

Maritime Property Guide – Establishing Infrastructure Leases

IPE Infrastructure Management System

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Table of contents

1	General	3
1.1	Context and purpose	3
1.2	Infrastructure leases and agreements.....	3
1.2.1	Site assessment.....	4
1.2.2	Marketing and tendering.....	5
1.2.3	Security and Guarantees.....	5
1.2.4	Guarantee amount	5
1.2.5	Parent company or director guarantees	6
1.2.6	Release of bank guarantee	6
1.2.7	Indemnities and insurance.....	6
1.2.8	Insurances	6
1.2.9	Types of insurances.....	7
1.2.10	Insurance policy requirements	7
1.2.11	Certificates of currency.....	8
1.3	Infrastructure lease agreement conditions	8
1.4	Infrastructure lease rental framework.....	9
1.4.1	Infrastructure rentals	9
1.4.2	Lease duration.....	10
1.5	Other matters.....	10
1.5.1	Maintenance obligations	10
1.5.2	Goodwill and residual value of improvements.....	10
1.5.3	Legally binding relationship.....	10
1.5.4	Subleases and mortgage or charge of lease	10
1.5.5	Assignment of a lease	11
1.5.6	Ownership and removal of improvements.....	11
1.5.7	Holding over	11
1.5.8	Default	11
1.5.9	Access to premises.....	12
2	Further information	12
2.1	Disclaimer notes.....	12
3	Document history.....	12

1 General

1.1 Context and purpose

An Infrastructure Lease relates to the use of TfNSW land associated with Public Wharves, Utility Infrastructure, public boat ramps, board walks, foreshore protection structures and unallocated land.

This guide:

- provides information to assist potential Lessees in the establishment of an infrastructure lease over Maritime Property owned by Transport for NSW (TfNSW)
- is applicable to all new agreements (referred to generically as Leases) issued over TfNSW land for structures and uses associated with the provision of infrastructure services
- Will generally be applied by TfNSW unless the delegated personnel determines that circumstances exist which justify a departure, including to the extent necessary to comply with its obligations at law.

TfNSW staff will assist current and prospective Lessees with their enquiries and provide general information in accordance with the TfNSW Code of Conduct.

Note: To avoid unnecessary duplication Lessees and Licensees will be referred to in this guide generically as Lessees and references to TfNSW relate to its relationship as the property owner and Lessor of Maritime Property.

1.2 Infrastructure leases and agreements

A person may not occupy Maritime Property without a fully executed agreement. A fully executed agreement with the Lessee is required before any unaccompanied access to or use of the property by the Lessee is permitted. No works may be conducted on TfNSW land without planning approval and a suitable Lease.

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 TfNSW land for leasing purposes. TfNSW 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), TfNSW may offer the prospective Lessee an Agreement for Lease (AFL).

Terms and conditions for any TfNSW 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 TfNSW Policy, and/or the term of the proposed Lease.

All Lessee obligations will be detailed in the Lease.

Infrastructure Leases include uses such as non-marine industrial or commercial operations such as communications, power or water supply and where no income-generating activity is directly conducted on the land that is subject to the lease.

Applicants for a new lease must provide the following information to TfNSW 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
- a report from a suitably experienced and practicing structural engineer qualified for corporate membership of the Institution of Engineers Australia independent of the Lessee and accepted by the Lessor, acting reasonably, as having the appropriate qualifications for marine structures. The report must review the condition and remaining lifespan of structures and improvements on the leased land and certify whether they are fit for purpose in accordance with all legislation and, given prescribed maintenance, will remain so for the proposed lease term. The report, if accepted by the Lessor, will be annexed to the new lease, its findings and recommendations are to be reflected in the Lessee's business case and they should form the basis of the initial maintenance plan required to be provided to the Lessor by the Lessee within the first 12 months of the new Lease
- 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 TfNSW for the purpose of deciding whether to lease land to the prospective lessee.

It is the intention of these provisions that TfNSW will satisfy itself that the proposed business endeavours are viable and have a reasonable prospect of success before entering a lease or AFL.

All offers to Lease TfNSW Maritime property will generally be completed via an open market process.

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

An indicative term for an Infrastructure Lease is 20 years.

1.2.1 **Site assessment**

Prior to granting a lease, TfNSW will generally conduct an assessment. The assessment will assist TfNSW 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 site will be at the discretion of TfNSW. Where multiple categories of land use are proposed for a single site, these will generally be incorporated into a single lease document.

1.2.2 Marketing and tendering

Prior to committing to a new Lease TfNSW will consider the optimal market strategy to achieve 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 before entering a new Lease.

All new Lease opportunities will generally be offered to the public via an open market process, though for some properties used for infrastructure purposes, leases may be issued via direct negotiation.

1.2.3 Security and Guarantees

TfNSW may require some form of security to ensure the Lessee's compliance with rental and/or maintenance obligations under a lease. This will usually take the form of a bond, bank guarantee or similar, on terms and for an amount acceptable to TfNSW, which will be determined prior to the execution of the Lease.

1.2.4 Guarantee amount

Where TfNSW requires a bank guarantee, this will generally be for an amount equivalent to up to 12 months' rent for the property, except in exceptional circumstances where additional securities may be required.

The Bank Guarantee will:

- specify Transport for NSW (ABN 18 804 239 602) as 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.

1.2.5 Parent company or director guarantees

In some circumstances, the directors of a Lessee company may be required to provide personal guarantees to protect the interests of TfNSW. In addition, parent company guarantees may also be required in addition to the financial securities provided by the Lessee company.

Circumstances that may require parent company and/or director personal guarantees may include (but are not limited to):

- Where leasing incentives have been provided to the Lessee in the form of a discount rent or any other form of financial assistance.
- Where a long-term lease term has been agreed and the Lessee is required to undertake significant capital improvements.
- Where other lease arrangements exist between the Lessee and TfNSW which potentially pose a significant risk to TfNSW resulting from non-performance of the Lessee.

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 TfNSW to call upon the bank guarantee or security will survive the expiration or earlier termination of the Lease.

1.2.6 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 with the Lease, the balance will be released to the Lessee only after all such obligations have been completed and paid for.

1.2.7 Indemnities and insurance

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

1.2.8 Insurances

The Lessee is required to effect and maintain insurance as deemed relevant by TfNSW 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 (except for Workers Compensation Insurance) may be taken out in the joint names of TfNSW and the Lessee, or in the name of the Lessee with TfNSW' interest noted.

1.2.9 Types of insurances

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

- Public liability insurance in the amount advised for any one occurrence or for any other amount TfNSW reasonably requires, containing all provisions that are normally contained in public liability insurance policies, or as reasonably required by TfNSW and expressly referring to and covering all the Lessee's obligations under the Lease, including the obligation to indemnify TfNSW, for not less than \$20 million or other amount as reasonably required by TfNSW.
- 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 TfNSW), for the full cost of reinstatement of the property (including demolition and remediation) if damaged or destroyed.
- Insurance for the contents of the leased property for the full cost of replacement and reinstatement of the contents if damaged or destroyed.
- Insurance to cover loss of earnings and profit resulting from any interruption to conduct of the Lessee's Business on the leased maritime property.
- Insurance to cover any pollution or contamination arising from any activity associated with the use of the property.
- Any other insurance required by law and as TfNSW reasonably requires.

1.2.10 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 APRA of registered insurers (and listed under 'Insurers Authorised to Conduct New or Renewal Insurance Business in Australia') or any other insurer reasonably approved by TfNSW.
- Policies are to be in the name of the Lessee and note the interests of TfNSW 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 TfNSW's approval.

1.2.11 Certificates of currency

Certificates of Currency must be provided to evidence the existence of all insurances required to be effected and maintained throughout the lease term. 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 TfNSW.

1.3 Infrastructure lease agreement conditions

A heads of agreement (HOA) or term sheet is used to record the agreement of key terms and conditions of a proposed Lease. The HOA or term sheet may:

- Be non-binding unless specifically stated that the intention of the parties is that the HOA or term sheet is binding.
- Include details of other less material clauses which are expected to be agreed after confirmation that the proposed Lease will be granted.

For Infrastructure Leases an Agreement for Lease and Construction Licence (AFL) will generally be used to provide rights to build development application (DA) approved works. The grant of a Lease over the completed work is subject to the satisfaction of preconditions spelt out in the AFL.

The AFL once executed is binding on both parties and will have a draft pro-forma Lease attached. Typically, the AFL will contain (in a schedule or annexure) details of the property design and specification of DA approved works, 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 TfNSW.

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

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- 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
- Subleasing 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.

1.4 Infrastructure lease rental framework

1.4.1 Infrastructure rentals

Rents for land uses in the Infrastructure Lease category, unless otherwise directed by NSW Government policy or decisions, are generally determined by agreement between the parties, noting that some public wharves may have rents determined through a tender process.

Agreed rent is based on an amount agreed to between the parties and generally aligned with market rent.

Where the rent payable under the Lease is wholly or partly based on agreed rent, that part of the rent will be subject to an annual adjustment to reflect positive movements in CPI.

TfNSW 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 public benefits, services or facilities; and
- relevant legislation.

The guide 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.

1.4.2 Lease duration

An indicative term for an Infrastructure Lease is 20 years.

1.5 Other matters

1.5.1 Maintenance obligations

Lessees will be always required to maintain the structures on the Land in a safe and physically suitable condition for the commercial activities authorised by the Lease.

Details of Maintenance and Repair obligations of lessees are found in the *Maritime Property Guide – Managing Infrastructure Leases*.

1.5.2 Goodwill and residual value of improvements

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

1.5.3 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.

1.5.4 Subleases and mortgage or charge of lease

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

All sub-leases and other sub-tenancy arrangements will require prior written notification to TfNSW 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 TfNSW, this may require renegotiation of applicable elements of the head lease.

Where a sublease is created on Land leased from TfNSW, 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 TfNSW 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 TfNSW will be liable for any breaches of lease conditions caused by sublessees and TfNSW will generally only deal with the Head Lessee, and not the Sublessee.

1.5.5 Assignment of a lease

TfNSW generally allows for the assignment of leases over infrastructure property following the prior written approval of TfNSW.

Information covering the assignment of a Lease can be found in the *Maritime Property Guide – Managing Infrastructure Leases*.

1.5.6 Ownership and removal of improvements

As TfNSW 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 TfNSW.

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 TfNSW.

Further guidance on the procedures for the removal of structures or improvements from TfNSW land can be found in the *Maritime Property Guide – Removal of Structures*.

1.5.7 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 TfNSW has commenced action to terminate a lease following material breaches of essential lease conditions.

1.5.8 Default

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

1.5.9 **Access to premises**

TfNSW, its agents or contractors may access the premises for the purposes of carrying out an assessment, allowing prospective lessees or purchasers to inspect the premises or land; or for any other purpose in the carrying out of TfNSW's statutory responsibilities or ensuring compliance with essential lease terms.

2 Further information

2.1 **Disclaimer notes**

- This guide 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 acting in relation to any matters covered by this document.
- While every reasonable effort has been made to ensure that this document is correct at the time of publication, the State of New South Wales, its agencies and employees, disclaim all liability to any person in respect of anything, or the consequences of anything, done or omitted to be done in reliance upon the whole or any part of this document.

3 Document history

Version	Published date	Summary of changes
1.0	June 2025	First version of the document