



FAXED 14/8/06

Minister for Local Government and Regional Development;
Fisheries; the Kimberley, Pilbara and Gascoyne

COUNCIL
Item No. 12.2
No. Pages 9

For recorded 14/8/06

Our ref: M0601423

Cr Graeme Campbell
President
Shire of Broome
PO Box 44
BROOME WA 6725

Record No	1560814-24242		
File No			
Case Ref			
Subject			
Department			
Case Officer	CEO		
RESPONSE DATE			
Client			
(Tick actions required)			
<input type="checkbox"/> READ	<input type="checkbox"/> FILE	<input type="checkbox"/> BIN	<input type="checkbox"/> CIRC

Dear Cr Campbell

Thank you for meeting with me and Cheryl Gwilliam, the Director General of the Department of Local Government and Regional Development, at Broome on 9 August 2006.

I have received a number of letters from members of the Broome community raising concerns about the Shire's tendering of the Cable Beach Camel Tours.

The issues of concern range from disappointment in the Council's decision to award all three licences to one operator - to questioning the Shire's power in undertaking a tender process whereby the licences have been granted on the basis of criteria that includes the amount of consideration.

I understand that the Shire has received legal advice on the tender process and has arranged for the process to be independently audited.

I am concerned, however, about other matters that have emerged from my Department's examination of the issues raised that has prompted the following questions:

1. Does the Shire have the power, under its Trading, Outdoor Dining and Street Entertainment Local Law 2003, to issue the relevant licences in the first instance?

Documentation provided by the Shire indicates that it has invited tenders for the processing of applications and issuing of licences to operate camel tours on Cable Beach, Broome.

Council's policy titled Commercial and Tourism Activities on Cable Beach states:



"This policy applies to all that portion of Cable Beach from Gantheame Point to a line on the beach between the high and low water marks formed by the westerly prolongation of the northern boundary of Lot 405 Lullfitz Drive".

An area described as the "Broome Port Area" was vested in the Minister for Transport on 2 February 1982 and gazetted on 5 February 1982. It would appear from the description in the Gazette that the area included the seabed starting from the high water mark of Roebuck Bay.

A plan referred to in the Shire's draft licence agreement at clause 29.2.2 indicates that the area the subject of the three licences is the foreshore, or shore, itself, ie, the land/water area between high and low water marks.

This area is vested in the Port Authority by section 24(1)(a) of the *Port Authorities Act*. Section 32 of the *Port Authorities Act* gives exclusive control of the foreshore to the Broome Port Authority.

It is noted that section 3.1(2) of the *Local Government Act 1995* (the Act) makes it clear that the scope of the general function of a local government is to be construed in the context of any constraints imposed by another written law, such as the *Port Authorities Act*.

The Department believes this brings into doubt the power of the Shire to make a local law in respect to the port land.

2. Leaving aside the jurisdiction issue, assuming the Shire has the power to issue a licence for the operation of camel tours on Cable Beach, has the Shire breached section 6.17(3) of the Act?

Section 6.16 of the Act allows a local government to impose a fee or charge for any service it provides, other than a service for which a service charge is imposed.

It would appear that the Shire has acted under section 6.16(1) in that it has imposed a fee or charge for the granting of (activity) licence to conduct camel tour operations on Cable Beach.

It is noted that section 6.17(3)(b) restricts the cost of receiving an application for approval, granting an approval and issuing a licence to the actual cost of providing that service. It is clear from section 16(2)(d) of the Act that receiving an application, granting approval and issuing a licence is included within the meaning of "service".

I understand that the Shire has accepted the Tender from Red Sun Camels for all three licences on the basis of an annual payment or fee of \$100,000 per licence.

I am advised by the Department that it is of the view that the Shire of Broome has not complied with section 6.17(3)(b) if it has set the licence fees at \$100,000 each per year. Doing so would also not accord with the common law or be permissible under section 45A of the *Interpretation Act*.

In order for me to consider this matter and respond to the concerns raised, I would appreciate further clarification from the Shire in confirming that:

- it has or it proposes to issue licences under its Trading, Outdoor Dining and Street Entertainment Local Law 2003 to Red Sun Tours for camel tour operations on Cable Beach, the subject of the recent tender;
- the licence fees imposed for the said licences amount to \$100,000 per annum per licence or, if not, the amount being charged; and
- the area for which the camel tour licences are intended or have been issued relates to that part of Cable Beach starting from the high water mark and finishing at the low water mark, which is the same area as described in the Gazette as being the area including the seabed starting from the high water mark of Roebuck Bay for the purpose of providing exclusive use over that area by the Broome Port Authority.

I welcome the Shire's comments and clarification on the above issues in order to assist in the determination, firstly, whether the Shire has the proper jurisdiction over the area of land/seabed the subject of the camel tour licences, which allows it to issue a licence for that activity.

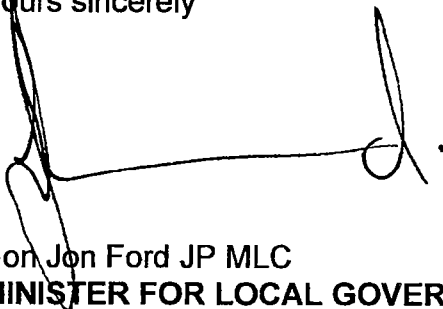
Secondly, assuming the Shire has the proper jurisdiction, whether it has breached section 6.17(3)(b) of the Act by imposing/charging a licence fee of \$100,000 per annum per licence.

Perhaps after the Shire has had time to consider these issues, it may be in a better position to reflect on whether the answer to these questions does in fact impact on the decision taken by Council, to invite tenders for granting licences to conduct activities on the area in question.

If there are jurisdictional problems with the Shire's actions, in this instance, I suggest that there may be some benefit in the CEO and yourself meeting with the Director General, and relevant officers of the Department, with the view to the Department providing advice that may assist the Shire in resolving these problems.

I would appreciate you treating this advice with the utmost priority and request that you respond by 25 August 2006.

Yours sincerely

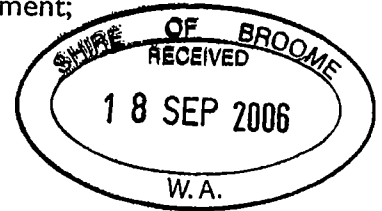


Hon. Jon Ford JP MLC
MINISTER FOR LOCAL GOVERNMENT AND REGIONAL DEVELOPMENT



Minister for Local Government and Regional Development;
Fisheries; the Kimberley, Pilbara and Gascoyne

Your ref: 06/08
Our ref: M0601497



PRIVATE AND CONFIDENTIAL

Cr Graeme Campbell
President
Shire of Broome
PO Box 44
BROOME WA 6725

Record No.	1050918-24530		
File No.	LET 001		
Cross Ref.	06/08		
Keywords			
Department			
Action Officer	CEO		
CC to			
RESPONSE DATE			
Other			
(Tick action/s required)			
READ	<input checked="" type="checkbox"/> FILE	<input type="checkbox"/> BIN	<input type="checkbox"/> CIRC

Dear Cr Campbell

I refer to our conversation at our meeting on 9 August 2006, my letter (dated 14 August 2006) and the Shire of Broome's (the Shire's) response dated 25 August 2006.

My concerns continue to exist in relation to the Shire inviting tenders that appear to result in the granting of activity licences on the basis of criteria that includes the amount of consideration. This, as I pointed out in my previous letter, would not be consistent with section 6.17(3)(b) of the *Local Government Act 1995* (the Act) which, as you would be aware, restricts the basis for determining a fee to the cost of providing the service. Previous budget papers suggest the Shire had set the licence fee at \$2000 for camel hire/rides, perhaps indicating what was previously considered the cost of providing the service, ie administering the licensing scheme.

Whilst I understand the Shire has now clarified that its intention was to impose a charge, not under section 6.16(2)(d), but under Section 6.16(2)(a) of the Act, the latter advice creates some confusion and still does not fully address my concerns.

The matters that remain outstanding are:

- The Shire's response of 25 August 2006 indicates that it is its intention to impose a charge under section 6.16(2)(a) of the Act for admission and use of the local government property at a fee/charge totalling \$300,000. This fee/charge will be applied as a condition in the licence for accessing and using that part of Cable Beach which is local government controlled or managed property.



If this were the case (assuming for the moment it was legally possible), I would expect that the "Conditions of Approval" for the "trading licence" would include such a condition. I note none of the 11 conditions listed refer to an admission or use charge as a condition of the licence.

- The location for the conduct of the activities, as portrayed in the latest aerial photograph provided by the Shire, dated 25 August 2006, is different to that indicated earlier. If it were the Shire's intention to charge for access to the activity area, it would be expected that some notation would be made in the tender documentation to clearly define what area was being offered.
- The only reference made to section 6.16(2)(a) is contained in the Shire's "Commercial and Tourism Activities on Cable Beach" policy that states that the Council will invite tenders in accordance with that section. However, this reference does not discuss the issue of a fee or charge for admission/use of property.
- The Shire has indicated that in respect of each licence there are two separate charges, one (\$150) for the trading licence and one (\$100,000) for admission to/use the trading area. To lessen the opportunity for ambiguity to emerge, I would expect that the Shire's local law and policy would have made a clear distinction between the fee or charge for the "Trading (activity) Licence" and the charge for access/use of the designated trading area.
- It is also apparent that the method adopted by the Shire in using a tendering process to set the various charges has resulted in significant differences between the Camel hire/rides (\$100,000 per licence, per annum) and the other activities on Cable Beach that were tendered (ie the other activities range from only \$1,100 - \$5,000).

I am advised that, primarily, calling tenders for access to land appears to be more appropriately governed by the provisions of section 3.58 of the Act. Whilst it is arguable that 16.17(1)(a) would provide an avenue for such a process, the argument for 16.17(1)(a), according to legal advice, is not particularly persuasive. Significantly, it is to be noted that section 3.58 of the Act provides for a tender process.

Nevertheless, I understand the Shire has advised that the fee/charges they will impose, as a result of their tender process, is consistent with section 6.17(1), with particular reference to subsection (1)(b). If this section of the Act is relevant, it makes it a requirement for the Shire to consider all three factors in setting a fee or charge for goods or services.

Leaving aside the question of what goods or services the Shire is providing, it is difficult to see how the Shire's consideration of factors (a) to (c) could be fulfilled through a tender process that provides for the fees and charges to be

set by the tenderer, with the local government simply accepting the highest bid.

A separate but significant issue for me is that this process may result in three existing camel tour operators losing their business (ie being unable to renew their licence or pay a fee to use the beach), with all camel hire licences being awarded to one successful tenderer based on the highest bid.

It is my Department of Local Government and Regional Development's (my Department's) opinion that the Shire's *Trading, Outdoor Dining and Street Entertainment Local Law 2003* and its *Commercial and Tourism Activities on Cable Beach* policy refer predominantly to the issue of a "Trading Licence", which is more in keeping with the view that the Shire has tendered for the issue of a licence, under Section 6.16(2)(d), and is not generally consistent with the Shire's purported intention of tendering for the use of, or allowing admission to land, as provided for under section 6.16(2)(a).

The Council may have acted with the best of intentions and did not expect the outcome that it is now required to deal with. I also understand the Shire's position in seeking to recoup some of its costs in maintaining and providing various support services for the Cable Beach area. In this regard, I point out that if the Shire controls land which can be the subject of both a trading licence, under section 6.16(2)(d) of the Act, and a real property licence under section 3.58 or arguably section 6.16(2)(a) of the Act, it could grant both and receive the \$150 trading fee licence and a larger sum representing the commercial value of the real property. These matters would obviously need to be discussed with your legal advisers.

Generally speaking, the Shire needs to resolve its lack of a property interest or right to control the "activity area" within the Port Authority land before it is in a position to seek to impose fees for access to land it has an interest in or controls. I understand that the Port Authority are open to negotiations in relation to the Shire regulating activities on its land and could well permit or pass control of that area to the Shire.

After securing its interest or right to control the area in question, the Shire would then be in a position to consider an appropriate method for setting a fee, which could be either under the provisions of section 6.16(2)(a) or preferably a new process under the provisions of section 3.58 of the Act.

I am keen to ensure that Council is aware that I consider it important that the Shire needs to address the problems that I have outlined in this letter. I ask that you bring to Council's attention my request for Council to:

- (a) note the problems that have been identified with the method the Shire has used to award the Camel licences;
- (b) seek legal advice (giving consideration to the Shire providing good governance to persons in its district) as to whether it is appropriate to

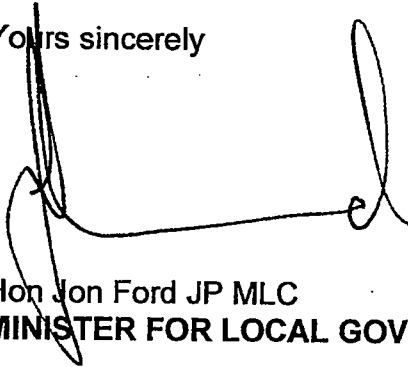
award the licences to the successful tenderer in light of the problems that have come to light;

- (c) consider, in light of its legal advice, whether it would be appropriate, and legally possible, to revoke, or otherwise reverse its decision, to award the tender licences to the successful tenderer.
- (d) liaise with the Maritime Section of the Department for Planning and Infrastructure in relation to the Broome Port Authority land, with a view to obtaining a property interest or right to control an area to be designated "activity area" with approval to charge an access fee and issue activity licences over this area; and
- (e) depending on the outcome of (d) above, consider starting a new licensing process under the provisions of section 3.58 of the *Local Government Act 1995*.

I have asked my Department to liaise with you and provide any further advice that you may require in relation to these recommendations.

I would appreciate you advising me of your considerations on this matter at the earliest opportunity.

Yours sincerely

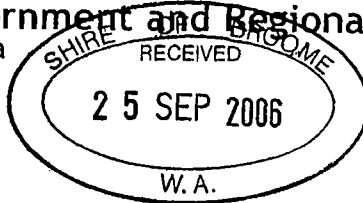
A handwritten signature in black ink, appearing to be 'Jon Ford', written over the typed name.

Hon Jon Ford JP MLC
MINISTER FOR LOCAL GOVERNMENT AND REGIONAL DEVELOPMENT

Graeme - copy for your records only



Department of Local Government and Regional Development
Government of Western Australia



Your ref: 06/08
Our ref: M0601423

Cr Graeme Campbell
President
Shire of Broome
PO Box 44
BROOME WA 6725

Record No.	060925-24530		
File No.	LET001		
Cross Ref.	06/08		
Keywords			
Department			
Action Officer	CEO Shire Pres		
CC to	MAS		
RESPONSE DATE	9/10/06		
Other			
<small>(Tick as/for required)</small>			
READ	FILE	BIN	CRS

PRIVATE AND CONFIDENTIAL

Dear Cr Campbell

I refer to our conversation at our meeting on 9 August 2006, the Minister for Local Government and Regional Development's letters (dated 14 August and 11 September 2006) and the Shire of Broome's (the Shire) response dated 25 August 2006.

I formally draw to your attention my concerns with the path the Shire has taken in inviting tenders that appear to have resulted in the granting of activity licences on the basis of criteria that include the amount of consideration. If this was the basis for the Shire's actions, this would appear to be inconsistent with section 6.17(3)(b) of the *Local Government Act 1995* (the Act).

Furthermore, the Department considers that the Shire has not set the level of fees and charges in accordance with section 6.17 of the Act as the charge the Shire intends to impose under section 6.16(2)(a) is the price tendered by the successful tenderer.

The Department is presently awaiting the Shire's response to the Minister's letter (11 September 2006) in deciding what action it should pursue in dealing with these concerns. I advise that one option presently under consideration is an Authorised Inquiry under the provisions of Part 8 Division 1 of the Act.

It is understood from the CEO, Mr Ian Bodill, that the Shire has legal advice indicating that Council would be unable to revoke its decision of 26 June 2006 to award the tender. In order to assist the Department in advising the Minister on what further action to take, I would be pleased to receive a copy of that advice.

As the Department considers this matter a high priority I ask that you treat it with urgency. In this regard I ask that you table the Minister's letters and this letter at the next available Council meeting. I understand the Shire's next Ordinary Council meeting is scheduled for 28 September 2006.

The Minister has asked the Department to liaise with you and provide any further advice that you may require in relation to his recommendations. Mr Brendan Peyton, A/Manager Compliance and Advice is available to discuss the matter with you and can be contacted on 9217 1427 or 0434564842

I would appreciate you advising me of your considerations by no later than COB Friday 6 October 2006.

Yours sincerely



Cheryl Gwilliam
DIRECTOR GENERAL

20/9/6

Cc Mr Ian Bodill (CEO)