12.1 ST KILDA MARINA INTERIM LEASE - REVIEW OF SUBMISSIONS

EXECUTIVE MEMBER: CHRIS CARROLL, GENERAL MANAGER, CUSTOMER AND CORPORATE SERVICES

PREPARED BY: JOANNE MCNEILL, MANAGER ASSET MANAGEMENT & PROPERTY

1. PURPOSE

1.1 For Council to review submissions received from interested parties regarding Council's intention to provide an interim three-year lease to the current lease holder of St Kilda Marina as required under Section 223 of the Local Government Act 2019.

2. EXECUTIVE SUMMARY

2.1 The 50 year ‘head lease’ between Council and Australian Marinas (A’Asia) Pty Ltd (Australian Marinas), began on 18 March 1968 and, through a supplemental agreement to the original lease, expires on 30 April 2019.

2.2 The work to procure a new long-term lease arrangement for the site is proceeding in line with the Project Approach and associated timeline approved in a Council Meeting on 7 February 2018.

2.3 To cover the gap between the expiry of the existing lease and the commencement of a new lease it was determined that an interim short-term lease arrangement is required.

2.4 Council undertook an assessment of the different options available when considering the approach to interim arrangements for the site.

2.5 The assessment included consideration of such things as assessment of the type of lease required and impact of legislative changes since the original lease was agreed 50 years ago, who (current tenant, other operator, council) is best placed to achieve the objectives for the short-term lease (outlined in 4.7), length of lease, rent, ownership of assets, risk, business continuity and transition requirements.

2.6 Based on the findings of the assessment of options, Council approved Officers entering into direct negotiations with the current tenant, Australian Marinas, for a short-term lease.

2.7 Whilst it was found that there were possible alternative operators able to take on the operations of the marina as an interim measure, the key factor in deciding to enter into a short-term arrangement with the current operator was the ownership of key marina infrastructure by the tenant, required for the continued operation of the marina.

2.8 The premise of the proposed short-term lease is essentially to keep existing marina and tenant operations going while a long-term lease is resolved.
2.9 Whilst Council would have preferred a significantly increased rent more closely aligned with the current estimated market rental for the site (estimated at $800,000 per annum) and a shorter length of term, the proposed key terms are a negotiated, in principle agreed outcome with the current tenant, Australian Marinas, that is considered to minimise risk for all parties, secure continuity of operations in the interim and best support the long-term vision for the Marina.

2.10 An assessment of the replacement costs and timeline for replacing the wet berths (owned by the current tenant) identified that any benefits gained from an increase in rent through a different management arrangement, would be lost through the need to close down the marina for a significant period of time and replace the existing wet berth and associated infrastructure with new.

2.11 Another consideration was the level of disruption for current users of the marina and associated facilities associated with a change in management of the site in the short term with all of the business set up that would be required, with another possible change in management three years later.

2.12 No significant changes to the management arrangements for the site are proposed as part of the short-term lease. Significant changes are being considered for the site as part of the long-term future of the site. Officers believe such improvements are therefore best left to be resolved as part of that long-term lease process.

2.13 Council resolved on 6 February 2019 that statutory procedures be commenced under Section 190 of the Local Government Act 1989 (Act) for the proposed interim lease with the existing tenant, Australian Marinas (A/Asia) Proprietary Limited for the St Kilda Marina.

2.14 Council also resolved to hear and consider any submissions received pursuant to Section 223 of the Local Government Act 2019 at a Council meeting to be held in March 2019.

2.15 Seven submissions were received by the end of the consultation period on 12 March 2019. Key themes raised in the submissions include concern over: the length of term, the sub-market rental amount, direct negotiation with current tenant, not following the legislative process, the current state of infrastructure (particularly the wet berths that are proposed to be purchased), inadequate information being made available during the submission period and its impact on the validity of the process.

2.16 One proposal contained key terms that could form the basis for a proposal if Council were to consider a different approach. Commercial in-confidence information within this submission has been redacted on request of the submitter from the report but will be made available to Councillors.

2.17 One proposal was made in support of the current interim lease.
3. **RECOMMENDATION**

That Council:

3.1 Considers submissions received during the consultation period, as required under Section 223 of the Local Government Act 2019, regarding Council’s intention to provide an interim three-year lease to the current lease holder of St Kilda Marina.

3.2 Directs Officers to bring back to Council a report on 3 April 2019 that proposes a response to the submissions received from interested parties regarding Council’s intention to provide an interim three-year lease to the current lease holder of St Kilda Marina.

4. **KEY POINTS/ISSUES**

**Background**

4.1 The St Kilda Marina is and has been located at 42 A - E Marine Parade, Elwood since 1969. The Marina occupies approximately 8Ha (80,000 m²) of foreshore Crown Land for which Council is appointed as the Committee of Management. Existing uses include marine services (boat storage and launch infrastructure, repairs, fuel for boats and sales), restaurants/cafes, service station and car parking.

4.2 The 50 year ‘head lease’ between Council and Australian Marinas (A’Asia) Pty Ltd (Australian Marinas), began on 18 March 1968 and, through a supplemental agreement to the original lease, expires on 30 April 2019.

4.3 The work to procure a new long-term lease arrangement for the site is proceeding in line with the Project Approach and associated timeline approved in a Council Meeting on 7 February 2018 (provided in Attachment 1 for reference). This timeline forecasts procurement of a new lease in 2020, with a yet to be determined transition period between existing and new lease/s, if required. The new lease arrangement will likely not be in place until 2021, and potentially 2022 to cover any additional time required for any planning or legislative issues that may arise.

**Short Term Lease Approach**

4.4 To cover the gap between the expiry of the existing lease and the commencement of a new lease it was determined that an interim short-term lease arrangement is required.

4.5 At a Council Meeting on 13 September 2016, Council approved in principle the development of a short-term lease, if required, to provide certainty to current operators at the site while a new lease is secured, with the rent for the short-term lease to be based on market value".
4.6 Following the assessment of possibilities for the short-term lease arrangement it was determined that market value was not an opportunity that should reasonably be pursued. Rather, that the focus should be on minimising risk, ensuring continuity of the site and supporting full focus on the process to secure a new long-term lease, with recognition that the opportunity for significant change on this site is through the work underway to develop a new long-term lease that delivers Council’s vision and objectives for the site.

4.7 A set of objectives were developed to frame the development of a short-term lease. These were:

- Provide continuity for the function of the site whilst the leasing process is underway.
- Minimise disruption to the site.
- Minimise change in the short term with terms based on the existing lease.
- A rental amount that does not disadvantage either party.
- Facilitates the project requirements for procuring a new long-term lease (site visits, transition and handover requirements, if applicable).

4.8 Council undertook an assessment of the different options available when considering the approach to interim arrangements for the site. This involved engagement with Council’s State Government partners and advice from legal, probity and commercial advisors. This also included market sounding and an assessment of whether there were viable alternatives to the current operators.

4.9 The options assessment included consideration of such things as assessment of the type of lease required and impact of legislative changes since the original lease was agreed 50 years ago, who (current tenant, other operator, council) is best placed to achieve the objectives for the short-term lease (outlined in 4.7), length of lease, rent, ownership of assets, risk, business continuity and transition requirements.

4.10 Whilst it was found that there were possible alternative operators able to take on the operations of the marina as an interim measure, the key factor in proposing to enter into a short-term arrangement with the current operator was the ownership of key marina infrastructure by the tenant, required for the continued operation of the marina.

4.11 Under the existing lease agreement, the tenant owns essential key marina infrastructure and is entitled to remove this infrastructure at the end of the current lease, which includes the wet berths, security gates and fencing and dry store boat mounts.

4.12 An assessment of the replacement costs and timeline for replacing the wet berths identified that any benefits gained from an increase in rent through a different management arrangement, would be lost through the need to close down the marina for a significant period of time to replace the existing wet berth and associated infrastructure with new.
4.13 Another consideration was the level of disruption for current users of the marina and associated facilities, associated with a change in management of the site in the short term with all of the business set up that would be required, with another possible change in management three years later.

4.14 It was considered that there is a compelling reason to support a direct negotiation with the current leaseholder for a short-term lease given the asset ownership issues and the long standing existing business arrangements that support the continued use of the site in the short term, with the understanding that a competitive process will be undertaken soon for a long term lease, which gives all interested parties an opportunity to put in a bid for the site.

**Short Term Lease Key Terms**

4.15 The key issues and differences that would apply to the short-term interim lease versus the current lease were explored by officers and the advisory team. Key issues identified that need to be addressed through the short-term interim lease to minimise risk, secure continuity of operations and best support the long-term leasing process include:

- Application of the *Retail Leases Act 2003* (RLA)
- Type of agreement – deed of extension (lease extension) or new lease.
- Length of term to support the transition to new long-term lease arrangement
- Appropriate rental amount
- Ownership of key marina assets and impacts on ability to operate the site at end of lease
- Clarification of the required condition of assets at the end of the current lease and short term interim lease.

4.16 The proposed key terms for a short-term lease with the current operator are outlined in the table below.

<table>
<thead>
<tr>
<th>Key Term</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Proposed Tenant</td>
<td>Australian Marinas (A/Asia) Proprietary Limited</td>
</tr>
<tr>
<td>Demised Premises</td>
<td>St Kilda Marina</td>
</tr>
<tr>
<td>Permitted Use</td>
<td>Marina</td>
</tr>
</tbody>
</table>
## Key Term Description

<table>
<thead>
<tr>
<th>Key Term</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commencement Date</td>
<td>1 May 2019</td>
</tr>
<tr>
<td></td>
<td>To immediately follow expiry of existing lease</td>
</tr>
<tr>
<td>Term</td>
<td>3 years</td>
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<tr>
<td></td>
<td>Agreed on the basis that this term supports both the tenant and sub-tenant</td>
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<tr>
<td></td>
<td>short term requirements from the site, and the requirements of the project</td>
</tr>
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<td></td>
<td>works being undertaken by Council for a new long-term lease arrangement.</td>
</tr>
<tr>
<td>Rental</td>
<td>$134,000 per annum plus 7% of gross receipts associated with car parking,</td>
</tr>
<tr>
<td></td>
<td>boat launching, rental of boat pens, parking of cars with trailers and dry</td>
</tr>
<tr>
<td></td>
<td>storage rentals.</td>
</tr>
<tr>
<td>Maintenance and Renewal</td>
<td>The agreement has been revised to reflect the application of the Retail</td>
</tr>
<tr>
<td></td>
<td>Leases Act where the landlord (Council) is responsible for the structure</td>
</tr>
<tr>
<td></td>
<td>of and fixtures, and the plant and equipment at the Marina.</td>
</tr>
<tr>
<td>Essential infrastructure and</td>
<td>As per current lease conditions, Tenant owns wet berth infrastructure and</td>
</tr>
<tr>
<td>ownership of assets</td>
<td>may remove it at the end of current lease. All other improvements (permanent</td>
</tr>
<tr>
<td></td>
<td>infrastructure) are to revert to landlord at end of lease.</td>
</tr>
<tr>
<td></td>
<td>The wet berths, security gates and fencing and dry store boat mounts will</td>
</tr>
<tr>
<td></td>
<td>be purchased by Council, or the new tenant (long term lease tenant), at the</td>
</tr>
<tr>
<td></td>
<td>end of the 3 year lease for the sum of $620,000, if Australian Marinas</td>
</tr>
<tr>
<td></td>
<td>exits the site, for the purposes of securing continuity of operations until</td>
</tr>
<tr>
<td></td>
<td>such time as the site is redeveloped.</td>
</tr>
<tr>
<td>Access to site</td>
<td>Access for site visits by those interested in tendering (effectively</td>
</tr>
<tr>
<td></td>
<td>coordinated with all parties)</td>
</tr>
<tr>
<td></td>
<td>Allowance for a smooth transition, if required</td>
</tr>
</tbody>
</table>

### Rationale for proposed key terms

4.17 The premise of the proposed short-term lease is essentially to keep existing marina and tenant operations going while a long-term lease is secured through a competitive process.

4.18 Whilst Council would have preferred a significantly increased rent more closely aligned with the current estimated market rental for the site (estimated at $800,000 per annum) and a shorter length of term, the proposed key terms are a negotiated, in principle agreed outcome with the current tenant, Australian Marinas, that is considered to minimise risk for all parties, secure continuity of operations in the interim and best support the long-term vision for the Marina.
4.19 An assessment of the replacement costs and timeline for replacing the wet berths (owned by the current tenant) identified that any benefits gained from an increase in rent through a different management arrangement, would be lost through the need to close down the marina for a significant period of time and replace the existing wet berth and associated infrastructure with new.

4.20 Another consideration was the level of disruption for current users of the marina and associated facilities associated with a change in management of the site in the short term with all of the business set up that would be required, with another possible change in management three years later.

4.21 No significant changes to the management arrangements for the site are proposed as part of the short-term lease. Significant changes are being considered for the site as part of the long-term future of the site. Officers believe such improvements are therefore best left to be resolved as part of that long-term lease process.

Public Notice as Required by Section 190 and 223 of the Local Government Act 1989

4.22 In order to comply with the requirements of the Local Government Act 1989, a public notification process must be undertaken in line with Section 190 and S223 to notify and hear any submissions from the public about the intention to lease the St Kilda Marina site on a short term (interim) basis to the current tenant.

4.23 Section 190 of the Local Government Act 1989 requires that Council must, at least 4 weeks before the lease is made, publish a public notice of the proposed lease.

4.24 A person has a right to make a submission under 223 on the proposed lease.

4.25 Section 223 of the Local Government Act 1989 requires Council to publish a public notice that:

- Details the matter.
- Provides a time by which submissions in response to the matter are to be submitted, being a date which is not less than 28 days after the date on which the public notice is published.
- States that a person making a submission is entitled to request in the submission that the person wishes to appear in person, or to be represented by a person specified in the submission, at a meeting to be heard in support of the submission.

4.26 Council resolved on 6 February 2019 that statutory procedures be commenced under Section 190 of the Local Government Act 1989 (Act) for the proposed interim lease with the existing tenant, Australian Marinas (A/Asia) Proprietary Limited for the St Kilda Marina.

4.27 Council also resolved to hear and consider any submissions received pursuant to Section 223 of the Local Government Act 2019 at a Council meeting to be held in March 2019.
Summary of Submissions Received

4.28 Seven submissions have been received. A summary of the key themes from these submissions is provided below.

4.29 The full submissions provided Attachment 2. One submission has commercially sensitive material that, on request of the submitter, has been redacted.

Length of term

4.30 A number of submissions provided feedback that the proposed length of 3 years for the short-term lease was too long, with suggested lease terms ranging from one to two years months.

4.31 Others suggested year by year options for the interim lease, or a lease with a term that exceeds one year should be subject to a competitive process.

4.32 A couple of submissions suggested the focus should be on expediting the process to deliver the long term lease to derive the benefits rather than delay it by the length of the interim lease.

Rental amount

4.33 Five of seven submissions highlighted the sub-market rent suggesting that this is disadvantaging the community and particularly rate payers.

4.34 Others proposed alternative means to increase the rent through:

- Suggesting a competitive process.
- Seeking approval for a direct negotiation with another party.
- Separating the marina component from the other tenancies to enable Council to have direct leases with the sub-tenant.
- Putting in an alternative proposal.

Competitive process vs direct negotiation

4.35 A number of submissions queried compliance with the legislative process. One suggested Council is being unlawful by not undertaking a competitive process while another requested evidence of ministerial approval for direct negotiation.

4.36 Other submissions requested a competitive process for the interim lease.

Immediate Improvements

4.37 One submission suggested that immediate improvements to the site revolving around public accessibility and removal of fencing, are made a requirement of the interim lease.
Condition of Infrastructure

4.38 Some submissions speculated that the state of the infrastructure, predominantly the wet berths, would be nearing the end of their useful life and could not be in the “good” condition as has been assessed.

Possible key terms

4.39 One submission included different key terms for a short term lease that could form the basis for a possible future bid. Following consultation with the submitter, commercially sensitive information has been redacted from the attached submission. However, the details will be made available to Councillors.

4.40 Other submissions suggested that other parties are willing to be considered for the interim lease.

Public Notification and Submissions Process

4.41 One submission queried the validity of the process given that certain documents (current lease, draft interim lease and market rent assessment report) were not made available during the process.

Provision of Information

4.42 A number of submissions requested the provision of information which is summarised as follows:

- The current lease (in full).
- The draft interim lease (in full).
- The market rental assessment report (the actual estimated market rent has been made available).
- Evidence of ministerial approval to undertake direct negotiation.
- The asset condition information as it pertains to the wet berths.

Inclusion of other lease terms

4.43 One submission suggested the inclusion of terms in the draft interim lease that facilitate increased access to the site, contact details of boat owners, water quality testing and boat storage occupancy levels.

Support for the Current Proposal

4.44 One submission was provided in support of the proposed interim lease. This submission, made by the current tenant, suggested that they are best placed to enable continuity of effective service, and is the least risky and more secure option for Council.
Requests to be heard at the Council Meeting

4.45 Five of the seven submitters requested to be heard at the Council meeting.

4.46 One submitter did not disclose the nature of their submission but requested the opportunity to make a short submission at the Council Meeting.

5. CONSULTATION AND STAKEHOLDERS

5.1 This report is to consider submissions received as part of the public notification process required by S.190 of the Local Government Act 1989.

5.2 This process enables consultation with key stakeholders and other interested parties to inform the development of a new long-term lease.

6. LEGAL AND RISK IMPLICATIONS

6.1 A short term interim lease arrangement with the current tenant based on the proposed key lease terms was determined through an extensive risk assessment process as presenting least risk to the continuity of the site while the project works proceed.

6.2 The interim lease documentation was developed by the legal representatives of both parties. The new lease takes the form of the original lease with a variation page attached to define the deviations from the original lease, plus covering pages providing definitions and an execution section page.

7. FINANCIAL Impact

7.1 The proposed rental income is $134,000 per annum plus 7% of gross receipts associated with car parking, boat launching, rental of boat pens, parking of cars with trailers and dry storage rentals.

7.2 This is a sub-market rent; however, increased from the previous rent to support the principle that neither party should be disadvantaged by the provisions in the interim lease.

7.3 Council has agreed in principle to purchase the wet berths, fencing and dry store boat mounts at the end of the interim lease should the current tenant be required to exit the site. This is to enable continuity of the site if and while it transitions to a new lease arrangement. Council may opt for the new long-term tenant to purchase the equipment as part of the long-term lease agreement.

7.4 The assets to be purchased have been assessed as being in good condition with significant useful life. An independent assessment of the value of the assets identified that the agreed sum provided best value for Council.

7.5 The estimated cost of legal fees for developing a new interim lease is $10,000 to $20,000.
8. ENVIRONMENTAL IMPACT

8.1 No impact or change from current arrangements

9. COMMUNITY IMPACT

9.1 It is expected that existing operations will be maintained on the Marina site for the length of the interim lease so the impact on the community is nil.

10. ALIGNMENT TO COUNCIL PLAN AND COUNCIL POLICY

10.1 This report contains information that aligns with Strategic Direction 4, “We are growing and keeping our character”. It supports the delivery of the specifically identified Council Plan key outcome, “a city of diverse and distinctive neighbourhoods and places”. The St Kilda Marina Lease is a specific priority in the Council Plan.

10.2 It also aligns with Strategic Directions 3 (We have smart solutions for a sustainable future) and 6 (Our commitment to you) by supporting delivery of the following outcomes:

- A financially sustainable, high-performing and well-governed organisation that puts the community first.
- A city that is adapting and resilient to client change
- A water sensitive city

10.3 St Kilda Marina is a key strategic site within Council's property portfolio and presents a significant opportunity in terms of social, environmental, economic and cultural possibilities for the St Kilda foreshore, the municipality and the State.

11. IMPLEMENTATION STRATEGY

11.1 TIMELINE

- Early April 2019 – Council to make a decision regarding the short-term lease, taking into consideration the submissions received.
- Mid April 2019 – formal briefing to Minister of the final lease arrangements to instigate Governor in Council process, as required by the St Kilda Land Act.
- Mid to late April 2019 – Governor in Council process to approve interim lease arrangement.
- May 2019 – Execute lease.

11.2 COMMUNICATION

- The tenant will be advised of Council’s position immediately following the Council Meeting.
- Should a sub-tenant contact Council Officers for information about the status, the sub-tenant will be advised of Council’s position following the Council Meeting, with a suggestion to contact the head tenant for further information about the lease.
• Updates are being provided as necessary to a database of interested residents, marina users, community, State Government and other key stakeholders.

12. OFFICER DIRECT OR INDIRECT INTEREST

12.1 No officers involved in the preparation of this report have any direct or indirect interest in the matter.

TRIM FILE NO: 20/15/63
ATTACHMENTS
Attachment 1: Project Approach
Attachment 2: Submissions