



Submission on the Proposed Interim Lease of the St Kilda Marina

March 2019

The St Kilda Marina should be a jewel in the Crown of Port Phillip. However the process is raising significant concerns.

The existing 50-year lease between COPP and Australian Marinas (A'Asia) Pty Ltd expires on 30 April 2019. It is a concern that officers believe that a 3-year extension to the current lease, on very generous terms, is required.

unChain Inc submits that:

1. The proposed lease is unlawful,
2. The proposed lease is unacceptable,
3. There are other parties are willing and able to take up an interim lease and therefore
4. Council should not approve the proposed lease and instead either:
 - Offer a one year interim lease to the existing operator or
 - Establish a competitive selection for a longer interim lease

1. The proposed lease is unlawful

The proposed interim lease does not comply with the requirements under the *St Kilda Land Act* and the *Crown Land Reserves Act*. These require a competitive selection process, not direct negotiation with the current operator except in special circumstances that have not been met.

The *St Kilda Land Act* (1965) (SKLA) provides that the Council is the committee of management for the marina land and provides for leases of up to 50 years. Section 6 of the SKLA provides that 'a lease shall not be entered into except with the approval of the Governor in Council given upon the recommendation of the Minister'. unChain understands that protocol requires prior Governor in Council approval for Council to enter into direct negotiations for leasing the marina. unChain understands that no such approval has been granted.

The *Crown Land Reserves Act 1978* (CLRA) provides for leasing of Crown Land for up to 21 years. Policies under that Act provide the detailed requirements to be followed in granting leases.

Is the marina subject to the CLRA? This has been Council's stated position. Council has placed a document on its website 'St Kilda Marina – Summary of Relevant Legislation'. This specifically states that 'The Site (the marina) is deemed to be reserved for public recreation under S4(1)' (of the CLRA).

However Council officers appear to have changed their position. They now maintain that Council is not bound by the CLRA for the St Kilda marina. unChain believes that this is wrong.

Section 4 (4) of the CLRA 1978 states that

*Every temporary or permanent reservation made or purported to have been made under the **Land Act 1958** or any previous corresponding enactment shall be deemed to have been made under subsection (1).*

This applies to the St Kilda marina lands. These were permanently reserved by Order in Council of 28th June 1880 and temporarily reserved under Orders in Council of 5th May, 1964 and 6th July 1965, as sites for public recreation. (Schedule 2 to the SKLA 1965). The Preamble to the SKLA states that 'pursuant to the **Land Act 1958** the council of the City of St. Kilda was on the 15th day of May, 1964, and the 7th day of July, 1965, appointed a committee of management of the lands'.

Therefore the CLRA applies to the St Kilda marina.

Therefore the Council must comply with the State's policies for leases under the CLRA. These came into effect on 13 October 2010 and were updated in May 2018.

Both envisage a competitive selection process for leases of Crown Land.

The State Government's *Leasing Policy for Crown Land* (2010) stated that a competitive selection process will apply to the leasing of Crown Land, unless there are special circumstances where direct negotiation is permitted (subject to Ministerial approval). unChain understands that no such Ministerial approval has been granted.

The *Leasing Policy for Victorian Crown Land* (2018) has a similar, but more detailed, policy. There is a two-stage process. In brief the requirements are:

- *Proposals to lease must be submitted to DELWP for Approval in Principle (AIP) by the Minister. The AIP process requires the Crown land manager or proponent to prepare a detailed submission for assessment by the Minister (5.1.1).*
- *A proposal to grant a new lease to an incumbent tenant may be considered by the Minister subject to the same considerations as a new lease (5.2.2).*
- *Regardless of the lease term, the final decision to allocate a lease through a direct negotiation process instead of a competitive allocation process rests with the Minister at the time of the AIP consideration (5.2.3).*

unChain understands Council has not complied with these obligations.

The *Crown Land Leasing Guidelines* were developed to accompany the CLRA and the Policies. The Guidelines lay down a wide range of factors that may be relevant in making an assessment of any lease proposal. These include:

- Is there a demonstrable public and economic benefit?
- Does the proposal have community support and how has that support been gauged?
- What type(s) of community consultation has been undertaken?
- Is the proposal consistent with other government policy objectives or legislation?

The *Guidelines* state that: 'The legislative requirements must be addressed to ensure the lease is valid and, if these are not fulfilled, the lease may be void, unenforceable or have unintended consequences'.

The potential need for a short-term lease was contemplated at Council Meeting in September 2016. Therefore there was ample time to arrange an appropriate competitive process for the short-term lease.

Even if the CLRA does not apply to the St Kilda marina, the spirit of the State Government Policy should have led the Council to investigate other possible proposals for an interim lease commencing 1 May 2019.

Furthermore Council's decision to directly negotiate with the existing operator violates Council's general obligations regarding competitive tendering. An internal audit has recently revealed that Council is failing to satisfy these obligations. The proposed interim lease is an egregious example of this failure.

It would be bizarre if there were a less rigorous process for a 50 year lease of Crown land than for a 21 year lease. unChain submits that Council must comply with the requirements of both the SKLA and the CLRA. The SKLA does not substitute its approval process for the process under the CLRA. Approval by the Governor in Council under the SKLA is an additional requirement, necessitated because there are significantly longer Crown leases under that Act.

unChain believes that the Council process is unlawful because the requirements under the CLRA have not been satisfied. If Council has received legal advice that this position is incorrect, it should make that advice public.

unChain, therefore, gives notice that, if Council approves the interim lease, it will vigorously pursue this issue with Council's Audit Committee, the Minister and the Ombudsman

2 The proposed lease is unacceptable.

It appears that the Council has been comprehensively out-negotiated by the existing operator, Australian Marinas, an experienced commercial entity. In 2016 Council approved in principle the development of a short term lease, if required, with the rent to be based on market value. (COPP 2016 1.5). The proposed interim lease does not comply with Council's directives:

2.1 It is not at market value

2.2 Three years is not a short term lease

2.3 There are other deficiencies in the proposed lease

Therefore the Council and/or the State Government should reject the proposed interim lease.

2.1 The interim lease proposes too low a rent

Officers are proposing that Council grant a subsidy of \$1,650,000 to the marina operator. The proposed rent is massively below market value.

When the existing lease was negotiated in 1969, the rental amount took into account Australian Marinas' intended capital investment. There is no such consideration now, so the starting point for a new interim lease should be market rent.

The existing 50-year lease required only a token rent (\$1,000) in the first six years during the marina construction phase, and \$10,000 (plus CPI) for every year following (COPP 2016 2.4). This now amounts to approximately \$170,000 plus per annum.

The proposed rental for the new interim lease is \$134,000 per annum plus 7% of gross receipts associated with car parking, etc. (COPP 2019 3.1) This may total about \$250,000 p.a. This does not include a share of the substantial rent paid to the marina operator by the petrol station, the three food outlets, the Skydiving office, the boat sales office and the boat maintenance area.

In 2016 officers estimated that the market rental was 'in excess of \$500,000'. A more recent officers' email said that the 'market rent is estimated as \$800K based on current conditions'.

Thus officers are proposing a subsidy of approximately \$1,650,000 to the marina operator over the course of the interim lease (\$2,400,000 market rent less \$750,000 proposed rent).

Is there another competent party that would be prepared to pay a significantly higher rent than that proposed in the interim lease?

2.2 The interim lease proposes too long a period (3 years)

In 2016 Council approved in principle the development of a short term lease, if required. Three years is too long. This is not a short term lease. It is, for example, longer than the average duration of the Australian Federal Parliament (32 months).

unChain has received expert independent advice that three years is manifestly excessive. We understand that the documentation for a long-term lease should be able to be completed in six months.

unChain is confident that a short interim lease (e.g. six months) would have been acceptable.

The Council should have begun documentation for the design, documentation and the management for the new lease years prior to the expiry of the existing lease. Council has failed to act in a timely manner to deliver the new lease.

We know from the officers' report in 2016 that Council had 'received interest in the site from other parties' more than three years ago. Presumably these had organised consortia with a mix of expertise and arranged finance. They would have had a reasonable expectation that, if successful in a tender competition, they would be able to begin immediately on expiry of the 50 year lease on 1 May 2019. Now they are being told that Council will countenance a three-year delay.

Council should be trying to complete the process for a long term lease as expeditiously as possible.

Is there an alternative that provides for a shorter term? Ideally this would be on a no more than a one-year basis.

2.3 Other problems with the proposed interim lease

The current marina does not comply with Code (Australian Standard 3962 – 2001 Guidelines for design of marinas). Council should not approve a 3-year lease for a non-complying marina if there is an alternative that more closely conforms to Code.

Also, it is extraordinary that the Council is proposing to buy for \$620,000 (via a put option) the existing marina infrastructure at the end of the 3-year interim lease. The infrastructure is at the end of its lifecycle. Council has not released the expert's report on which this was based.

At the very least Council should be exploring whether the existing infrastructure can be improved in the interim term, either by the current operator or a new one.

Furthermore unChain understands that the current operator has notified the existing boat owners and retail tenants of significant rent increases. In the case of boat owners unChain understands this is an 18% increase. It is possible that a competing proposal for an interim lease will not involve a significant increase in the rent of the current retail tenants and the boat owners.

In addition, the current marina also does not satisfy the need of the general public. This is a legitimate consideration as the *St. Kilda Land Act 1965* includes this in the definition of a marina: 'an area where facilities are provided for ... the recreation, comfort and convenience of ... members of the public'. The current marina does not welcome the public. Immediate improvements could include removing fences, landscaping along Beaconsfield parade and opening the sea front to provide public access to the beacon.

Council could also use an interim lease to require co-operation that has previously been refused by the current operator. This will enable a level playing field for other parties tendering for the long-term lease. This includes:

(a) Access to the marina to conduct water and seabed quality testing. The marina has been a pollution disaster as the 'whirlpool' design has never worked as intended to flush out pollutants. Testing will allow for accurate clean-up costings to be available to all tenderers.

(b) Disclosure of occupancy rates for the wet berths and dry berths. This is an indication of the existing and future demand for berths at St Kilda which would be useful information for all tenderers.

(c) Contact details of the existing boat owners. This will allow Council to survey interested stakeholders to encourage them to participate in the process with their particular expertise and experiences.

(d) The interim lease should allow others to access the site for the purpose of carrying out site investigations and survey necessary for the design and construction of the future works. Access should also be guaranteed for assessment of safety and compliance issues. Furthermore where early works are to be carried out on the site by others access will be required and subject to negotiation between the COPP and the Lessee.

Conclusion:

For the above reasons the proposed interim lease is unacceptable.

3. There are other parties willing and able to take up an interim lease.

The existing marina is unsatisfactory. To lock it up for three more years should only be done if there is no alternative.

unChain understands that there is at least one other party willing and able to take up an interim lease. This is the Australian Marina Development Corporation. However, unChain does not know any details of their proposal. There may be other competent parties also willing and able to take up an interim lease.

A condition for any rival bid for an interim lease would be guaranteeing continuity for the existing users and not prejudicing the long-term lease process.

Officers stated in an email that ‘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’. However unChain understands that it is quite possible for a seamless transition to a new operator on an interim basis. All that is required is an agreed program of works. The Council officers’ approach is based on an incorrect assumption.

4. Council should not approve the proposed interim lease

unChain believes that the Council officers have been comprehensively out-negotiated by the existing operator. The Spooner family built the St Kilda marina in 1969 and it still holds the 50-year lease through its company, Australian Marinas (A’Asia) Pty Ltd. The Spooner family is an interesting example of successful Australian entrepreneurs. In 2015, the family ranked 19th on Business Review Weekly’s list of rich Australian families, with a reported wealth of \$626 million.

It is not in the Council officers’ skill set to match the negotiating prowess of experienced commercial operators like the Spooner family.

It is the responsibility of the elected Councillors to satisfy themselves that they are fully informed and that the best possible process is taking place for the St Kilda marina.

There are other parties are willing and able to take up an interim lease. Therefore Council should not approve the proposed interim lease that has been directly negotiated with the existing operator. Instead Council should establish a competitive selection process with the existing operator (the Spooner family company), the Australian Marina Development Corporation and any other competent operators able to apply.

Alternatively, if Council is reluctant to go into a competitive process at the present time, it could instruct its officers to:

- Offer the existing operator a one year interim lease, with a competitive selection for a longer interim lease if the operator rejects this offer and
- Accelerate the processing of the long term lease so this can be finalised within a year

A variation on this would be to offer a three year interim lease to the current operator but with Council having the right to terminate it after 12 or 24 months. This would enable an accelerated long term lease process but provide some certainty if officers are unable to complete the process within 12 months.

Council should note that a one-year interim lease may now be acceptable to the current operator. In the past it may have believed it had Council ‘over a barrel’. It will realise that Council now has a realistic alternative for an interim lease and it will be reluctant to allow a rival to ‘get its foot in the door’. The current operator

will also be anxious to maintain Council's goodwill for the long-term lease competition. It has a proposal for redevelopment with additional berths, hotel, office space, car parking and greater public access, including to the existing lighthouse. Indeed it may eventuate that is approved as the best proposal for the long term lease.

It is in everybody's interest to get a wonderful new St Kilda marina as soon as practicable.

Summary

unChain Inc submits that:

1. The proposed interim lease is unlawful,
2. The proposed interim lease is unacceptable,
3. There are other parties are willing and able to take up an interim lease and therefore
4. Council should not approve the proposed lease and instead either:
 - Offer a one year interim lease to the existing operator or
 - Establish a competitive selection process for a longer-term interim lease

Peter Holland
Secretary unChain Inc



12 March 2019

Attn: Michelle Rysanek
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BY EMAIL

CC: Mr Dick Gross, Mayor
Mr Peter Smith, Chief Executive Officer
Mr Chris Carroll, General Manager, Customer and Corporate Services
Ms Joanne McNeill, Manager Asset Management & Property

Dear Councillors and Officers,

Submission in relation to proposed St Kilda Marina Interim Lease

Australian Marina Development Corporation Pty Ltd (“AMD Corp”) hereby makes the following formal submission to Port Phillip City Council (“Council”) in response to the public notice published on 12 February 2019 (“Notice”), with regards to Council’s intention to enter into a new, short-term lease for St Kilda Marina with the existing leaseholder, Australian Marinas (A/Asia) Proprietary Limited (“Current Lessee”).

We thank Council for considering these submissions and invite further discussion at its convenience.

AMD Corp has extensive commercial experience in the development and management of internationally recognised marinas. AMD Corp hopes it will be able to assist Council, where appropriate, through the process of negotiating an interim and long-term lease for the St Kilda Marina that is in the best interests of Council, the Port Phillip Community and users and visitors of the St Kilda Marina.

With this in mind, AMD Corp makes the following submissions on the Notice.

Executive Summary

Recommendation

AMD Corp recommends:

- that in the first instance, Council rejects the current proposal put forward by the Current Lessee because it is uncommercial;
- that Council either:

- runs a competitive process for the short-term lease (which we realise may now be impractical given the impending long-term lease expiry); or in the alternative,
- seeks the requisite approvals from the Minister and/or Governor in Council to enter into a direct negotiation process with the Current Lessee (or another party);
- if Council succeeds in obtaining approval to enter into direct negotiation with the Current Lessee (or any other party), that Council renegotiate the terms of the current short-term lease proposal, such that:
 - it is on a yearly basis (1+1+1) allowing flexibility for Council in the short-term;
 - at market rent, eg. \$ [REDACTED] plus 7% of gross receipts from operations; and,
 - contains various performance undertakings from the lessee to allow a smooth, unimpeded competitive long-term leasing process and smooth transition to the successful bidder at the termination of the interim leasing arrangement.

Following negotiation and settlement of the short-term lease, Council can then proceed with the competitive process and award the contract with a start date that is earlier than 2022 (given the short-term lease is on a year to year basis).

Concerns with the current proposal

AMD Corp is concerned by the proposed leasing terms under which the St Kilda Marina will be leased to the Current Lessee for a further 3 year period. From its extensive international and domestic experience in the area, AMD Corp is concerned that:

1. Proper process has not been followed:
 - a. a competitive leasing process has not been undertaken; and,
 - b. requisite Ministerial approval may not have been obtained to enter into direct negotiations.
2. The proposed terms are not on a reasonable commercial basis:
 - a. The general terms do not meet the requirements of the *Crown Land (Reserves) Act 1975* or the *Leasing Policy and Guidelines for Victorian Crown Land*;
 - b. Market rental has not been achieved; and,
 - c. Key infrastructure is beyond its useful life and overvalued.
3. The proposed terms delay the outcome of the competitive long-term leasing process
4. Everyone loses – except the Current Lessee
5. Viable alternatives are still available to Council

Request to be heard

In accordance with the Notice, AMD Corp hereby requests to be heard in support of its submission before Council (or its committee established by Council for this purpose), or be represented by a person acting on its behalf.

Background

The expiry of the 50 year “head lease” at St Kilda Marina on 1 May 2019 represents a unique opportunity for Council to appoint a new lessee that will develop and revitalise the site for the benefit of all boat owners, site tenants, the community, ratepayers and Council itself.

For the first time in 50 years, the St Kilda Marina and surrounds finally has the opportunity to realise its full potential in becoming a thriving hub of activity in one of Victoria's most popular Bayside areas, taking advantage of the site's key waterfront positioning on Melbourne's most popular beachfront.

The key to a successful outcome for the site will be attracting a highly-experienced, world-class marina developer and operator, who will replace and redevelop key marina infrastructure assets which are beyond their useful life (50 years old); and similarly, attract high-quality sub-tenants, providing enhanced food and beverage offerings; ancillary marina services and greater community access, facilities and activities.

For the last three years, AMD Corp has set about developing an inspiring and compelling vision for St Kilda Marina, bringing together the best possible consortium of highly-credentialed developers, operators, architects, urban planners and sub-tenants, in anticipation of the master lease competitive tender process that was expected to occur in the twelve months prior to 1 May 2019.

Below, we set out a timeline of the process to date as disclosed in publicly available documents published by the Council and our direct contact with Council or its authorised representatives.

13 September 2016

At an Ordinary Meeting of Council on 13 September 2016, Council Officers sought approval from Council to run a competitive process to award a new lease for the St Kilda Marina following expiry of the current long-term lease on 1 May 2019.

In the report provided to Council at this same meeting, Council Officers referred to the *State Government's Leasing Policy for Crown Land (2010)* (Clause 3.3 of Item 8.11), stating that a competitive selection process will apply to leasing Crown Land, unless there are special circumstances where direct negotiation is permitted (subject to Ministerial approval).

The report to Council specifically stated (clause 3.4) that direct negotiation is not recommended in this case, because:

- Council considered it financially prudent to test the market to ensure the best return is gained for public land which is managed for a commercial profit;
- Officers had already been approached by stakeholders who had expressed interest in participating in a process to secure the long-term lease of the site; and,
- There is likely to be a high degree of community interest in the future use of the site.

At this meeting, Council also approved in principle the development of a short-term lease, if required, to provide certainty to current operators at the site whilst a new lease is secured, with the rent for the short-term lease to be based on market value.

Council estimated that rental income in excess of \$500,000 per annum could be achieved with no further development of the site based on current tenancies.

7 February 2018

At an Ordinary Meeting of Council on 7 February 2018, Council was presented with a new lease project approach, associated timeline and probity plan for approval.

The Council report tabled at this meeting noted that:

- An interim or short-term lease would be required to cover the period between the expiry of the existing lease and implementation of the new lease arrangement (clause 2.8);
- It is estimated that Council could potentially receive in excess of \$500,000 per annum in rent under a new lease agreement after the expiry of the current agreement in 2019. This was based on no changes to the current Marina site and maintaining existing operations and sub-leases (clause 4.6);
- Council Officers were currently reviewing options and conditions for an interim lease solution to cover the period between lease expiry (30 April 2019) and the implementation of the new lease arrangement (expected sometime from May 2020) (clause 4.26); and,
- Under the Implementation Strategy Timeline, it was expected that the approach to and conditions of the short-term lease would be agreed by June 2018 (clause 11.1.5).

18 April 2018

At an Ordinary Meeting of Council held on 18 April 2018, Council was presented with the draft Community and Stakeholder Engagement Plan for approval, and sought further approval to begin the first phase of engagement for the Project by releasing the Draft Site Vision and Objectives and Draft Opportunities and Constraints Paper for consultation.

No update was provided with regards to the short-term or interim leasing process.

12 October 2018

On 12 October 2018, Maurice Cococcia from M21 Advisory Pty Ltd (“M21”) contacted AMD Corp on behalf of Council, enquiring as to whether AMD Corp would be interested in taking on the interim management of St Kilda Marina until the long-term competitive leasing process was complete.

AMD Corp expressed interest, submitted a preliminary credentials document, and made attempts over the following weeks to set a meeting with Council Officers to discuss Council’s requirements so that AMD Corp could submit a detailed proposal.

14 December 2018

On Friday 14 December 2018, Mr Cococcia from M21 called AMD Corp to advise that Council had come to an agreement with Australian Marinas for the interim lease period.

6 February 2019

At an Ordinary Meeting of Council on 6 February 2019, Council was asked to approve the publishing of the Notice under Section 190 of the *Local Government Act*, in relation to Council’s intention to provide an interim three-year lease to the current lease holder of St Kilda Marina.

The Council report tabled at this meeting stated, amongst other things, that:

- An assessment of a number of options for a short-term interim arrangement had been undertaken by Council officers and their advisors. The assessment determined that the most suitable approach from a time, cost, operational and risk perspective was to pursue a new short-term lease with the Current Lessee (clause 2.3);

- Following the assessment of possibilities for the short-term lease arrangement, it was determined that market value was not an opportunity that could reasonably be pursued given the short-term nature of the extension and the importance of the focus being on the procurement of a long-term lease rather than a protracted short-term lease negotiation (clause 2.5);
- Proposed a rental term of 3 years, and a rental amount of \$134,000 per annum plus 7% of gross receipts associated with car parking, boat launching, rental or boat pens, parking of cars with trailers and dry storage rentals (clause 3.1);
- At a confidential Council Report on 21 November 2018 (which has not been made available to the public), Council approved the proposed approach with all the key terms as listed with the exception of a confirmed rental amount still to be agreed with the tenant (clause 4.7);
- Council had agreed to purchase the wet berths, fencing and dry store boat mounts at the end of the interim lease from the current tenant for a purchase price of \$620,000, should the current tenant be required to exit the site (clause 7.3 and Q&A); and
- The assets to be purchased had been assessed as being in good condition with significant useful life (15 years beyond the proposed 3 year lease term) and that an independent assessment of the value of the assets identified that the agreed sum provided best value for Council (clause 7.4 and Q&A).

Submissions

For the reasons set out below, AMD Corp strongly recommends that Council first reject, and then renegotiate the current interim lease proposal.

1. Proper Process has not been followed

1.1. A competitive leasing process has not been undertaken

Given St Kilda Marina is Crown land, and Port Philip City Council is the appointed Committee of Management, any leasing arrangement of St Kilda Marina falls under the *Crown Land (Reserves) Act 1978* (the "CLRA") and related *Leasing Policy for Victorian Crown Land* (updated May 2018) ("the State Leasing Policy"), issued by the Victorian Government, Department for Environment, Land, Water and Planning ("DELWP").

AMD Corp draws Council's attention to the following relevant paragraphs within the State Leasing Policy (emphasis added):

5. Principle 2 – Consistency and transparency in leasing

To ensure consistency and transparency in leasing processes, and to adhere to legislative requirements, a two-stage process applies to the granting of leases:

- *First, all lease proposals require the Approval in Principle (AIP) of the Minister to lease before a land manager agrees or commits to lease Crown land.*
- *Second, all leases require the Minister's approval of the terms and conditions of the lease which must align with the permitted purpose and conform to government policy and statutory requirements.*

Generally, a competitive selection process will apply to the leasing of Crown land, although in special circumstances direct negotiations will be permitted. Lease allocation processes must be fair, open and impartial.

AMD Corp submits:

- An open and transparent competitive selection process has not occurred in awarding the short-term lease of St Kilda Marina; and
- The process undertaken by Council has not been fair, open or impartial.

1.2 Requisite Ministerial Approval may not have been obtained to enter into direct negotiations

AMD Corp draws Council's attention to the following clause of the State Leasing Policy (emphasis added):

5.2.3 Ministerial approval

Regardless of the lease term, the final decision to allocate a lease through a direct negotiation process instead of a competitive allocation process rests with the Minister at the time of the AIP consideration.

AMD Corp submits:

- A final decision to allocate the short-term lease of St Kilda Marina through a direct negotiation process may not have been provided by the Minister at the time of the AIP consideration, if in fact AIP was sought.

2. The proposed terms are not on a reasonable commercial basis

2.1 The general terms do not meet the requirements of the *Crown Land (Reserves) Act 1978* or the *Leasing Policy and Guidelines for Victorian Crown Land*

Council's revised position is that pursuant to the *St Kilda Land Act 1965* (the "St Kilda Act"), Council does not need to seek permission from the Minister to enter into a direct negotiation, but will need to seek Governor in Council Approval for the ultimate lease.

Whilst the St Kilda Act does not require approval from the Minister to proceed with direct negotiation, the CLRA and State Leasing Policy set out a procedure that do.

We respectfully submit that the St Kilda Act's silence on this requirement does not supersede or replace Council's obligations under the CLRA or the State Leasing Policy, as all can be applied appropriately at once.

Accordingly, we believe that Council is still required to obtain Ministerial approval to enter into direct negotiations with the Current Lessee, in lieu of a competitive process.

AMD Corp submits the following:

- Council has obligations with respect to leasing Crown reserved land under the St Kilda Act, the CLRA, and the State Leasing Policy and Guidelines;

- Given these obligations are not inconsistent with each other, all obligations are required to be observed and the Council cannot favour one piece of legislation over another;
- Council has identified that a competitive process is appropriate for the long-term lease of the St Kilda Marina yet has not applied the same principles to the shorter three-year lease of the Marina, despite identifying the potential need for a short-term lease in September 2016;
- Council's failure to consider alternative viable options to the current proposal for the short-term lease with the Current Lessee, is not in line with the State Leasing Policy or the relevant legislation;
- Council's statements to the public with respect to the process for awarding the short-term lease have led at least some stakeholders to believe a competitive process was going to be implemented for the short-term lease; and
- Given the immediate need for a short-term lease, AMD Corp proposes to Council that any short-term lease it enters into, be terminable on a yearly basis (rather than committing the Council to a three-year lease). This will be the most practical solution to the current situation and will be in the best interests of Council moving forward.

2.2. Market rental has not been achieved

On both the 13 September 2016 and 7 February 2018, Council estimated that the market rental reasonably expected to be achieved from St Kilda Marina would be in the order of \$500,000 per annum without any changes to the marina or its operations, based on current sub-tenancies.

The proposed rental amount of \$134,000 per annum plus 7% of gross receipts from other services under the proposed interim lease arrangement is substantially short of the anticipated market rental able to be achieved.

AMD Corp draws Council's attention to the following Clause in the State Leasing Policy:

5.3.4. Rent and rent valuations

Commercial and private uses

All commercial leases will be subject to a market valuation by the Valuer General Victoria or a registered valuer.

...The requirement for market rental valuation extends to tenants who, under the terms of their lease, undertake a mixture of community and commercial uses.

The St Kilda Marina lease is a commercial lease arrangement, and therefore market value rental should be achieved.

AMD Corp submits:

- In this instance, market rental has not been achieved to the detriment of Council, ratepayers and the broader community.

2.3 Key infrastructure is beyond its useful life and overvalued

In Council Officers' report and recommendation to Council on 6 February 2019 (*Agenda Item 12.2 – St Kilda Marina Interim Lease*), Clause 7.4 stated (emphasis added):

*“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**.”*

In the Council Meeting of 6 February 2019, the following additional information was provided during Question Time in relation to this Agenda Item:

- The “useful life” was assessed as being fifteen (15) years beyond the three (3) year proposed interim lease period; and,
- The “agreed sum” (or negotiated purchase price) of the marina infrastructure was \$620,000, either payable by Council upon the Current Lessee exiting the site or passed on to a new tenant as part of the future long-term lease.

Given the existing infrastructure referred to is almost fifty years old, AMD Corp has requested a copy of the independent assessment referred to in Clause 7.4, so as to validate the credentials of the independent assessor, and the basis upon which the condition, useful life and value of the existing marina assets were determined.

Unfortunately, at the date of this submission, that information has not yet been provided.

AMD Corp submits that, in its expert opinion, the current marina infrastructure is:

- beyond its useful life;
- does not meet applicable marina safety codes (for example, the Marina Code (AS3962) requires a minimum fairway of 1.5 times the berth length for safe and acceptable navigation into and out of berths. Given the bigger boats that are now using the berths at St Kilda Marina, the Marina does not appear to be in compliance with the Marina Code (AS3962); and
- is overvalued at \$620,000.

We further draw Council's attention to the following Clause under the State Leasing Guidelines (emphasis added):

5.3.5 Ownership and maintenance of existing and new improvements

Unless the tenant is required under the lease to remove the improvements or structures at or before the end of the lease, all improvements and structures on the leased premises become the property of the Crown at the end of the lease term. Generally, it is policy that all structures and improvements are to be maintained by the tenant at the tenant's cost during the lease term.

We understand that this is not the case under the current lease arrangement with the Current Lessee. However, Council should consider whether this *should* be the case under any new proposed interim lease.

AMD Corp submits:

- any obligation to purchase the potentially worthless infrastructure should be avoided if possible, ie. not be passed on to Council ratepayers or any future tenant;
- the Current Lessee should be responsible for the safe and timely removal of the infrastructure; and,
- the Current Lessee should be obliged under the new interim lease arrangement to work closely with the new long-term lease tenant to achieve the above outcome in an orderly way, whilst minimising disruption to marina tenants.

3. The proposed terms delay the outcome of the competitive long-term leasing process

Council had indicated on 13 September 2016, prior to the Council elections, that it may require an interim leasing arrangement for the site in 13 September 2016.

Although Council has had 50 years to prepare for the expiry of the current lease at St Kilda Marina, changes to Council following the Council elections in late 2016 may be responsible for certain delays in relation to the competitive long-term leasing process.

However, as at 7 February 2018, Council Officers were currently reviewing options and conditions for an interim lease solution to cover the period between lease expiry (30 April 2019) and the implementation of the new lease arrangement (expected sometime from May 2020).

Under the Implementation Strategy Timeline, it was expected that the approach to and conditions of the short term lease would be agreed by June 2018.

AMD Corp submits:

- The St Kilda Marina precinct has been in a state of slow decay and deterioration for many years, to the detriment of Council, the community, the environment, marina berthing tenants and sub-tenants;
- Therefore, the long-term leasing process should not be delayed any longer than is absolutely necessary; and,
- Any short-term lease Council enters into should be terminable on a yearly basis, rather than committing Council to a three-year lease.

4. Everyone loses – except the Current Lessee

Under the current proposed interim leasing arrangement, the Current Lessee will enjoy paying a peppercorn rent to Council, while all other stakeholders suffer for a further three years.

AMD Corp submits that the following stakeholders will be disadvantaged under the proposed interim lease arrangement:

- Council loses rental income and flexibility in the timing of awarding the long-term lease;
- Ratepayers are forced to subsidise the Current Lessee's commercial operations for a further three years;

- The broader community is denied the revitalisation of, and greater access to, a key asset for a further three years;
- Current marina tenants have already been subjected to an 18% berth rental increase in July 2018, and the Current Lessee may further increase the rental rates during the interim leasing period to maximise its short-term returns for its own benefit, while providing sub-standard marina operations and servicing standards that fail to meet applicable code, such as the berth requirements in the Marina Code (AS3962) (as discussed above);
- Current sub-tenants in the marina area may also lose, because whilst the Current Lessee has been offered below market rental, AMD Corp is not aware of any restriction on the Current Lessee increasing rental rates for sub-tenants during the interim leasing period;
- Tender proponents for the long-term leasing process lose now that potential bidders will be subjected to a three-year delay in the awarding of the long-term lease, which further increases the costs of preparing, submitting a winning bid, and negotiating the final terms of the long-term leasing arrangement; and,
- St Kilda loses, Melbourne loses, and Victoria loses, because the local and broader community miss out on the timely redevelopment and revitalisation of a key community asset.

AMD Corp submits that:

- The only winner under the current proposed leasing arrangement is the Current Lessee, who will pay a peppercorn rent while they make little or no investment in infrastructure and potentially extract as much money as possible from current boat owners and sub-tenants during the interim lease period.
- We are concerned that the proposed short-term lease at below market rental has been negotiated without Council appreciating that there may be viable alternatives to the proposed short-term lease to the Current Lessee.

5. Viable alternatives may still be available to Council

AMD Corp is confident it could deliver much better economic, financial, environmental and social benefits to both Council and the local community during an interim lease period.

AMD Corp is confident it would be able to submit an alternative interim lease proposal to Council that may:

- address the majority of Council's concerns around risk;
- guarantee continuity of operations;
- improve marina operational management and service delivery;
- remove infrastructure risk (or potentially install new marina infrastructure);
- provide increased rental income;
- be on a shorter-term basis to allow more expedient execution of the long-term lease tender process;
- better service existing marina tenants and sub-tenants;

- address pre-existing safety issues;
- address pre-existing environmental issues;
- allow improved community access; and,
- provide Council with regular quarterly updates against KPIs.

[REDACTED], AMD Corp hereby provides Council with indicative alternative commercial terms that it might be willing to consider with regards to an interim lease arrangement:

Key Term	Description
Proposed Tenant	Australian Marina Development Corporation Pty Ltd (“AMD Corp”)
Demised Premises	St Kilda Marina
Permitted Use	Marina
Commencement Date	1 May 2019 To immediately follow expiry of existing lease
Term	1 year initial term , with the option to renew on an annual basis at the end of each year for up to three years (1+1+1) Proposed on the basis that this allows Council maximum flexibility in the awarding the long-term lease of the site, for the benefit of all stakeholders
Rental	\$ [REDACTED] 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. This base rental is [REDACTED] the current proposed base rental negotiated with the Current Lessee [REDACTED]. AMD Corp believe this is more akin to market value for a short-term only lease, with the marina in its current condition and to be maintained on that basis.
Maintenance and Renewal	As per the Retail Leases Act, the landlord (Council) will be responsible for the structure of and fixtures, and the plant and equipment at the marina.
Essential infrastructure and ownership of assets	AMD Corp believes the existing infrastructure is worthless, given it is 50 years old; well past its useful life; and currently doesn’t meet quality standards for Australian marinas. However, AMD Corp would nonetheless willing to purchase the existing infrastructure from the Current Lessee up front, including the wet berths, dry store boat mounts, security gates and fencing, for the agreed price of \$620,000 for the purposes of securing continuity of operations until such time as the long-term lease is awarded, or the site is redeveloped. The \$620,000 purchase price can either be paid by Council or passed on to a new tenant as part of the new lease at the end of the short-term lease arrangement, so Council is no worse off than its current position.

Access to site	AMD Corp would ensure unfettered access to the site by arrangement with those proponents interested in tendering for the long-term lease, and would work with Council to ensure a smooth transition if required.
Additional Commitments	<p>During the interim lease period, AMD Corp would:</p> <ul style="list-style-type: none"> • guarantee continuity of operations; • improve marina operational management and service delivery; • provide assurances to maintain current wet berth, dry stack and trailer rentals at current rates for marina tenants; • provide assurances to maintain sub-tenant rentals at current rates; • better service existing marina tenants and sub-tenants; • implement basic safety procedures and equipment to address existing safety issues; • implement an environmental clean-up program to address existing environmental and waste issues on site; • allow improved public and community access to the site during daylight hours; and, • provide Council with regular quarterly updates against agreed management KPIs.

While the above indicative terms would be subject to due diligence to the satisfaction of AMD Corp, and final negotiation of terms acceptable to AMD Corp and Council, they are indicative of what a fair short term-lease of St Kilda Marina should look like [REDACTED].

AMD Corp submits these indicative alternative short-term leasing terms [REDACTED] in the interests of Council and the community achieving a better outcome in terms of improving short-term rental income, and ensuring flexibility and expediency with regards to the long-term leasing process.

Recommendations

In closing, AMD Corp recommends the following to Council:

- that in the first instance, Council rejects the current proposal put forward by the Current Lessee because it is uncommercial;
- that Council either:
 - runs a competitive process for the short-term lease (which may now not be impractical given the impending long-term lease expiry); or in the alternative,
 - seeks the requisite approvals from the Minister and/or Governor in Council to enter into a direct negotiation process with the Current Lessee (or another party);
- if Council succeeds in obtaining approval to enter into direct negotiation with the Current Lessee (or any other party), that Council renegotiate the terms of the current short-term lease proposal, such that:
 - it is on a yearly basis (1+1+1) allowing flexibility for Council in the short-term;

- at market rent, eg. \$ [REDACTED] plus 7% of gross receipts from operations; and,
- contains various performance undertakings from the lessee to allow a smooth, unimpeded competitive long-term leasing process and smooth transition to the successful bidder at the termination of the interim leasing arrangement.

Following negotiation and settlement of the short-term lease, Council can then proceed with the competitive process and award the long-term lease with a start date that is earlier than 2022 (given the short-term lease is on a year to year basis).

We also reiterate our desire to be heard in support of this submission before Council (or its committee established by Council for this purpose), or be represented by a person acting on AMD Corp's behalf.

We thank Council for considering these submissions and again note that AMD Corp hopes it will be able to assist Council, where appropriate, through the process of negotiating an interim and long-term lease for the St Kilda Marina that is in the best interests of Council, the Port Phillip Community and users and visitors of the St Kilda Marina.

Yours faithfully,



Andrew Barlow
For and on behalf of
Australian Marina Development Corporation Pty Ltd

Australian Marinas (A'asia) Pty.Ltd.

Reg. Office: 1278 Ferntree Gully Road, SCORESBY, VICTORIA 3179 Phone: 9763-7233 Fax: 9764-1441
A.B.N. 51 004 443 190

Dear Michelle,

Please find attached Australian Marinas' submission for the St Kilda Marina interim Lease. If given the opportunity I would like to personally present this submission to Council.

Australian Marinas has been, and continues to be a Melbourne based family-owned company. As Council would be aware the Spooner family's head operations is based in Scoresby, where various business enterprises are run. The Caribbean boat manufacturing plant, which has been in operation for over sixty years is one of the oldest in the world. The Caribbean Business Park, established in 1986, currently consists of 37 different warehouse and office buildings, employing over 3500 people, and continues to grow on its five hundred acre grounds. It has now been awarded best business park by Property Council of Australia for two consecutive years running. Other interests the family are involved in, include the Caribbean Gardens and Markets, along with the Caribbean roller skating rink. All of these diverse businesses and the land they are situated on, are all owned by the family, and are debt free.

In the fifty years of running the marina, the business has never encountered any financial hardship, and has consistently paid rent, rates, taxes, and all other associated costs in a timely manner. Neither has the business ever experienced any sort of catastrophe that would cause embarrassment to ourselves or indirectly to council. Australian Marinas frequently conducts routine inspections, maintenance and service of boat storage equipment to ensure a safe working environment for our staff and boat owners. Dredging works outside the entrance of the marina is also regularly conducted to provide safe access to the harbour for all vessels at considerable cost to ourselves.

The Australian Volunteer Coast Guard Association, a non-profit organisation, provide a vital service to the community, including safety on our waterways, search and rescue, and basic training in boat safety and handling. Australian Marinas have supported this association for many years and have provided rent free mooring and land for their premises. Australian Marinas has also established tenants within the marina precinct that provide essential services for our boat owners and general public, consisting of boat sales, service and repair operations, restaurants, bars and function rooms.

Given the opportunity, we hope to be included in any prospective tender process that may occur in the near future. The parkland to the West of the marina is an excellent example of Council's fantastic achievements, and we would like to continue this theme along the foreshore area if we were to be the successful candidate.

We feel that Australian Marinas has lived up to its commitment to Council by providing a boat safe haven and storage facility. Whilst we recognise that Council constructed the harbour, Council would be aware that Australian Marinas has provided the necessary dry storage buildings and racking along with the wet pen birthing, which, according to a recent site summary are still in good condition.

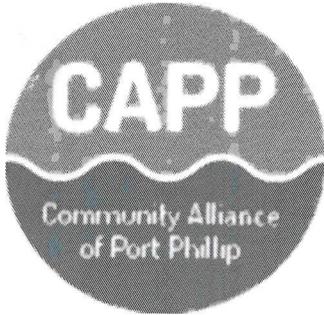
We believe that providing Australian Marinas with an interim lease would guarantee security and the least amount of risk to Council. It would allow continuity for our boat owners, tenants, and public visitors and would allow us to continue to provide the level of service essential to St Kilda Marina.

Yours faithfully,

Richard Spooner



SERVING THE BOATING PUBLIC THROUGHOUT AUSTRALIA



SUBMISSION RE:

'Notice of Intention to Lease Property, St Kilda Marina, Marine Parade, Elwood'

The Community Alliance of Port Phillip (CAPP) sees the renewal of the St Kilda Marina is an exciting part of the process of determining the new long-term lease for the Marina. Council has made a significant investment in consultation and used a community deliberative panel in setting the vision and exploring options for the Marina design (August-December 2018). Council is currently developing the tender documents for the new long-term lease and has determined that a short-term interim lease is required to ensure ongoing operation of the Marina until the tender process is complete and the new long-term lease with either the incumbent lessee, or a new lessee, can be awarded.

CAPP has a number of concerns about the proposed three-year interim lease negotiated directly with the incumbent lessee Australian Marinas (A'Asia).

1. Council has undertaken a process of direct negotiation with Australian Marinas for a short-term lease, something at odds with its oft-stated commitment to competitive tendering processes.
 - * CAPP would like to see documentation of legal and/or ministerial advice that supports their having taken this action in relation to leasing of Crown Land .
2. Council has entered into an agreement with Australian Marinas to buy marina infrastructure valued at \$620,000 (or possibly to pass this cost on to a new lessee) at the end of the three-year lease should they be unsuccessful. An independent assessment of this infrastructure has been received by Council, noted at the Council meeting on 6 February, which apparently states that the marina infrastructure in question has a life of up to 15 years beyond the end of the short term lease, but this report has not been released.

* CAPP asks Council to make the Marina infrastructure assessment report public prior to hearings to be held at which submitters may speak to their submissions.

* CAPP understands that the concept design for the renewed Marina will likely require remodelling of wet and dry berths and we therefore question the value of purchasing infrastructure that will be replaced long before the claimed 15 year life of the current infrastructure. We suggest that this investment of \$620,000 of our community's money in infrastructure that may well not be fit for purpose is therefore imprudent. Furthermore, given the recommendations for the new design, a new lessee may not be at all interested in taking on this cost and Council could indeed be left 'high and dry' footing the bill. How can such a commitment be justified?

3. CAPP is also concerned about the low rental proposed for the Marina during the short-term lease, of \$134,000, which is well below market rental, and clearly fails the guiding principle that Council itself set, i.e. 'A rental amount that does not disadvantage either party' (Report to Council 6 Feb 2019). Clearly Council and the community at large ARE disadvantaged by not securing a rental much closer to market value for the next three years.

* What, if anything, has Council negotiated in terms of improvements to the Marina over the next three years, such as removal of unnecessary fencing on the Marine Parade side of the Marina and providing public access to the beacon, in return for such a discounted rental?

* CAPP recommends that Council require Australian Marinas to implement some immediate improvements in relation to public access to the Marina, as part of the short-term lease arrangements, namely removal of fencing along the Marine Parade side of the Marina, and opening up of public access to the Beacon.

4. Council officers have argued that preparation of the new lease documents and implementing the tendering process for the long-term lease necessitates the offer of longer than a 12 month lease, yet surely three years is unnecessarily long? We understand from statements made at Council on 6 February that Council wanted a two year lease and Australian Marinas wanted a five year lease, so three years was the compromise struck. Surely as short an interim lease as possible to ensure the awarding of the new long-term lease as speedily as possible to be fair to all interested parties, should have been the most important consideration.

*CAPP recommends that no longer than a two-year interim lease be offered to Australian Marinas, and if such cannot be negotiated, then an open tender for a two-year interim lease should be instigated.

Thank you for the opportunity to make a submission.

CAPP would like to present on our submission when the interim lease hearing is called.



Rhonda Small

Convenor

Community Alliance of Port Phillip (CAPP)

12 March 2019

Mobile: [REDACTED]

Email: [REDACTED]

Submission and commentary to the City of Port Phillip regarding the St Kilda Marina

Author: Lindsay Gordon BSc LLB, Lawyer

Introduction

The City of Port Phillip has sought comment from interested parties and ratepayers of the city of Port Phillip in relation to a proposed new three-year lease to Australian Marinas (A Asia) Pty Ltd. The new lease is proposed to commence on 1 May 2019 upon expiration of its existing lease which commenced in 18 March 1968 and expires on 30 April 2019.

The writer of this document has been a lawyer for in excess of 40 years practising substantially in the area of property law which included planning and leasing. He also has had experience in relation to business and development proposals and is accordingly well-qualified to make observations and comments from an experience as well as legal perspective. The contents of this are also approved by the board of the Ratepayers of Port Phillip Inc.

Documentation and information available the public

Comments in this document are based upon publicly available documents prepared for Council as well as information made available to the public.

To make detailed comments regarding the matter copies of the following documents were also requested:

1. The first lease of the St Kilda Marina which is due to expire on 30 April 2019;
2. The proposed draft lease detailing the terms and conditions so far negotiated with the proposed tenant;
3. The valuation in relation to the premises sought to be leased.

These documents were requested on 21 February 2019 but were not made available. Accordingly any commentary on these documents is based on the non-legal commentary by Council officers and others contained in documents provided publicly or to Council and on guesswork.

In addition, certain information and documentation appears to have been presented to Council at a confidential meeting on 21 November 2018 which has not been released to the public. Again, without the public having all information available it is almost impossible to make a completely meaningful submission. This is particularly the case given that at that meeting it appears to have been acknowledged by Council that the proposed rent is a sub-market rent but there has been no explanation whatsoever as to why Council has accepted this. This is not satisfactory and also does not appear to be in conformity with the recommendations contained in the Probity Report.

This makes a mockery of the consultation process with the community if the community are not apprised of all the information that Council is. I don't accept that there would be any information that the public should not be made aware of.

As these documents or information were not made available then, in my view, the public cannot be expected to make meaningful submissions in relation to the proposals. I believe in those circumstances it could be said that the consultation was not a proper consultation pursuant to the

provisions of the Local Government Act 1989 and is therefore defective in substance and may not meet the requirements of the Act.

The lack of documentation as well as the acknowledgement that the rental is less than a market rental would also appear to be not in accordance with Strategic Directions 3 and 6 in particular that the Council is not putting the "community first" as it is required to do. The Council also has a fiduciary duty to ratepayers to obtain the best possible rental and that rental would be deemed to be the market rental.

Council meeting of 13 September 2016

It appears that Council and Council officers commenced preparation for what would occur upon expiry of the first lease from as early as 2016, some three years ago. At that time a Council officer's report was provided to the council meeting on 13 September 2016 and included in that report with the following statements:

"2.5 If no redevelopment of the site occurred, it is estimated that Council could receive rental income in excess of \$500,000 per annum upon expiry of the Australian Marinas lease in 2019, based on current tenancies."

"3.3 The State Government's Leasing Policy for Crown Land (2010) states that a competitive selection process will apply to the leasing of Crown Land, unless there are special circumstances where direct negotiation is permitted (subject to Ministerial approval)."

"3.4 Direct negotiation is not recommended in this case, for the following reasons: ..."

"3.5A project plan is being developed for the project, with three work streams proposed; (1) Leasing, (2) Strategic Planning and (3) Engagement. This plan will be brought to Council for approval."

In the minutes of the council meeting of 13 September 2016 council decided in relation to the St Kilda Marina (inter-alia) as follows:

"1.4 Directs Officers to develop a leasing process for the site for approval by Council that includes extensive community engagement in the development of strategic objectives and leasing principles for the site."

"1.5 Approves in principle the development of a short term lease, if required, to provide certainty to current operators at the site whilst a new lease is secured, with the rent for the short term lease to be based on market value."

It should be noted that in paragraph 1.5 of the minutes that a short term lease was only to be approved "if required".

In any event, a "short term lease" is still a lease within the meaning of paragraph 3.3 above yet direct negotiation took place but there is no indication that there was any Ministerial Approval for that to occur.

Council meeting of 7 February 2018

The matter was next returned to Council some 16 months later on 7 February 2018.

In my view, 16 months was far too long a period of time for its take the Council officers to complete what they had to do. There is no explanation as to why it took this long. This has therefore put the ratepayers at a disadvantage because the matter was not progressed in a timely manner. This should have been able to be completed in half the time.

The Council officer's report for this matter was extensive and was accompanied by supplementary documents including the timeline, maps, a Probity Report and a Probity Summary.

Furthermore, the timeline presented to the meeting of 7 February 2018 for the completion of the project stretching out to May 2021 was and still is excessively long. For instance, it is my view that to achieve the last two stages namely 5 – Procuring New Lease/s and 6 – Delivering New Leases will not take from May 2019 to May 2021.

I would expect that the last two stages could easily be completed within 12 months instead of 24 months and there would be no reason that the proposed interim lease should be as long as three years. As I understand it Council already has a valuation and all the tools already to put this proposal out to the marketplace although it has not yet been presented as to how precisely this will occur and whether or not any consultants would be involved. Council is requested to answer the question as to why a process or proposal for this to occur has not been put in place and to confirm that any cost in relation to this aspect would be included in the previously budgeted amount of \$1,075,000.00?

The Probity Report

Having read the Probity Report I am somewhat astounded that it was felt that this report was required at all. Whilst this is a large project, the Probity Report could and should apply to each and every transaction that the Council undertakes. In my view, there was absolutely no need for a separate Probity Report to be prepared for this matter.

The Probity Report contains many important and salient points in relation to conflicts of interest and other such probity matters (most of which should already be known by Councillors and Council officers), however, this document should not have needed to be unique to this transaction (and I don't believe that it is). This Probity Report could and should have been adopted by the Council as a policy document to guide Council, Council officers and others through any transaction that it undertakes no matter how large or small. Probity is important in every instance as is transparency. I would recommend, as an aside, that this Probity Report be adopted by the Council in this fashion so that the need to for another Probity Report does not occur again.

I also believe that the cost of this Probity Report should be disclosed because, as mentioned above, I believe it was not a document necessary specifically only for this transaction.

The buildings and improvements on the land

From the information provided it appears that all buildings and improvements on the land revert to the Council upon expiration of the lease on 30 April 2019.

However, there is no explanation as to why it is considered that the wet berths do not also revert to the Council. Whilst these probably rise and fall with the tides the pylons are fixed in the ground and would clearly appear to be fixtures. There appears to be an acknowledgement that these may be able to be removed by the current tenant and I would question why this is the view. Without having access to the original lease document I am not able to comment further.

The proposed three-year term of the lease

For the reasons stated above I do not see why the lease needs to be as long as three years.

The rental

It is my view that the rental is manifestly inadequate.

As long ago as three years Council officers reported to the Council that the market rent would have been in excess of \$500,000.

Apparently a market appraisal has been conducted by Charter Keck Cramer which has assessed the market rental as \$800,000 per annum. There is no indication, however, as to whether or not the \$800,000 includes the revenue from the leasing of the BP petrol station, Riva restaurant and the other premises currently sublet. At the moment Australian Marinas receives all the rent from the sublet properties. This would clearly amount to several hundred thousand dollars per annum.

It is assumed that the whole of the Marina as described in the original head lease is proposed to be leased for the three years.

This would mean that Australian Marinas would continue to receive all rental for the sublet premises as well. This makes no sense now that the buildings are all owned by the Council.

The proposed rental is \$134,000 per annum plus 7% of the gross receipts associated with car parking, boat launching, rental of boat pins, parking of cars with trailers and dry storage rentals. There has been no estimate as to what the 7% is in dollar terms. This information should be provided to ratepayers.

The net effect is that it appears to me that Australian Marinas is quite possibly effectively being paid by the ratepayers to run their business. We simply do not know because we haven't been given any of these figures to make a proper assessment.

What is absolutely clear, however, is that the proposed rental is far below market rates and is not in accordance with the resolutions of the council that "neither party should be disadvantaged by the provisions in the interim lease".

It is insufficient to say that because this is an increase on the existing rental that it should be satisfactory. The point is that upon expiry of the original lease all improvements revert to Council and as owner of the premises Council (and therefore the ratepayers) are entitled to a proper market rental.

The Council is being substantially disadvantaged if the lease were to proceed upon this basis and accordingly, ratepayers are funding the Australian Marinas business. This is unacceptable and the lease must not proceed upon this basis.

Under the provisions of the St Kilda Act 1965 the Governor in Council must approve the lease and the Ratepayers of Port Phillip Inc. will make representations to the Minister to advise the Governor in Council to refuse to consent to the lease in its present form until all information has been made available to ratepayers and a proper market rental has been struck.

Severance of the subleases from the Marina lease

It also appears that there has not at any stage been consideration in relation to the severance of the subleases from the Marina lease to allow the Marina proper to be a standalone business and entity.

The BP petrol station, Riva restaurant and some of the other commercial standalone leased premises have really nothing to do with the Marina itself other than that they adjoin the Marina proper.

In other words, consideration should also be had, since the Marina's lease expires, in relation to the rental payments being made by the current subtenants directly to Council rather than to Australian Marinas. This would then facilitate Council leasing only the remainder of the land which is absolutely necessary for the conduct of the Marina to Australian Marinas. This would give Council better control of the Marina site and put Council in a stronger position insofar as marketing the Marina for its core business namely a Marina. In my view, it would make a lot more sense that all the separately leased portions of the Marina area should be paying rent directly to the Council and not to the Marina operator. It is also my view that this would be of greater financial benefit to Council and ratepayers and would produce a more simple and secure means of leasing and marketing the Marina operations themselves.

Council would simply become the landlord with no further documentation required if the demised premises under the interim lease and subsequent main lease of the Marina are expressed to exclude all the other leased areas that are appropriate. Mechanics workshops and suchlike associated with the Marina could remain with the Marina.

In addition, if Council subsequently leases the Marina to an operator who for one reason or another goes into liquidation or has an administrator appointed then all lease money that has been paid by the subtenants to the Marina operator would be lost to the Council. The financial risk to the Council would be substantially lessened and the return to the Council and ratepayers would be more advantageous and secure.

11 March 2019

7 March 2019

Ms Michelle Rysanek
Port Phillip City Council
Private Bag 3
St Kilda, Victoria 3182

Mr Peter Tanner

e/mail:

Re : St Kilda Marina, intention for interim three year to current lease holder

Dear Michelle,

The following is my written submission on the proposed interim three year lease to the current lease holder of the St Kilda Marina. My objections points against the proposal are as follows:

1. The current lease holder "Australian Marinas (A'Asia) Pty Ltd has operated this lease for 50 years and is on record as opposing any form of current or future tender evaluation process. (Refer Port Phillip council ordinary meeting dated 13 September 2016) They don't deserve a further 3 year extension without a tender evaluation. The minutes also record under section 1.1 " ..that the Council has had several parties including the current tenant express their interest in leasing the property".
2. As noted within the paper presented to the Port Phillip Council 7 February 2018, section 4.5 "The 50 year lease in combination with low rent provided the tenant opportunity to recoup their return on this and subsequent investments." The tenant 50 years ago invested an estimated \$2 Million over the first six year of the lease to develop the site. It is therefore disappointing to note that the proposed 3 year lease extension will continue to offer sub market rent of \$134,000 pa plus 7% gross receipts. As is noted in the paper presented to the council on 7 February 2018 section 4.3 "Under the current lease arrangement the income is approximately \$170,000 plus GST pa which comprises rent and & 7% of gross receipts. The increase in revenue to the council for the interim 3 year lease from the lease holder is incredibly and unbelievably small. A real golden hand shake for the current lease holder.
3. The current lease holder also has a very poor record of compliance with the conditions listed within the 50 year old lease. e.g it was allowed and suppose to have 250 dry boat shortage, when recently checked it had over 303 boats in dry storage. That is over 17% more boats than was specified within the lease.

Conclusion:

I don't believe that the current lease holder based on it's operational history deserves the incredible opportunity to have another 3 years of being the St Kilda Marina lease holder, that includes no tender evaluation process and a very favorable sub market rent & gross receipts percentage. Based on its attitude to tendering, it's noncompliance record and because other parties have previously expressed an interest in leasing the site, it should not be granted a further 3 years interim lease, without a tender evaluation or at the very least a selective quotation comparison.

Yours faithfully,



Peter Tanner FCPA

sent via e/mail to: Michelle.Rysanek@portphillip.vic.gov.au

Melanie Darmanin

Subject: FW: Application.- Submission

From: Elizabeth [REDACTED]
Sent: Tuesday, 12 March 2019 10:46 AM
To: Michelle Rysanek <Michelle.Rysanek@portphillip.vic.gov.au>
Subject: Application.- Submission

Hello Michelle.

Re: St Kilda Marina and Comments at 20 March Council Meeting re interim lease.

Please forward to the appropriate person if I have chosen the wrong address.

I wish to make a short submission.

Regards,

Elizabeth Meredith
[Wirillda P/L -Stakeholder]