



Office of
Environment & Heritage
NSW National Parks & Wildlife Service



Property Leasing Guidelines

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The National Parks and Wildlife Service

The NSW National Parks and Wildlife Service (NPWS) manages land reserved under the *National Parks and Wildlife Act 1974* (NPW Act). NPWS is part of the Office of Environment and Heritage (OEH) within the Planning and Environment cluster.

The national parks system covers 868 parks¹ making up approximately seven million hectares, or 8.75 per cent of the State of NSW. This system of parks protects some of the State's most biologically rich and culturally important places. National parks are important places for conservation and the community. NPWS is committed to providing park experiences that support local communities and conserve cultural and natural heritage.

Aim of these Guidelines

The parks and reserves managed by NPWS are a major tourism and recreation draw card, receiving around 39.1 million domestic visits each year, and an estimated 1.5 million international visitors. Visitors to parks managed by NPWS are increasingly seeking a broader range of experiences supported by new services, facilities and infrastructure.

NPWS is committed to increasing visitor access to parks by offering unique and quality experiences, and recognises that building and maintaining effective partnerships with the private sector will be important to achieving this.

NPWS currently administers various arrangements, most commonly in the form of leases, which enable the private sector to offer visitor services within parks. This document aims to provide clear guidance on the process that will apply to the grant or renewal of commercial or retail leases and licences over NPWS managed land and infrastructure.

NPWS Objectives for Commercial Arrangements

The objectives of NPWS in relation to the commercial use of its property portfolio are to:

- ensure that partnerships with current and future business owners support activities and infrastructure that are compatible with the conservation of natural and cultural heritage and promote public appreciation of those values
- enhance partnerships with current and future business owners in the provision of sustainable, world class visitor experiences
- achieve a mix of commercial opportunities to best respond to the current diversity of visitor needs and to anticipate potential future needs
- seek innovative ways for NPWS and the private sector to work together
- effectively communicate how NPWS will determine the appropriateness and feasibility of commercial lease applications
- deliver transparent, consistent and streamlined processes for applying for and renewing commercial leases
- support current and future partners in fulfilling NPWS legislative and policy commitments

¹ The term 'park' is the general term that is used in the NPW Regulation and here refers to all land that has been acquired under the NPW Act. It includes all park categories.

- obtain an appropriate financial return for the NSW Government.

Private Sector Partnerships

NPWS recognises that while it is responsible for managing many unique assets in iconic locations on behalf of the community, the delivery of quality visitor experiences within parks managed by NPWS may be enhanced through effective partnerships with the private sector, utilising its skills and experience in this area.

NPWS recognises that while it owns many unique assets in iconic locations, NPWS may not be the most appropriate operator of businesses in these assets.

This document provides guidance on the process to apply for leases within NPWS managed land. A lease or licence provides for a lessee or licensee to use specified land or buildings for a defined period and for a permitted activity.

Private partners may also operate businesses in NPWS parks in a number of different ways. For example, commercial recreation and tour operators can apply for a Parks Eco Pass (for more information on Parks Eco Pass see: www.environment.nsw.gov.au/parksecopass/).

In all of NPWS' dealings with its business partners, it is essential that NPWS can demonstrate each of the arrangements support the protection of conservation values within the national parks system and deliver public and economic benefit, and are developed in accordance with NSW Government requirements.

Policies and Legislation

Leases and licences can only be granted for activities permissible under the NPW Act. They must be consistent with the objects of the NPW Act (section 2A) and the management principles for the park or reserve (Division 2, Part 4). The NPW Act also has specific provisions which set out:

- the purposes for which a lease or licence can be granted (section 151A)
- what the Minister must consider before granting a lease or licence (section 151B)
- when the Minister must refer a proposed lease or licence to the National Parks and Wildlife Advisory Council, the Aboriginal Cultural Heritage Advisory Committee or the Karst Management Advisory Committee for advice (section 151G)
- when and how a proposal must be publically advertised (section 151F).

In addition, many parks have a statutory Plan of Management which may also define the circumstances under which leases can be granted for a particular park. Some lease or licence proposals may also require a review of environmental impacts under the *Environment Planning and Assessment Act 1979*.

When granting and managing leases for commercial activities on park, NPWS will also be guided by NSW Government and OEH goals and objectives for park management, and relevant principles, policies and guidelines that reflect legislative requirements. Below are the key policies and guidelines used by NPWS in determining whether or not a leasing proposal is appropriate and if so, the conditions under which it should proceed.

- Proponents Guidelines for the Review of Environmental Factors:
www.environment.nsw.gov.au/resources/protectedareas/110028REFProGde.pdf

- Sustainability Guidelines for Visitor Use and Tourism in NSW National Parks: www.environment.nsw.gov.au/resources/protectedareas/20100980SustainabilityGuidelines.pdf
- Sustainability Assessment Criteria for Visitor Use and Tourism in New South Wales National Parks: www.environment.nsw.gov.au/resources/protectedareas/20100987SustainabilityAssessmentCriteria.pdf
- Leases and Licences Referral Policy and Procedures: www.environment.nsw.gov.au/resources/parks/policies/policyLeaseReferral.pdf; and
- Any conservation management plan for the assets under consideration.

Other legislation, including that administered by other government departments, can also be relevant to some leases granted under the NPW Act. These include:

- *Conveyancing Act 1919*
- *Environmental Planning and Assessment Act 1979*
- *Environment Protection and Biodiversity Act 1999* (Cth)
- *Heritage Act 1977*
- *Protection of the Environment Operations Act 1997*
- *Real Property Act 1900*
- *Residential Tenancies Act 2010*
- *Retail Leases Act 1994*
- *Wilderness Act 1987*

The NPWS property team will assist current and prospective partners in identifying the relevant statutory and policy requirements specific to a particular proposal.

Leasing Process

When applying for a lease with NPWS, there are two processes available depending on the nature of the opportunity, namely:

- competitive selection process; and
- direct negotiations.

The default position is to make all leasing opportunities available to the market through a competitive selection process, unless exceptional circumstances justify direct negotiations. Page 11 of this document clearly outlines the required probity principles for any leasing process.

During either the competitive selection process or direct negotiations process, NPWS may decide not to progress the negotiation or assessment at any stage if it does not consider that it is in the best interests of the Government to progress negotiations or enter into a new lease.

Competitive Selection

In line with NSW Government policy, most new leasing opportunities will be offered through an open market process. A competitive selection process will also generally be required at the expiry of leases.

An open market process will typically include the following:

- expression of interest or a request for tenders
- evaluation against assessment criteria
- negotiation with the successful proponent
- finalisation of the lease documents.

Each process may have different submission requirements and will be tailored to the specific opportunity. At any stage during the process, NPWS might decide not to continue. Some of the reasons for making this decision may include where:

- terms and conditions for the lease cannot be agreed
- the rent or prevailing market conditions do not provide for a sufficient financial benefit for the Government
- there is insufficient interest in the offer
- there is a conflict of interest or other probity concern with the process
- the outcomes for environmental and cultural heritage values are not acceptable
- public consultation demonstrates that the community is not supportive of the lease
- there is a change in Government policy.

Direct Negotiations

In exceptional circumstances, if it can be demonstrated that it is in the best interest of the public, a process other than a competitive selection process may be undertaken to secure a lessee for NPWS properties.

The reasons for pursuing a direct negotiation must be clearly documented by NPWS, achieve best value for money, and demonstrate that an open market process would not yield the optimum result.

Circumstances in favour of direct negotiations that may arise include:

- when the current market rental value of a property is low relative to the cost of conducting a competitive process
- when a recently completed competitive process has not produced a satisfactory lease outcome
- when it is clear beyond reasonable doubt that there is only one prospective tenant for a particular property asset
- where, after an assessment of the site, it can be determined that direct negotiation with a prospective tenant would maximise benefits to the community and the Government
- when the lease is short term and does not include obligations on the tenant to carry out capital works
- where there is evidence that conducting a competitive process may place a project of regional or state significance at risk
- where the only practical access is available from adjoining land owned by the proponent
- when it can be clearly justified that the negotiation leads to best value and demonstrates that the process will meet the probity principles.

If a decision is made by NPWS to enter into direct negotiations for a particular lease, this does not set a precedent about when NPWS will enter into direct negotiations for other opportunities as each circumstance will be different.

NPWS will generally use an independent valuation to guide it in working out the appropriate return to Government for a lease. This valuation will generally not be disclosed to the potential lessee. In addition, NPWS may appoint a probity auditor to oversee the process.

At any stage during the negotiation NPWS might decide not to continue with the process.

Some of the reasons for making this decision may include where:

- terms and conditions for the lease cannot be agreed
- the offered rent or prevailing market conditions do not provide for a sufficient financial benefit for Government
- direct negotiations do not yield the potential benefits initially considered achievable in entering into the direct negotiations
- market forces are identified during the negotiation process that require reconsideration of the decision to directly negotiate
- the outcomes for environmental and heritage values are not acceptable
- public consultation demonstrates that the community is not supportive of the lease
- there is a change in Government policy.

A guiding document for direct negotiation is the *ICAC Direct negotiations: Guidelines for managing risks in direct negotiations*. This is available on the ICAC website:

www.icac.nsw.gov.au.

Case Study

Tracey was visiting a park and noticed a lodge that looked empty so approached NPWS to rent it out for visitor accommodation. Tracey's business case was excellent and the works she proposed were all best environmental practice. However, she was unable to demonstrate she was the only provider in the market.

As it turned out, NPWS was preparing to launch a request for tenders for this lodge one month after Tracey approached NPWS. When the request for tenders was launched NPWS contacted Tracey to make sure she knew the opportunity was being advertised. Tracey was able to submit a tender setting out her proposal for the lodge.

Unsolicited Proposals

The Department of Premier and Cabinet has developed a Guide for Submission and Assessment of Unsolicited Proposals. This Guide can be accessed here:

www.nsw.gov.au/your-government/unsolicited-proposals

Unsolicited proposals are defined as an approach to the Government from a proponent with a proposal to:

- build and/or finance infrastructure; and/or
- provide goods and services

where the Government has not requested the proposal.

Proponents who propose a commercial arrangement with NPWS (when there is no relevant competitive process) should consider this Guide and whether their proposal would satisfy the principles in this document.

Lease Renewals

There is no automatic right for any existing tenant to have their lease renewed unless the lease provides for an option term (see page 10 in relation to options).

At the expiry of a lease, the default position is that the opportunity will be available to the market through a competitive selection process.

Direct negotiations with an existing lessee for a lease renewal will only occur if it is justified having gone through the direct negotiations process outlined above, and where the current lessee has a demonstrated positive track record of:

- compliance with all terms and conditions in its existing lease
- compliance with all environmental, heritage and maintenance requirements
- punctual rental payments at all times
- no significant breaches or non-compliance issues during the term of its lease
- operation within the permitted use
- no ongoing record of customer complaints
- provision of appropriate sales data (where applicable) on a timely basis
- adherence to trading hours approved under the lease.

Additional clauses may also be negotiated to improve the environmental performance of the lessee.

In addition, NPWS will generally not consider a renewal of a lease earlier than 18 months prior to the expiry of the existing lease.

NPWS is not obligated to enter into a new lease with an existing lessee. If agreement cannot be reached on the terms of a new lease, the situation will revert to the existing lease and NPWS will consider its options for the property. Examples of reasons why NPWS might decide not to continue may include the following:

- where terms and conditions for the lease cannot be agreed
- where the rent or prevailing market conditions do not provide for a sufficiently improved financial benefit for government
- where direct negotiations do not yield the potential benefits initially considered achievable in entering into the direct negotiations
- where market forces are identified during the negotiation process that require reconsideration of the decision to enter into direct dealings
- where the outcomes for environmental and cultural heritage values are not acceptable
- where public consultation demonstrates that the community is not supportive of the lease
- where there is a change in Government policy.

Probity Principles

Probity principles are core to NSW Government dealings and so underpin the way in which NPWS procures lessees for its properties. Irrespective of whether a competitive process or

direct negotiation is used to secure a lessee, the probity principles must always be complied with.

In addition to the requirement to identify the lessee offering the best value for money, the leasing process must be robust in terms of probity and fairness and the other objectives outlined below. The process must be fair and equitable and must also be perceived by all involved as being fair and equitable.

It is important to note that NPWS is not bound to accept the highest rent offered and may pass over, or not consider further, any lessee.

Whichever leasing process is undertaken, it must comply with the following probity principles:

- accountability and transparency – the process will be open, clear, and defensible
- impartiality – those making decisions do so in an unbiased manner
- objectivity – decisions are made based on objective evidence
- reasonableness – decisions are based on the information reasonably known by the evaluation team and are supported by rational and logical argument
- thoroughness – decisions are based on competent and comprehensive analysis of all relevant information
- confidentiality and information security
- identification and resolution of conflicts of interest.

A guiding document in relation to probity principles is the *NSW Government Procurement Guidelines*:

www.procurepoint.nsw.gov.au/sites/default/files/documents/tendering_guidelines-1_october_2011.pdf

Documentation

Record keeping is a key tool in ensuring accountability and transparency in the leasing process. The appropriate mix and level of documentation will be determined by the nature and risk profile of the lease process being undertaken. In all cases, NPWS must ensure there is sufficient documentation to provide an understanding of the reasons for the lease, the process that was followed, and all relevant decisions and the basis of those decisions.

Delegation and Approvals

The power to make decisions about leases is delegated to various levels within NPWS. The person who has the power to make a particular decision about the leasing process will be identified within NPWS and the decision process will be documented.

Any new lease or variation of terms of existing leases will be subject to the appropriate approvals process. This may include public notification and referral to the National Parks and Wildlife Advisory Council. These approval processes will be clearly communicated to parties at the commencement of the process. See page 5 and 6 for a list of relevant policies.

General criteria for the evaluation of leases

In addition to criteria that may apply to specific opportunities, the general criteria for NPWS to evaluate all lease proposals is as follows:

- compliance of the proposed use with the NPW Act (including consistency with the objects of the NPW Act and any plan of management)
- demonstrated positive social, economic and environmental benefits arising from the proposed use
- suitability and objectives of the proposed use
- demonstrated financial and economic viability of the proposed use
- demonstrated financial capacity of the proponent
- capability of the proponent to execute the proposal, along with demonstrated track record
- general credentials of the proponent including skills, experience and expertise
- demonstrated history of compliance by the proponent with the terms of any past leases, and demonstrated history of good customer service.

New Leases

To ensure consistency in its approach with all business partners, NPWS will use standard leasing documentation where possible.

In some cases, a formal lease may not be able to be entered into until certain events (conditions precedent) have occurred, such as planning approvals or capital works. If this is the case, NPWS may offer an agreement to lease until the conditions precedent are satisfied.

Length of lease

- Retail Leases: the term will be subject to the *Retail Leases Act 1994*. Option terms may be determined during the negotiation process.
- Commercial Leases: the term of these leases will be negotiated based on the type of proposal and level of capital investment committed.

When assessing the lease term, NPWS will take the following factors into account:

- ability to fund, resource and manage the lease over the proposed term
- level of committed capital investment
- purpose of the proposed activities
- demonstrated public social, economic and environmental benefit
- demonstrated direct return to NSW Government
- requirement of the Government to re-tender within a reasonable period.

Leases may provide options for further terms. However, the total of the initial term plus any option terms shall be regarded as the total term for the purpose of assessing the length of lease to be offered.

Rent

Generally, the rent on NPWS leases may comprise a base rent plus percentage of turnover. All rents will reflect current market rent.

Rent may be determined by the market in situations where tenderers submit bids in open competition. In other cases, NPWS may use an independent valuer to guide it in determining

the appropriate rent. This independent valuation advice will generally not be disclosed to the prospective lessee.

An assessment of market rent will consider the factors:

- general terms and conditions of the proposed lease
- level of capital investment proposed by the lessee
- lease tenure
- nature of operation
- comparative rents paid by comparable businesses.

Security deposits

Security deposits or bank guarantees are required on all retail and commercial leases. They will generally be the equivalent of 3-months' rent paid in advance. Leases may provide for security deposits to be increased should the tenant demonstrate a poor track record in the payment of rent. This is in order for NPWS to protect its interests for the remaining term of the lease.

In addition, if capital works are proposed under the lease then NPWS may require security in relation to those works. This security in these circumstances will reflect the scope and nature of the works.

Rent reviews

Market rent reviews will be undertaken. They will typically be required at a minimum of five-year intervals. Between the market reviews, rent each year will be increased by CPI year on year.

Hold Over provisions

Leases may provide that at the expiry of the term, the lessee may, with consent from NPWS, remain in the premises on a month to month basis. The lease may provide that the rent for this period is at the current yearly rate, and NPWS may vary the rent with one month's notice. Under hold over provisions, the lease will generally be terminable at any time by either party giving one month's notice.

Variation of leases

Where there is a requirement for a variation to lease, agreement and consideration from both parties is required. This consideration may include the payment of a premium, an increased rent, or agreement to a contemporary lease format for consistency.

The improved benefit to the Government and the satisfactory performance of the lessee under the lease will also be taken into account when considering the granting of a lease variation.

Where an application for variation is being considered in respect to an older lease, the opportunity may be taken to review the lease provisions and to negotiate variations of out-dated or inadequate provisions. An example of conditions that might be varied is in relation to environmental requirements.

Lease options

At the expiry of the lease term, some leases include a provision for a further lease term. This is known as an option. These options are usually at the discretion of the lessee. However, the lessee must not be in breach of the lease when it exercises the option.

Case Study

Kelly was the lessee of a café in one of our parks. She was a very amicable, friendly tenant who exercised a high degree of professionalism during lease discussions. However, Kelly was always late with her rent payments. Kelly had several other investments and payment of her rent was not a priority.

Kelly's café was trading well during the last year of her five year lease. At the end of the initial lease term, Kelly gave notice to NPWS that she wanted to exercise the option in her lease for a further lease term. At the time of exercising her option, Kelly was in rent arrears. In addition, she had not submitted her turnover figures in accordance with the lease. NPWS decided that as Kelly was in breach of her lease, the further lease would not be granted. Instead, expressions of interest were sought for the opportunity to lease the café.

Costs

Allocation of costs will be negotiated and agreed prior to the commencement of the leasing process.

Generally, a request from an existing lessee for a variation will result in the lessee paying all applicable costs.

Probity Advisor

NPWS is committed to observing the highest standards of probity in its commercial dealings. A probity advisor may therefore be appointed to oversee the process throughout the different phases. The principal role of a probity advisor is to provide probity advice and solutions throughout the transaction.

When and how probity auditors are used will be guided by *Direction 2013– 05: Engagement of probity advisers and probity auditors*:

www.procurepoint.nsw.gov.au/policies/nsw-procurement-board-directions/direction-2013-05

In accordance with this Direction, NPWS will consider engaging a probity auditor:

- where the integrity of the process (or part of it) may be called into question
- where the project is politically sensitive and/or potentially controversial
- to avoid a perception of bias/favouritism
- where the process is extremely complex

- where there are substantial costs involved in preparing submissions or there is substantial government funding involved.

The probity advisor's role includes, but is not limited to, the following:

- confirming that fairness and impartiality are observed during the process including discussions and/or negotiations after the receipt of proposals, during the evaluation process, and during any negotiation period
- confirming that the evaluation criteria and any other relevant matters are consistently applied to the consideration, evaluation and assessment of each proposal
- confirming that the probity of the process is independently validated
- monitoring and reporting that the proposal process and procedures are followed, and that the outcome is capable of being independently validated
- providing guidance to the Government regarding how unforeseen probity issues can be resolved
- observing government meetings with respondents
- observing unsuccessful respondents' debriefing meetings, if applicable
- preparing a report outlining the work performed and the issues that arose during the proposal process, and confirming the proposal process had been conducted in accordance with the approved assessment process, the evaluation criteria and any other relevant matters.

The probity advisor will not be involved in the evaluation of any proposal, but will be an independent observer of, and advisor to, the proposal process.

Case Study

Jack has a lease of a heritage building that has been adaptively modified for use as a conference facility. Six months before the expiry of Jack's lease, Jane, a senior property manager at NPWS, arranges for a market valuation to be undertaken as part of the preparation for a request for tender for a new lease of the building.

Jack's business is successful and he decides he would like to submit a tender for a new lease. To submit his tender proposal he briefs a valuer to conduct a market valuation.

Jane becomes aware that both valuers have been discussing the valuation of the lease and Jack has received a copy of NPWS' valuation. Jane decides that the process has been compromised. She briefs a new valuer and informs Jack that the earlier valuation is compromised and will not be considered as part of the tender process. Jane also seeks advice about whether Jack should be excluded from the process.