the total area of RMS land. The term of the new Lease will be equivalent to the remaining term of the existing Lease, plus any extension calculated in accordance with the level of capital expenditure above, up to a maximum total of 20 years.

Capital works

Roads and Maritime encourages investment in new and renewed maritime infrastructure, to ensure the delivery of world-class commercial and recreational boating facilities.

It will be a standard lease condition that significant works may only be carried out on the Premises provided:

- Prior written approval has been obtained from Roads and Maritime
- The Lessee has obtained and complied with all relevant planning approvals, consents and permits for the works
- The works are carried out in accordance with any timetable, program or standards agreed in writing between the parties prior to commencement.

If a lessee fails to meet these obligations, Roads and Maritime may:

- cease providing any concessions or incentive contingent upon the works
- seek repayment of the value of applicable concessions or incentives provided; and/or
- commence action to terminate the Lease or AFL

Most marine structures on the harbour will require a Construction Certificate (CC) prior to work commencing. A CC certifies that the detailed construction plans and specifications for the development are consistent with the development consent and comply with the Building Code of Australia.

If work requires a CC, a Principal Certifying Authority (PCA) must also be appointed before work commences. The PCA will inspect building works during their construction to allow them to issue an Occupation Certificate. An accredited certifier can be engaged to issue the CC and/or act as the PCA.

Accredited certifiers are recognised by the Building Professionals Board and carry a certificate of accreditation. In order to certify marine structures, generally an A1 or A2 category of accreditation is required.

Other Matters

Maintenance obligations

Lessees will be required at all times to maintain the structures on the Land in a safe and physically suitable condition for the activities authorised under the Lease.

Details of Maintenance and Repair obligations of lessees are found at [Information Guide — Maritime Property— Managing Community Leases](#).

Goodwill and Residual Value of Improvements

No compensation will be payable to a lessee by Roads and Maritime for the residual value of any improvements, or for business goodwill, at the expiry, termination or assignment of a lease.

Legally binding relationship

No lease or agreement to lease (or variation of an existing lease or agreement to lease) will be legally binding on either party unless it is in writing and is signed by authorised representatives of the parties concerned.

Subleases and Mortgage or Charge of Lease

RMS generally allows for the sublease or licence of leases over commercial property and such leases being security for a mortgage or charge following the prior written approval of RMS.

All sub-leases and other sub-tenancy arrangements, including catering agreements, must be for market rent and must be consistent with the terms of the head lease, including any changes that may apply to that head lease from time to time. At the discretion of RMS, this may require renegotiation of applicable elements of the head lease.

Where a sublease is created on land leased by RMS, the head lessee's rent will increase either by a proportion of the rent payable by the sub-lessee, or by a fixed amount agreed between RMS and the head lessee.

Subleases are not subject to the indicative lease durations outlined in this procedure, but may not be for a term, including any option provisions, that would extend beyond the expiry of the head lease.

Lessees of RMS will be liable for any breaches of lease conditions caused by sub-lessees and RMS will generally only deal with the Head Lessee, and not the Sub-Lessee.

Transfer or assignation of a lease

Roads and Maritime generally allows for the transfer or assignment of leases over community property following the prior written approval of Roads and Maritime.

Information covering the Transfer or Assignment of a Retail Lease can be found at [Information Guide — Maritime Property — Managing Community Leases](#).

Ownership and removal of improvements

As Roads and Maritime legally owns any structures affixed to its Land, the lessee must not remove any such structures either during the lease term or upon expiry or earlier termination of the lease without the written approval of Roads and Maritime.

Leases may require the removal of some or all structures or improvements, upon the expiration of the term or the earlier termination of the lease and at the lessee's cost. In addition, the lessee may be required to carry out "make-good" and remediation works to restore the land to the reasonable satisfaction of Roads and Maritime.

Further guidance on the procedures for the removal of structures or improvements from Roads and Maritime land can be found at [Information Guide — Maritime Property — Removal of Structures](#).

Holding over

If a Lease expires and the lessee remains in occupation of the Premises with the consent of the Lessor, the lease holdover provisions of the Lease, where applicable, will apply and the Lease may be terminated by either party by giving six months' notice in writing.

The notice period under this clause does not apply where Roads and Maritime has commenced action to terminate a lease following material breaches of essential lease conditions.

Default

Persistent breaches of essential lease terms or conditions (such as persistent failure to pay the applicable rent) will entitle Roads and Maritime to certain remedies, including commencing action to terminate the Lease.

Access to Premises

Roads and Maritime, its agents or contractors may access the Premises for the purposes of carrying out a Site Assessment, allowing prospective lessees or purchasers to inspect the Premises or Land; or for any other purpose in the carrying out of Roads and Maritime's statutory responsibilities or ensuring compliance with essential lease terms.

Other relevant Information Guides

The following guides provide further information on matters affecting Retail Leases;

- [Information Guide — Maritime Property - Managing Community Leases](#)
- [Information Guide — Maritime Property— Gaining Roads & Maritime Permission to Lodge DA](#)
- [Information Guide — Maritime Property - End of Lease Activities](#)
- [Information Guide — Maritime Property - Removal of Structures](#)

Important Note: *This document does not constitute legal advice and provides guidance only. Users are advised to seek professional advice and refer to the relevant legislation as necessary, before taking action in relation to any matters covered by this document.*

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