



Resource and Performance Agreement

Cairns Regional Council
("Council")

and

Friends of the Botanic Gardens Inc.
("the Friends")

DATED THIS

DAY OF

2020

PARTIES

Cairns Regional Council ABN 24 310 025 910	("Council")
Friends of the Botanic Gardens Cairns Inc. ABN 91 089 816 295	("the Friends")

BACKGROUND

- A. The Parties intend to work together to facilitate the aims and objectives of the Friends to:
- stimulate interest and community awareness in the activities of the Cairns Botanic Gardens (Botanic Gardens);
 - raise funds, generate ideas and run projects to improve the Botanic Gardens;
 - under the direction of the Botanic Gardens Curator, undertake approved work programs to enhance the Botanic Gardens; and
 - promote horticultural and botanical science in Cairns.
- B. Council has agreed to provide In-Kind assistance to the Friends and the Friends has agreed to accept the In-Kind assistance on the terms and conditions set out in this Agreement.

1. Reference Particulars

1.1. Council

Name: Cairns Regional Council
ABN: 24 310 025 910
Address for Notices:
Delivery: 119-145 Spence Street, Cairns QLD 4870
Post: PO Box 359, Cairns QLD 4870

1.2. Friends

Name: Friends of the Botanic Gardens Cairns Inc
ABN: 91 089 816 295
Address for Notices:
Post: 78-96 Collins Avenue, Edge Hill, QLD 4870
Email: info@botanicfriendscairns.org.au

1.3. Activities and Events

The Friends are responsible for the management and delivery of all activities and events outlined on the annual calendar of events. These activities and events include but are not limited to:

- Starry Night Cinema
- Jazz under the Stars
- Weekly and annual plant sales
- Guided tours
- Monthly talks

1.4. Term

The term for this agreement will be for a period of five (5) years commencing on 1 January 2021 and expiring 1 January 2026

The parties intend to carry out their obligations in accordance with the terms of this agreement.

2. Interpretation

2.1. General

Unless:

2.1.1. The context otherwise requires; or

2.1.2. A contrary intention appears,

This agreement is to be interpreted by reference to the definitions and subsequent provisions of clause 3.

3. Dictionary

3.1. In this Agreement unless inconsistent with the context or subject matter: -

address for service means the address of each party appearing in this agreement or any other address nominated in writing by a party to the other party as its new address for notices or service;

agreement means this Resource and Performance Agreement and any amendments to this agreement;

approvals means any approvals required to be issued by any Authority in connection with the Botanic Gardens and all changes to those Approvals which may need to be agreed to by that Authority;

Authority means any federal, state or local government or regulator, which is required to approve all or any aspect of the Activity or Event;

Botanic Gardens means the Flecker Botanic Gardens and its associated infrastructure;

Business Days	means a day (other than a Saturday, Sunday or public holiday) on which banks are open for business in Queensland;
Council	means the Cairns Regional Council;
Friends	means the Friends of the Botanic Gardens Inc;
Friends House	means the Council-owned office building inside the grounds of the Botanic Garden which is jointly utilised by Council and the Friends;
Insolvency Event	occurs if the contractor becomes the subject of bankruptcy proceedings, winding up proceedings, is declared bankrupt, has a winding up order made against it, has a receiver and/or manager or administrator appointed or enters into a scheme of arrangement with creditors;
Laws	means any statute, regulation or ordinance made by any Authority and where appropriate, includes the applicable common law;
Term	means the period specified at clause 1.4;
Visitor Centre	means the Council-owned facility located at Lot 402 on SP241304, 64-76 Collins Avenue which houses administration staff and has meeting and display spaces and a shop;
Volunteers Supervisor	the Council staff member nominated as the first point of contact between Council and the Friends.

3.2. This agreement is to be construed as follows unless the context requires otherwise:

- 3.2.1. Reference to one gender includes all genders;
- 3.2.2. Reference to the singular includes the plural and vice versa;
- 3.2.3. Reference to a person includes a corporation or other entity and vice versa;
- 3.2.4. Reference to a schedule means a schedule to this agreement;
- 3.2.5. Reference to money is to Australian dollars.

4. The Friends Obligations

4.1. The Friends must:

- 4.1.1. no later than September of each year, and in accordance with clause 1.3, provide Council a calendar of events to be delivered by the Friends for the forthcoming calendar year.
- 4.1.2. provide no less than one (1) months' notice to Council for any events that are to occur that have not previously been advised in accordance with clause 4.1.1.
- 4.1.3. comply with Council booking procedures.
- 4.1.4. obtain all necessary licences, permits, consents required from all government authorities to conduct activities within the Botanic Gardens; including but not limited to a General Activity permit from Council in accordance with its local laws.
- 4.1.5. conduct activities within the Botanic Gardens professionally, competently and in a business-like manner.
- 4.1.6. ensure that insurance is in place to:

- 4.1.6.1. cover personal accident, injury or theft of any members undertaking Friends' initiated activities; and
- 4.1.6.2. cover public liability for any member of the general public attending a Friends' organised and directed event.
- 4.1.7. provide an incident report to Council if an incident occurs whilst Friends are working on Council land.
- 4.1.8. maintain responsibility for opening and closing the Friends' House shop on week days and for managing a reference library for use by the public, members, visitors and Council staff.
- 4.1.9. maintain responsibility for managing Friends members in the plant propagation area and co-ordinating plant sales.
- 4.1.10. Provide and maintain, at the Friends expense, any items for the sole use of the Friends; and
- 4.1.11. Provide at the Friends expense administration support staff for Friends activities and operations.

5. Council Obligations

5.1. Council will:

- 5.1.1. provide the necessary financial and staffing resources to maintain the Botanic Gardens precinct to a standard determined by Council and with the intent of enabling the Friends to meet its stated aim. Council reserves the absolute right to make all decisions concerning the management, staffing and operation of the Botanic Gardens precinct.
- 5.1.2. conduct appropriate induction/briefings in relation to the activities Friends' members are undertaking such as emergency evacuation for Friends volunteers.
- 5.1.3. provide the Friends, at no cost, use of Friends House, the Visitor Centre and Botanic Gardens to enable the Friends to undertake their aims and objectives under this agreement.
- 5.1.4. remain responsible for opening and closing the Visitor Centre on a daily basis as well as cleaning and external services, such as water and electricity, for both the Visitor Centre and Friends House.
- 5.1.5. Maintain the buildings and providing external services, such as water and electricity.
- 5.1.6. provide approved plant material to the Friends gardeners for propagation purposes and general nursery consumables.
- 5.1.7. waive all Council application and usage fees for any General Activity permit in accordance with clause 4.1.3.
- 5.1.8. waive all Council costs associated with the delivery of Starry Night Cinema on an in-kind basis
- 5.1.9. attend, in the capacity of an ex officio member of the management committee of the Friends, all management committee meetings.

- 5.1.10. consult with the Friends in relation to Council funded capital projects at the Botanic Gardens. Council reserves the right to make the final decision on any capital project.

6. Calendar of Events

- 6.1. Upon receipt of the calendar of events both parties will work together to agree on proposed program and an allocation of resources, including access to facilities, to conduct the activities and events.
- 6.2. The annual program of Friends activities and events, and any associated allocation of Botanic Gardens resources, may be varied by agreement between the Parties. Either Party may propose changes to the program. Approval for any changes will not be unreasonably withheld.
- 6.3. The Friends will use best endeavours to ensure any activities and events conducted by the Friends will not impose burdens on Botanic Gardens resources outside what is agreed under this agreement.

7. Use of Friends House

- 7.1. The Parties agree that
 - 7.1.1. the Friends House provides a service to the visitors of the Botanic Gardens and complements the services of the Visitors Centre.
 - 7.1.2. use of Friends house by the Friends will be determined between the parties throughout the term, in consultation between the President of the Friends and the Council Curator of the Botanic Gardens; and
 - 7.1.3. Any disputes that arise in relation to the use of Friends House will be resolved in accordance with Clause 16.

8. Reporting Obligations

- 8.1. The Friends must submit to Council no later than 30 March of each year of the term, a written report, in a format acceptable to Council, outlining:
 - 8.1.1. major achievements and activities.
 - 8.1.2. financial summary of the operations of the Friends; and
 - 8.1.3. detailed financial report of the operations of the Friends.
- 8.2. All reports are to reflect the financial year immediately preceding¹ the report date.

9. Insurance and Liabilities

- 9.1. The Friends must, prior to the commencement date, take out and maintain insurance for the duration of this agreement for public liability to the value of \$20,000,000.00 per incidence and otherwise in respect of the Friends activities and potential liabilities to Council and third parties under this agreement and the Friends must cause Council's interests to be noted on its relevant insurance policies. The Friends must provide Council with evidence of these insurances prior to conducting the first scheduled event or when requested by Council.

¹ That is, a report due by 30 March 2021, must reflect the financial year ending 30 June 2020.

- 9.2. The parties acknowledge that Council is self-insured.
- 9.3. Council will not in any way be liable to the Friends for loss or damage the Friends suffers in connection with this agreement except to the extent any action, claim, charge, cost, damage or expense is caused by the act, omission, negligence or default of Council, or its employees, contractors or agents.
- 9.4. The Friends indemnifies Council against all losses, claims or damages Council incurs as a result of the Friends activities in respect to conducting any activity, negligence or failure to comply with the terms of this agreement except to the extent any action, claim, charge, cost, damage or expense is caused by the act, omission, negligence or default of Council, or its employees, contractors or agents.
- 9.5. This clause 9 shall survive termination or expiration of this agreement.

10. Governing law

This agreement is made in the state of Queensland and is to be construed with reference to the laws of the time being enforced in Queensland and the parties submit to the non-exclusive jurisdiction of the courts of Queensland.

11. Assignment

- 11.1. The Friends must not assign or subcontract any of the rights or obligations of the Friends under this agreement without the prior written consent of Council. Any consent given by Council:
 - 11.1.1. may be conditional; and
 - 11.1.2. will not relieve the Friends from the performance of any of its liabilities or obligations under the agreement prior to the date of assignment.
- 11.2. The Friends is liable to Council for the acts and omissions of sub-contractors and employees and agents of sub-contractors as if they were the acts or omissions of the Friends.

12. Successors and assignment

This agreement is binding on and ensures to the benefit of the parties and their administrators, executors, respective successors and permitted assigns.

13. Amendment

No amendment or variation is valid or binding on a party unless made in writing duly executed and signed by the parties.

14. Legal Fees

- 14.1. Each party is responsible for its own legal fees in relation to the negotiation, preparation and execution of this agreement.
- 14.2. Unless specified otherwise, the Friends must compel with its obligations under this agreement at its own cost.

15. Duty

The Friends will pay all duty (and any interest or penalties) assessed or otherwise payable in respect of this agreement.

16. Dispute Resolution

- 16.1. If a dispute arises in connection with this agreement, then a party may only deal with that dispute in the manner set out in this clause.
- 16.2. A party to a dispute which arises in connection with this agreement may give to the other party or parties to the dispute a notice specifying the dispute and requiring its resolution under this clause.
- 16.3. Within 14 days after a notice is given under clause 16.2 of this clause (or such longer period as is agreed in writing by the parties to the dispute) each party to the dispute must use its best efforts to resolve the dispute in good faith.
- 16.4. If the dispute is not resolved within 14 days, any party may take legal proceedings to resolve the dispute.
- 16.5. The provisions of this clause do not prevent any party from obtaining any injunctive, declaratory or other interlocutory relief from a Court which may be urgently required.

17. Relationship of Parties

- 17.1. Unless otherwise stated:
 - 17.1.1. Nothing in this agreement creates a joint venture, partnership or the relationship of principal and agent, or employee and employer between the parties; and
 - 17.1.2. No party has the authority to bind any other party by any representation, declaration or admission, or to make any contract or commitment on behalf of any other party or to pledge any other party's credit.

18. Notices

- 18.1. Formal Requirements
 - 18.1.1. This clause governs notices under this agreement unless another provision of this agreement expressly provides otherwise.
 - 18.1.2. A notice must be in writing.
 - 18.1.3. The Party giving the notice, or one of its officers, must sign the notice.
 - 18.1.4. If a Party is comprised of more than one person:
 - 18.1.4.1. a notice by that Party need not be signed by all of those persons if it expressly states that the signatory is, or signatories are, authorised by all of those persons to sign the notice; and
 - 18.1.4.2. the contractor of the notice need not enquire into the validity of the authorisation.
- 18.2. Service of Notices

A Party must give a notice by:

18.2.1. delivering it; or

18.2.2. posting it,

to the intended contractor's Address for Notices.

18.3. Receipt of Notices

18.3.1. A notice that is delivered or posted is deemed received:

18.3.1.1. if delivered, at the moment of delivery;

18.3.1.2. if posted at an address in Australia, two business days after posting;

18.3.1.3. if posted to an address outside Australia, five business days after posting.

19. Disclosure of information

19.1. Other than as provided in this agreement, Rotary must not disclose the terms of this agreement to any third party without Councils written consent.

19.2. Council may disclose the terms of this agreement as it sees fit.

19.3. This clause 19 shall survive termination or expiration of this agreement.

20. Counterparts


20.1. This agreement and any document required under this agreement may be executed in any number of counterparts, each of which is taken to be an original.


20.2. Where a party to this agreement requires more than one person to sign on behalf of that party, then those persons may execute this agreement in any number of counterparts, each of which is taken to be an original.


20.3. An executed counterpart may be delivered by email to the contractor.

Executed as an agreement


EXECUTED for and on behalf of **CAIRNS REGIONAL COUNCIL ABN 24 310 025 910** by its Delegated Officer in accordance with the Local Government Act 2009 in the presence of:

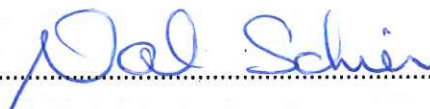

.....
Signature of witness


.....
Delegated Officer


.....
Full name of witness

EXECUTED for and on behalf of **FRIENDS OF THE BOTANIC GARDENS CAIRNS INC ABN 91 089 816 295** by the President who warrants their authority to sign in the presence of:


.....
Signature of witness


.....
President


.....
Full name of witness

3/02/2021