

22. HEARINGS PANEL REPORT - PROPOSED CHARITABLE TRUST TO OPERATE THE WORLD BUSKERS FESTIVAL



General Manager responsible:	General Manager Regulation and Democracy Services DDI 941-8462
Officer responsible:	Legal Services Manager
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PURPOSE OF REPORT

1. The purpose of this report is to:
 - (a) Report the result of the Special Consultative Procedure adopted by the Council in relation to the proposed establishment of a charitable trust to operate the World Buskers Festival ("WBF") as a Council-controlled organisation
 - (b) Recommend that the Council resolves to establish the proposed charitable trust as a Council-controlled organisation as part of the legal and financial structure to operate the WBF.

EXECUTIVE SUMMARY

2. At the Council meeting held on 19 December 2008 the Council authorised the purchase of the WBF from the Festival City Trust and settlement of the purchase transaction was completed on 12 May 2009.
3. In the report considered by the Council at the 19 December 2008 meeting staff advised that the previous owner operated the WBF through the medium of a charitable trust with the profits (if any) being applied to specified charitable objects. The reason for this arrangement was that a substantial portion of the revenue generated by the WBF (87 per cent at the time of purchase) took the form of grants, sponsorship and other donated support which would not be available unless the operator of the WBF was a charitable trust.
4. At its meeting of 19 December 2008 the Council specifically resolved, inter alia:
 - "4 That ... the Chief Executive be authorised to take the appropriate steps to establish a trust or such other entity, as he shall consider necessary or appropriate for the purpose of ensuring that outside funding sources can be obtained.
 - 5 That the Chief Executive be authorised to establish and put in place the financial and legal structures that he considers appropriate for the establishment and operation of the World Buskers Festival by the Council."
5. The Legal Services Unit has sought specialist advice from Kerry Ayers of the law firm of Helmore Ayers on the appropriate legal structure to adopt in relation to the operation of the WBF. Mr Ayers is a legal practitioner with substantial experience in the trusts law area and is currently a government appointee to the Charities Commission.
6. To ensure that the WBF continues to be eligible to receive the substantial portion (87 per cent at the time of purchase) of its revenue currently received from grants, sponsorship and other donated support, it has been determined that it is necessary for a charitable trust to operate the WBF.
7. Until a new trust can be formed, the Council has, in the interim, licensed the previous owner/operator of the WBF, the Festival City Trust, to use the Council owned intellectual property and related assets to continue to operate the WBF in the year ending 31 March 2010.

8. Commencing the process to form a new trust, at the Council's meeting of 23 July 2009 the Council resolved to:
 - “(a) Approve the Statement of Proposal and the Summary of Information attached to this report.*
 - “(b) Adopt the special consultative procedure for consulting with the public on the proposal to establish a charitable trust to operate the World Buskers Festival.*
 - “(c) That a hearings panel of three Councillors be appointed by the Deputy Mayor and Councillor Wells, in conjunction with the Council Secretary, to consider any oral submissions that may be received in respect of the proposal.”*
9. Pursuant to the Council's resolution of 23 July 2009 a Hearings Panel of Councillors Wells, Broughton and Johanson was appointed by the Deputy Mayor and Councillor Wells, in conjunction with the Council Secretary.
10. The proposal was publicly notified on 31 July 2009 and the consultation period ran from 1 August 2009 to 1 September 2009. No submissions were received on the proposal.
11. Subsequently, in December 2009 the Festival City Trust approached Council staff and indicated that it was interested in continuing the interim licensing arrangement that was put in place for the 2009/10 year for a further three years. A discussion of the Festival City Trust proposal considered by the Hearings Panel is contained in paragraphs 43 to 48 of this report.
12. The Hearings Panel met on 1 February 2010 and again on 10 February 2010 to deliberate.
13. Consequently, having considered the proposal before it, and the proposal received from the Festival City Trust, the Hearings Panel resolved (Councillors Wells and Johanson in favour and Councillor Broughton abstaining) for the reasons specified in paragraph 48 of this report not to advance the Festival City Trust proposal and to recommend that the Council approves the establishment of a new trust as a Council-controlled organisation to operate the WBF.
14. If the Hearings Panel recommendation is adopted, it is anticipated that the Council will, from 1 April 2010, use a similar licence arrangement with the new Trust to regulate and control the use by that Trust of the Council's WBF intellectual property asset to deliver the festival. Such arrangements will include Jodi Wright's continuing obligation to manage the WBF.

FINANCIAL IMPLICATIONS

15. The establishment of the proposed charitable Trust will ensure that the WBF remains eligible to source external funding which would not otherwise be available to the Council. As currently a substantial portion of the revenue generated by the WBF (87 per cent at the time of purchase) takes the form of grants, sponsorship and other donated support it is essential that the WBF remains eligible for this support.
16. As it is necessary for the proposed Trust to operate the WBF, and as the Trust is required to be an independent charitable trust, any profit that it may make from operating the WBF from time to time will not be able to be returned to the Council, but will, subject to retaining sufficient reserves, need to be distributed to specified charitable beneficiaries. Mr Ayers has advised, in order to maintain the Trust's charitable status, that it will be necessary for the Trust to apply, at reasonably regular intervals, a trading surplus to clearly charitable objects. These charitable objects must be specified in the Trust Deed.

17. If the proposed Trust was to make a financial loss from operating the WBF, it would be necessary for the Council, as owner of the WBF, to cover such loss. However, it is expected that any licence agreement between the Council and the Trust would impose stringent mechanisms to control the risk of a loss being made, including requirements for a pre-agreed budget and business plan, regular reporting to Council, the obligation to reduce the scale of the festival if it becomes clear that is necessary to avoid a loss being made and the provision of audited accounts. These arrangements were imposed as part of the interim licence with the Festival City Trust for the 2009/10 year. Also, reserves can be accumulated in a profitable year so as to offset a loss and minimise the need for the Council to cover any shortfall.
18. The financial results for the WBF since 2007 were as follows:

2007 - \$6863 loss
2008 - \$7224 surplus
2009 – Broke even
19. The 2010 WBF is expected to break even.

Do the Recommendations of this Report Align with 2009-19 LTCCP budgets?

20. Yes. The establishment of the Trust will have no effect on current LTCCP budgets. The WBF budget aims to at least break even, with no funding additional to that currently committed being required from the Council's Events and Festivals Fund.

LEGAL CONSIDERATIONS

21. Mr Ayers has advised that, subject to a "need to produce at reasonably regular intervals, a trading surplus that is applied to clearly charitable objects ... then a charitable trust could be set up which would run the WBF for the purpose of producing a surplus to be distributed for clearly charitable purposes".
22. Establishing a charitable trust to operate the WBF is expressly authorised by the resolution of the Council at its meeting of 19 December 2008, as detailed in paragraph 4 above.
23. As it is proposed that the Council will have the right to appoint all of the trustees, the proposed charitable trust will be a Council-controlled organisation in terms of Section 6 and Part 5 of the Local Government Act 2002. This will enable the Council an element of control to ensure that the charitable trust functions, as far as is legally possible, in concert with the Council's objective to ensure the continued operation of the WBF in Christchurch.
24. The draft Deed of Trust for the proposed Trust has been prepared by Mr Ayers and is substantially similar to the Deed adopted for the Gardens Event Trust formed to support the Ellerslie International Flower Show. The Hearings Panel has recommended that the draft Deed or Trust be amended to provide that, whilst all the trustees are to be appointed by the Council, it is not necessary that any of the trustees be elected members. The necessary amendments that flow from that recommendation have been made to the copy of the draft Trust Deed **attached** to this report.
25. As an independent charitable trust, any profit that the Trust may make from operating the WBF will not be able to be returned to the Council, but will, subject to retaining sufficient reserves, need to be distributed to specified charitable beneficiaries. Mr Ayers has advised that it will be necessary, in order to maintain the Trust's charitable status, that at reasonably regular intervals a trading surplus is applied by the Trust to clearly charitable objects.
26. These charitable objects must be specified in the Trust Deed. The draft Trust Deed attached to this report describes the proposed charitable objects in a very general way in order to allow the trustees flexibility as to which charities to benefit from time to time.

27. Section 56 of the Local Government Act 2002 requires the Council to adopt the special consultative procedure before it can make a decision on whether or not to establish a Council controlled organisation. The necessary Statement of Proposal as required under the Special Consultative Procedure was publicly notified on 31 July 2009 and the consultation period ran from 1 August 2009 to 1 September 2009. The Statement of Proposal proposed “the establishment of a charitable trust as a Council controlled organisation for the purpose of operating the World Buskers Festival from 1 April 2010”. The proposed objects of the proposed Trust were detailed in full in the Statement of Proposal and in addition a full copy of the proposed Deed of Trust was attached to the Statement of Proposal.
28. A Council-controlled organisation cannot be established unless the Special Consultative Procedure is used. The Council has complied with this requirement.
29. No submissions were received in response to the Special Consultative Procedure.
30. Mr Ayers has advised that the proposed Trust Deed in the form attached will meet the necessary statutory requirements to enable the proposed Trust, if formed, to be registered under the Charitable Trusts Act 1957 and the Charities Act 2005.
31. If the Council approves the establishment of the Trust, it will be necessary to register the Trust under the Charitable Trusts Act 1957 and the Charities Act 2005.
32. If the Hearings Panel recommendation to form the new Trust as a Council-controlled organisation is adopted by the Council, the Hearings Panel further recommends that a subcommittee of Councillors be appointed to consider trustee candidates, to appoint trustees of the trust and to negotiate and enter into on behalf of the Council the licence and other contractual arrangements required to allow the Trust to operate the WBF.
33. If the Council was minded to consider the proposal received from the Festival City Trust, it could, in the context of the special consultative process, resolve not to establish a Council-controlled organisation to operate the WBF. The Legal Services Unit’s opinion is that such a resolution would be a legally acceptable outcome of the Special Consultative Procedure. Once that decision was made, it would then be open to the Council, should it so wish, to resolve to enter into a licence with the Festival City Trust.
34. The Legal Services Unit has also given consideration to the effect of the Office of the Auditor General ‘Procurement Guidelines’, if the Council was to consider continuing the appointment of the Festival City Trust. Given the existing contractual relationship with the Festival City Trust, the Legal Services Unit has advised that the option of dealing unilaterally with the Festival City Trust without going to competitive tender is available. The Council can comply with the ‘Procurement Guidelines’ and avoid going to a tender process, as the ‘Procurement Guidelines’ make specific provision for relational purchases, which covers the circumstances applying here due to the existing relationship with the Festival City Trust. However, if the Council wishes to proceed in that way, it should record the reasons for not wishing to seek competitive tenders on the open market and ensure that it complies with the “sound business practices” requirement of section 14(1)(f) of the Local Government Act 2002 by taking the appropriate accounting and legal advice during the contractual negotiations with the Festival City Trust.

Have you considered the legal implications of the issue under consideration?

35. Yes – see above.

Proposed Trust Name

36. It is proposed that the name of the Trust be the ‘World Buskers Festival Trust’.

ALIGNMENT WITH LTCCP AND ACTIVITY MANAGEMENT PLANS

37. The WBF is aligned with the current Events and Festivals Activity Management Plan and the draft 2009 – 2019 Events and Festivals Activity Management Plan and the 2009-2019 LTCCP. The WBF aligns with the following key community outcomes:

- A City of Inclusive and Diverse Communities
- A Prosperous City
- A City for Recreation, Fun and Creativity

Do the recommendations of this report support a level of service or project in the 2009-2019 LTCCP?

38. Yes. The WBF fits well into the Council's objective specified in the 2009-2019 LTCCP – that is to ensure that events and festivals contribute to the enjoyment of living in Christchurch. The Council's strategic direction is to provide and support a year round programme of events that:

- Attracts visitors and generates economic activity.
- Strengthens the distinctive identity and lifestyle qualities of Christchurch.
- Provides multiple and lasting benefits to the city.
- Celebrates and promotes Christchurch's culture and diversity.

ALIGNMENT WITH STRATEGIES

39. The Council's Events Strategy 2007 - 2017 was adopted in December 2007. The WBF delivers on several goals of the Events Strategy:

- Goal One: Events attract visitors and strengthen the distinctive identities and lifestyle qualities of Christchurch.
- Goal Two: A vibrant calendar of events that enhance Christchurch as a place to live and visit.

Do the recommendations align with the Council's strategies?

40. Yes.

CONSULTATION FULFILMENT

41. The Council adopted and used the special consultative procedure in relation to the proposed establishment of the Trust as a Council-controlled organisation.

42. There is no statutory impediment to the Council making a decision in respect of the recommendations contained in this report.

HEARINGS PANEL RECOMMENDATION

That the Council:

- (a) Approve the establishment of a charitable trust as a Council-controlled organisation to operate the World Buskers Festival.
- (b) Adopt the Deed of Trust in the form attached to this report as the form to be used in the establishment of the charitable trust, subject to such amendments as may be required by the Registrar of Charitable Trusts or the Charities Commission.
- (c) Adopt the name 'The World Buskers Festival Trust' as the formal name of the charitable trust or such other similar name as shall be approved by the Registrar of Charitable Trusts or the Charities Commission.

- (d) Authorise the registration of the charitable trust under the Charitable Trusts Act 1957 and the Charities Act 2005.
- (e) Appoint a subcommittee of Councillors with delegated power to:
 - (i) Appoint the initial trustees of the charitable trust; and
 - (ii) On behalf of the Council, negotiate and enter into the such licensing and other contractual arrangements (including reporting arrangements) with the charitable trust as the subcommittee shall consider necessary to enable the charitable trust to use the Council's World Buskers Festival intellectual property and other assets required to operate and deliver the World Buskers Festival.

(Councillor Broughton abstained from voting on this item.)

FESTIVAL CITY TRUST PROPOSAL

- 43. After the consultation period under the special consultative procedure had closed, in December 2009 the Festival City Trust approached Council staff and indicated that it was interested in continuing the interim licensing arrangement that was put in place for the 2009/10 year for a further three years. Generally speaking, the Festival City Trust wish to continue operating the WBF on the same terms as they have operated the 2009/10 festival, but for a fixed three year period going forward.
- 44. Under the 2009/10 licence arrangement, ownership of the WBF intellectual property and other assets was retained by the Council and the Festival City Trust was licensed to use those assets to hold the WBF in Christchurch. The terms of the contractual relationship between the Council and the Festival City Trust in respect of the 2009/10 WBF were governed by a comprehensive licence agreement from the Council coupled with a management services agreement with Jodi Wright (Red Toad Limited). The Festival City Trust was not paid for its role in the 2009/10 WBF, other than being reimbursed from WBF income for its administrative expenses.
- 45. Previously, the Festival City Trust intended to cease their involvement with the WBF following the end of the interim licence on 31 March 2010. However, after a year of working with the Council's Events Team on the 2009/10 festival, they have now indicated a willingness and desire to continue to be involved in the governance and delivery of events and festivals for the benefit of the Christchurch community.
- 46. The reasons why the Council might consider not forming a new charitable trust as a Council-controlled organisation and extend the current interim licence arrangement with the Festival City Trust are as follows:
 - (a) The Festival City Trust established the WBF in 1994 and has run and operated the WBF successfully every year since that date (including a year of Council ownership).
 - (b) The Festival City Trust has demonstrated the ability over a long period of time to successfully operate and grow the WBF.
 - (c) The WBF is a unique event, the success of which is largely built around the 'know how' and relationships that have been developed by the Festival City Trust over a long period of time, which would not be easily replicated by another operator. Whilst the Council has secured the services of Jodi Wright as manager for a total of three years, it may be perceived that there would also be value in continuing to secure the services of the Festival City Trust at a governance level.
 - (d) As a substantial portion of the income of the WBF (87 per cent at the time of purchase) is sourced from grants, sponsorship and donations, continuity and stability in terms of the entity and personnel dealing with potential donors is important to the successful operation of the WBF.

- (e) The Festival City Trust has recently appointed two additional trustees to its Board and has indicated a willingness to be involved in the governance and delivery of events and festivals for the benefit of the Christchurch community.
 - (f) The Council has an existing contractual relationship with the Festival City Trust in relation to the 2009/10 WBF, which can be easily replicated if desired.
47. The Festival City Trust has sought a further appointment as licensee to use the Council's WBF intellectual property and other assets to operate the WBF for a further three years. If the interim licence to the Festival City Trust for the 2009/10 year was to be extended for such a period it is envisaged that it would include the following general requirements:
- (a) To operate the WBF annually in Christchurch, and not elsewhere
 - (b) To exclusively use the services of Jodi Wright and the Council's Events Team to manage the WBF
 - (c) To regularly liaise with and report to the Council
 - (d) To hold sufficient reserves from profitable years to offset any losses made in other years
 - (e) Not to use the WBF to cross-subsidise any of its other activities
 - (f) Only to distribute WBF profits to such charities as the Council directs.
48. The Hearings Panel, in considering the Festival City Trust proposal in relation to the establishment of a new charitable trust, recommends in a majority decision the establishment of a new charitable trust as a Council-controlled organisation for the following reasons:
- (a) The reversal of a previous decision in 2008 to purchase the WBF from the Festival City Trust.
 - (b) Greater Public Accountability. The Hearings Panel considered that the issue of public accountability was very important and that the best outcome in that context would be achieved by establishing a trust as a council-controlled organisation rather than relying on any contractual arrangements to be negotiated with the Festival City Trust. A new trust formed as a Council-controlled organisation would be subject to the reporting requirements of the Local Government Act 2002.
 - (c) The Hearings Panel's preference was for the Council to exercise as much influence over a future trust as possible. It was felt that the ability of the Council, as settlor of a new Trust, to appoint and remove trustees would give the Council a level of influence over the activities of the trust.
 - (d) It was not thought that the advantage arising from the continuity afforded by licensing the Festival City Trust to continue to operate the WBF was sufficient to outweigh the Hearings Panel's concerns relating to public accountability and influence.