



Australian Government

Commonwealth National Lease – User Guide

Notes on using the Commonwealth National Lease template

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Introduction to this CNL User Guide for the Commonwealth National Lease

1. This User Guide and the Commonwealth National Lease

1.1 Background to the Commonwealth National Lease

- (a) The Commonwealth National Lease (**CNL**) was introduced by the Department of Finance (**Finance**) in 2011 to create efficiencies and appropriate risk management for the Commonwealth entity lease portfolio.
- (b) Since then, the Property Services Coordinated Procurement Arrangements (**PSCP Arrangements**) and the Commonwealth Property Management Framework (which is set out in Resource Management Guide 500 (**RMG 500**)) have changed the way the Commonwealth approaches its leased property portfolio. By adopting a Whole-of-Australian-Government approach and engaging a Strategic Property Advisor (**SPA**) and Property Service Providers (**PSP**), the Commonwealth has placed a greater emphasis on efficiency of leasing transactions and property/facilities management and on commercial outcomes, including by ensuring that leases appropriately engage with risk.
- (c) The CNL has been updated to assist with the implementation of the PSCP Arrangements and the Commonwealth Property Management Framework.

1.2 The CNL as a standard form for Commonwealth leasing

- (a) The CNL is a leasing template intended to be used by Commonwealth tenant entities. It is designed to assist Commonwealth tenant entities with lease negotiations as using standard form documents can reduce the time and costs associated with negotiations. In addition, using standard form documents assist the commercial office market's understanding of the Commonwealth's preference and requirements in leasing transactions. In both instances, resulting in Commonwealth preferred outcomes.
- (b) The CNL has the following key features:
 - (i) the CNL is primarily intended for office leasing transactions and some parallel ancillary uses. The CNL may be used for non-office leases, however Commonwealth tenant entities should seek appropriate advice on the form of the proposed lease before doing so;
 - (ii) the CNL is not mandatory for corporate or non-corporate Commonwealth tenant entities, however using the CNL is encouraged to facilitate consistency of risk allocation in leasing and lease management activity by Commonwealth tenant entities;
 - (iii) the standard outgoings position in the CNL reflects the Commonwealth's commercial preference for gross rent leases, which includes an assumption that an amount attributable to the value of outgoings is included in the baseline rental amount. The alternative clauses in this CNL User Guide allow the CNL to be used as a net lease (ie – where a prescribed set of the Landlord's operating expenses is payable in addition to the baseline rental amount) or a semi-gross lease (ie – where increases in statutory outgoings are payable in addition to an otherwise gross baseline rental amount including, for example, municipal rates, other rates such as water supply rates and taxes payable by the Landlord); and
 - (iv) the CNL has been drafted with reference to Commonwealth policy or legislative requirements and the Commonwealth's preferred risk and lease management positions (eg – in respect of maintenance requirements and green leasing credentials). Any amendments to the CNL potentially increase risk for Commonwealth tenant entities and should only be pursued with the benefit of appropriate advice and in justifiable circumstances.

- (c) The Commonwealth National Lease suite (**CNL Suite**) is a suite of documents developed by Finance to supplement the CNL on a range of leasing transactions. The CNL Suite includes:
 - (i) this CNL User Guide;
 - (ii) the standard form CNL template (**CNL template**);
 - (iii) guidance on the 'assignment' of Commonwealth leased property between non-corporate Commonwealth entities and a memorandum of understanding for the 'assignment' of Commonwealth leased property between non-corporate Commonwealth entities;
 - (iv) guidance on 'subletting' Commonwealth leased property between non-corporate Commonwealth entities and a standard form memorandum of understanding for the 'subletting' of Commonwealth leased property between non-corporate Commonwealth entities;
 - (v) a Lease Divestment Handbook;
 - (vi) a standard form deed of surrender;
 - (vii) a standard form deed of assignment of lease; and
 - (viii) a standard form sublease.
- (d) Commonwealth tenant entities can access the most recent version of the CNL Suite from the Finance website available at <https://www.finance.gov.au/government/property-construction/commonwealth-property-management-framework>.

1.3 Objectives of this CNL User Guide

The objectives of this CNL User Guide are to:

- (a) provide guidance on the CNL;
- (b) assist Commonwealth tenant entity staff and industry participants to understand the CNL;
- (c) identify situations where the CNL template may require amendment; and
- (d) provide explanatory information on the Commonwealth's approach to the CNL and office leasing transactions.

2. Using this CNL User Guide

- (a) This CNL User Guide contains:
 - (i) a brief explanation of the purpose of each clause;
 - (ii) hints for using each clause;
 - (iii) a description of key identified risks and issues with each clause;
 - (iv) where appropriate, alternative clauses for specific identified situations; and
 - (v) information on lease management practices.
- (b) The explanations in this CNL User Guide appear in the same order as the clauses in the CNL template. Capitalised terms have the meaning given to them in the Definitions section in the CNL template.
- (c) Site and use specific considerations may necessitate changes to the CNL template. For example, storage facilities, data centres, Premises at airports, Premises for high security activities or other special or mixed use Premises will have special requirements which may necessitate changes to the CNL template.
- (d) Further advice can be obtained from Finance by email at propertyframework@finance.gov.au. Advice can also be sought from your legal adviser or, for Commonwealth tenant entities, the entity's appointed PSP.
- (e) This CNL User Guide is intended to provide guidance notes and explanatory material only. It is not a substitute for legal or other advice necessitated by the circumstances.

3. Approvals required prior to binding arrangement

- (a) An approval under the *Lands Acquisition Act 1989* (Cth) to acquire an interest in land by lease, and approvals under the *Public Governance and Accountability Act 2013* (**PGPA Act**) and *Public Governance and Accountability Rule 2014* (**PGPA Rule**) must be obtained prior to a Commonwealth tenant entity entering into a binding arrangement (whether by execution of a lease or by binding heads of agreement, binding correspondence or exchange of correspondence which can be construed as a legally binding commitment).
- (b) Commonwealth tenant entities are also required to consider RMG 500 including lease endorsement and notification requirements (or any amending or replacement guidelines issued as a result of the enactment of the PGPA Act and/or PGPA Rule) (available at <https://www.finance.gov.au/government/managing-commonwealth-resources/pgpa-legislation-associated-instruments-and-policies>) in planning a lease procurement.
- (c) The commercial, operational and practical considerations around each lease procurement will necessitate a well thought out assessment of requirements, opportunities, constraints and risks which goes beyond the scope of this CNL User Guide. Officials are responsible for informing themselves of the policies that apply to a specific procurement. They should refer to their entity's Accountable Authority Instructions for guidance and, if needed, approach the relevant policy department for further information on a specific policy. More information on Procurement Connected Policies is available at <https://www.finance.gov.au/government/procurement/buying-australian-government/procurement-connected-policies>.
- (d) The SPA and PSPs have been engaged to assist with these requirements and Commonwealth tenant entities are encouraged to consult with them as appropriate.

4. Using the correct version

- (a) The CNL Suite and the Commonwealth Property Management Framework are available from the Finance website available at <https://www.finance.gov.au/government/property-construction/commonwealth-property-management-framework>. The most recent version of the CNL template should be used unless there is a specific reason to use an older version (eg – if the parties agree to document a new lease using the terms of an existing lease based on an older version of the CNL). Finance recommends that users download the CNL template from the website each time such a lease is required, to ensure the most up-to-date version is used.
- (b) Finance advises against modifying or using a modified version of the CNL template without obtaining legal advice and, if appropriate, advice from a PSP appointed to the Whole-of-Australian-Government PSP panel.
- (c) Where the CNL template is modified and included in tender documentation, Finance recommends that the modified clauses be identified in a table (or similar format) or that the amendments be marked-up or tracked. This may assist landlords, in the preparation of their tenders, as well as Commonwealth tenant entities, in their evaluation of responses.

5. Date

5.1 Purpose

Insertion of the date on the signing page records the date the Lease was executed for future reference by the Parties.

5.2 Hints for use

- (a) The actual date of signing of the Lease should be inserted on the signing page. The Commencement Date of the Lease should only be inserted in the Information Table.
- (b) Where the Parties sign on different dates, the date the last Party signs the Lease should be inserted by hand at the time of execution.

6. Registration summary

The table below is a brief summary of registration requirements for each State and Territory. It is generally preferable for leases to be registered to attract the benefits of indefeasibility (a priority interest in the land).

State	Registration requirement to obtain indefeasibility	Plan requirements
ACT	<p>Leases with a term exceeding 3 years must be registered to obtain indefeasibility.</p> <p>There is no mandatory requirement for leases of 3 years or less to be registered as they are automatically afforded statutory protection to occupy, however, registration is required to protect the Tenant's right to renew against any subsequent purchaser of the land.</p>	<p>A Subleasing Plan is not required where the whole of the land or the whole of a building on the land is being leased.</p> <p>A Subleasing Plan is required where only part of the building is being leased and must be prepared, drafted and signed by a surveyor, architect, qualified technical officer or survey draftsman.</p>
NSW	<p>Leases with a term exceeding 3 years must be registered to obtain indefeasibility.</p> <p>Leases with a term of 3 years or less, including an option to renew, may be registered but do not need to be registered (unless an option provides for an extension, which when added to the original term would exceed 3 years).</p>	<p><u>Lease term of 5 years or less (including any option to renew)</u></p> <ul style="list-style-type: none"> plan is not required to be registered for 'whole' of the building plan is required where lease is for 'part' of a building <p><u>Lease term of more than 5 years (including any option to renew)</u></p> <ul style="list-style-type: none"> plan is not required to be registered for 'whole' of the building plan is required where lease is for 'part' of the building: <ul style="list-style-type: none"> must be a deposited plan of subdivision; must bear a completed subdivision certificate; and must be a survey
NT	<p>Leases with a term exceeding 3 years must be registered to obtain indefeasibility.</p> <p>Leases with a term of 3 years or less do not need to be registered (provided the Tenant is in possession of the Premises), but this does not include an option to renew beyond 3 years from the beginning of the original term.</p>	<p>Plans are not required where the whole of the land or the whole of a building on the land is being leased.</p> <p>Plans are required where only part of the building is being leased and must be prepared, drafted and signed by a surveyor, architect, qualified technical officer or survey draftsman.</p>
QLD	<p>Leases with a term exceeding 3 years must be registered to obtain indefeasibility.</p> <p>Leases with a term of 3 years or less, including an option to renew, may be registered but do not need to be registered.</p>	<p>Plans are not required to be registered if the lease is for the whole of the Building or an entire level.</p> <p>Where the lease is for a part of the Building or land, a survey plan must be registered.</p> <p>If the lease is for more than 10 years (including any options to renew) and it is a lease over part of land, it is treated as a deemed reconfiguration and development approval must be obtained from the local council.</p>
SA	<p>Leases with a term exceeding 1 year must be registered to obtain indefeasibility.</p> <p>Leases with a term of 1 year or less do not need to be registered (provided the Tenant is in possession of the Premises). However, options or rights to purchase will not be valid against subsequent dealings unless the lease is registered or protected by caveat.</p>	<p>Plans are required to be registered prior to being annexed to the lease.</p>

State	Registration requirement to obtain indefeasibility	Plan requirements
TAS	<p>Leases with a term exceeding 3 years need to be registered to gain indefeasibility.</p> <p>Provided the Tenant is in possession of the Premises, leases with a term of 3 years or less are indefeasible (whether or not the Tenant has an option to renew) and cannot be registered.</p>	Plans are required to be registered.
WA	<p>Leases with a term of 3 years or less are not registrable. Caveats may be registered to protect the Tenant's interest for shorter term leases.</p> <p>Leases with a term of more than 3 years but less than 5 years do not need to be registered (provided the Tenant is in possession) but should be registered to protect any future interests.</p> <p>Leases with a term exceeding 5 years (excluding options to renew) are required to be registered to obtain indefeasibility.</p>	A sketch plan of the Premises must be attached to the lease.
VIC	<p>Although registration is possible, it is not required and is rarely done. All Tenants in possession gain indefeasibility notwithstanding registration or the Term of the lease.</p> <p>Only leases that exceed 3 years may be registered.</p>	No specific plan requirements. A survey plan may be inserted into the lease. The description of 'premises' in the lease should include reference to the land contained in 'certificate of title volume # folio #'.

Guidance on specific clauses of the Commonwealth National Lease

7. Background to the clause-by-clause guidance

- (a) Part A to Part J of this CNL User Guide provide guidance on each clause of the CNL template, the purpose of the clauses and matters that Tenants (particularly the personnel responsible for the negotiation and management of the Lease) should be aware of for each clause.
- (b) Included throughout the clause-by-clause guidance is general commentary on issues likely to be encountered in the negotiation and administration of the Lease, such as:
 - (i) matters relating to the operation of the Premises or the Building;
 - (ii) the allocation of risk between the Parties; and
 - (iii) lease management considerations.

8. Optional clauses – contraction and expansion rights

- (a) This CNL User Guide includes a number of optional clauses for use by Tenants in circumstances where they require flexible use of premises (either by expanding or contracting their premises at various points during, or before the commencement of, a lease term). The optional clauses are set out at Annexure A to this CNL User Guide and can be inserted in the CNL template as appropriate.
- (b) The optional clauses address the following:
 - (i) **Expansion rights** – allowing for the Commonwealth tenant entity to increase the size of its premises as follows:
 - (A) **Option 1** – provides the Commonwealth tenant entity with a right of first refusal to lease additional space that becomes available in the Building; and
 - (B) **Option 2** – provides an option to take identified additional space at pre-agreed dates (eg – at years 5 and 7 of the Lease); and
 - (ii) **Pre-commencement contraction right** – providing for the reduction in the size of premises to be leased by a Commonwealth tenant entity prior to the commencement of the Lease.

Part A – Lease information, definitions and interpretation

9. Information Table

9.1 Purpose

- (a) The Information Table sets out the variable details that apply to the Lease, including any variation from the standard position in the CNL template. The CNL template has been prepared in a way that allows users to prepare Leases by completing the Information Table, without the requirement to amend the Lease terms unless there is a site or deal specific requirement to do so.
- (b) Each Item in the Information Table refers to a specific clause (or clauses) in the Lease and includes brief user notes to assist users in completing the Items appropriately. Some Items in the Information Table include elective details, for example:
 - (i) which clauses do or do not apply to the Lease;
 - (ii) if a Green Lease Schedule will be used, which version of the Green Lease Schedule applies; and
 - (iii) which Party is responsible for certain aspects of the Tenant's occupation of the Premises. For example, Item 20 of the CNL template Information Table specifies that (subject to the terms of CNL template clause 31) either the Landlord or the Tenant is responsible for cleaning the Premises, or vice versa.

9.2 Hints for use

- (a) Tenants should carefully consider the standard position of each clause before agreeing to a variation and be aware that an agreed variation for one Premises may not be appropriate for another.
- (b) The appropriate section for each clause of this CNL User Guide referenced in the Information Table should also be considered. More information on the Items in the Information Table is included in the commentary on the relevant CNL template clauses, except for Items 1 – 4 which are discussed below.

9.3 Parties – Landlord and Tenant (CNL template Items 1 & 2)

Purpose

These Items identify the Parties entering into the Lease. The names of the Landlord and the Commonwealth tenant entity, the Parties' Australian Company Numbers (if applicable), Australian Business Numbers and addresses for service are to be included here.

Landlord – Hints for use

The Landlord must be a legal entity. Natural persons, companies registered in accordance with the *Corporations Act 2001* (Cth), and incorporated associations, are legal entities. Business names and partnerships are not legal entities.

Appropriate identification of the Landlord should be carried out prior to committing to a lease to ensure that the Party purporting to grant the lease has the capacity to grant the lease and that the Party's liability as Landlord will not be capped in a way which poses an undue risk to the Tenant.

Tenant – Hints for use

Tenants should consider obtaining legal advice if trustees, custodians, consortia or other vehicles are presented as the potential Landlord.

Entity type	Information to be included	Example
A Non-Corporate Commonwealth Entity (NCCE) subject to the <i>Public Governance, Performance and Accountability Act 2013</i> (Cth)	The name of the NCCE representing the Commonwealth and reference to the Commonwealth	The Commonwealth of Australia as represented by the Department of ABC
A Corporate Commonwealth Entity (CCE) subject to the <i>Public Governance, Performance and Accountability Act 2013</i> (Cth)	Insert the name of the CCE	The Commonwealth of Australia as represented by the ABC Authority
Company incorporated under the <i>Corporations Act 2001</i> (Cth)	The name of the company (see www.asic.gov.au for more information on company searches)	ABC Pty Limited
An incorporated association (ie – an association incorporated under the relevant legislation of a State or Territory)	The name of the incorporated association including the words 'incorporated'	ABC Incorporated
A trust	The name of the trustee and the trust (and any additional information referred to above for corporate trustees as if the trustee was the landlord in its own capacity)	ABC Pty Ltd as trustee for the ABC Trust
A partnership	The name of the partnership and, where practicable, the full names of each of the partners	ABC Partners comprising Annabel Andrews, Bobby Brown and Claire Collins
An individual person	The name of the individual person	Annabel Bronwyn Collins

9.4 Land and Premises (CNL template Items 3 and 4)

Purpose

Item 3 is to be completed with the legal description of the Land on which the Premises are located.

Item 4 describes the Premises using its street address (including the location of the Premises within the Building) and the unique title reference of the Land.

Hints for use

The title reference and any reference to plans must be accurate to ensure the Lease can be registered. A title search will ensure the title reference is correct, verify the identity of the Landlord and ascertain the nature of the Land on which the Premises is located, including any prior registered interests affecting the Premises, which may have an impact on the Tenant's rights.

9.5 Lease management

- (a) The Information Table is designed to be used as a lease management tool by creating a lease summary with:
 - (i) commercial information; and
 - (ii) landlord/tenant responsibility sharing information.

- (b) Although Tenants should always have regard to the specifics of each clause, the Information Table can be used by lease managers to identify:
 - (i) the essential details of the Premises and the Term;
 - (ii) the essential commercial details of the Lease;
 - (iii) the details of the Landlord, including email and postal addresses; and
 - (iv) which Party is responsible for matters which may variously be allocated to either Party, for example, cleaning of the Premises and making good the Premises at the end of the Lease.

10. Interpreting this Lease – Definitions (CNL template clause 1.1)

10.1 Purpose

This clause defines terms that are used consistently throughout the CNL template and which have specific meanings in the Lease.

10.2 Hints for use

- (a) Many definitions cross refer to information which should be set out in detail in the Information Table or in the Schedules. If the Parties do not insert this information or insert incorrect information in the relevant Schedule the definition may become meaningless or inaccurate.
- (b) Some definitions (eg – the definition of the relevant CPI for Rent reviews) provide a default definition but specifically allow for that definition to be varied in the Information Table.
- (c) Where an alternative clause included in this CNL User Guide is used it is important to update any corresponding definitions (which are flagged in the relevant alternative clause) in CNL template clause 1.1. Definitions should be placed in this clause rather than in individual clauses for consistency and ease of interpretation.

11. Interpreting this Lease – Interpretation (CNL template clause 1.2)

11.1 Purpose

This clause provides general rules of interpretation that apply to the CNL template and which assist with its legal interpretation.

11.2 Hints for use

This clause should only be amended in exceptional circumstances and Tenants should not agree to any amendment without appropriate legal advice.

Part B – Grant of Lease, use and associated rights

12. Grant of Lease (CNL template clause 2)

12.1 Purpose

This clause provides that the Tenant is granted a leasehold interest in the Premises for the Rent, the Term and on the conditions contained in the Lease.

12.2 Hints for use

This clause should only be amended in exceptional circumstances and Tenants should not agree to any amendment without appropriate legal advice.

13. Option to renew the Lease (CNL template clause 3)

13.1 Purpose

- (a) An option to renew is a right held by a tenant to require a landlord to grant a new lease of the premises, usually on the same terms as the existing lease (other than the term, the number of options for renewal, the rent and any other terms which are required to be amended). Once an option is exercised, the parties will be treated as having an enforceable agreement for lease between them.
- (b) This clause sets out:
 - (i) the timeframes and procedures for the Tenant to effectively exercise any option to renew; and
 - (ii) the form that the new lease is to take.

13.2 Hints for use

- (a) **Number of Option Terms and length of Option Terms:** Item 13 of the Information Table provides for the number of Option Terms and the length of each Option Term. The preferable number of Option Terms should be considered at the initial negotiation stage.
- (b) **Timing for exercise of Option Term:** Clause 3.1 of the Lease provides a timeframe for the Tenant to exercise any option to renew. Item 13 of the Information Table provides for the selection of the window in which an Option Term can be exercised by the Tenant. The Commonwealth's preferred timeframes, based on an assessment of the Whole-of-Australian-Government lease portfolio considerations, are:
 - (i) for leases with a Term of 3 years or less, the option to renew may be exercised during the period that starts 6 months before the Expiry Date and ends 3 months before the Expiry Date; and
 - (ii) for leases with a Term that is longer than 3 years, the option to renew may be exercised during the period that starts 12 months before the Expiry Date and ends 6 months before the Expiry Date.

However, the notice period can be extended by an appropriate time. In deciding an appropriate minimum notice period for the exercise of the option, consideration should be given to the size of the Premises, the proportion of the building area occupied, the Term of the Lease and any other relevant circumstances. This is a matter that may be considered in conjunction with advice from the Tenant's appointed PSP.

- (c) **Rent review on Commencement Date of Option Term:** Item 14 of the Information Table provides for the selection of the type of rent review mechanism for the Rent review that is to occur on the Commencement Date of the Option Term. For example, if a fixed increase applies on the commencement of the Option Term, the identifiable, fixed amount can be inserted. If the initial Rent for the Option Term is not fixed, the mechanism for determining the initial Rent of the Option Term should be inserted.

The Tenant should consider the Rent review mechanism to be used at the Commencement Date of the Option Term (eg – fixed, CPI or Market Review), with its commercial advisor or PSP (if any) during the lease negotiation stage.

If the initial Term is lengthy it may be appropriate to consider a Market Review at the Commencement Date of the Option Term to ensure the Rent escalations during the initial Term have not resulted in the Tenant paying Rent that is significantly higher than market. This is a matter that may be considered in conjunction with advice from the Tenant's appointed PSP.

Minimum rent (or 'ratchet') clauses should be avoided but reasonable 'cap and collar' provisions can be considered.

- (d) **Rent review on Review Dates in Option Term:** Item 15 of the Information Table provides for the selection of Rent review mechanisms during the term of the option lease (ie – the dates during the Option Term that any of a Fixed Increase Review, CPI Review, Market Review or Mixed Review will apply).

13.3 Lease management

- (a) Prior to exercising an option to renew, Tenants should consider the ongoing value for money considerations, taking into account the Rent payable during the option term lease (including consideration of Rent review) informed by a market assessment.
- (b) If a market rent review mechanism applies for the Rent at the start of the Option Term, it is preferable for the Tenant to commence dialogue with the Landlord well in advance of the date for exercising the option. This will allow sufficient flexibility for alternative accommodation to be considered before exercising the option if the Tenant and the Landlord cannot agree on the market rent. Ideally, the market rent for the option term should be agreed, or determined, prior to the Tenant exercising the option.
- (c) Lease managers should make note of option timeframes to ensure that the Tenant is well placed to exercise the option to renew if that course of action is desirable.

14. Holding over (CNL template clause 4)

14.1 Purpose

- (a) This clause applies if the Tenant continues to occupy the Premises after the Expiry Date. If the Landlord does not demand possession on the Expiry Date, the Tenant is entitled to a rolling monthly tenancy, which can be terminated by either Party by giving 1 months' written Notice.
- (b) The Rent payable during the monthly tenancy is the same as the Rent payable immediately before the Expiry Date.

14.2 Hints for use

Tenants can amend the terms of the holding over provisions if it is justifiable in the circumstances, for example, to provide for:

- (a) longer rolling periods (eg – quarterly – and the corresponding amendment to the Notice period made);
- (b) different commercial terms (eg – the Parties may agree a rent review fixed, CPI or Market Review) will apply on the start of the holding over period; or
- (c) a rent review if the holding over period continues for a specified period (eg – for 1 or 2 years).

14.3 Lease management

Where possible, Tenants should avoid holding over to maximise certainty of their current and future tenancy arrangements.

15. The Landlord's reserved rights (CNL template clause 5)

15.1 Purpose

- (a) This clause entitles the Landlord to pass Services through the Premises if there are no other reasonable options.
- (b) The effect of this clause on the Tenant is limited in a number of ways:
 - (i) the clause only permits the Services to pass through the Premises where necessary and where there is no other reasonable alternative;
 - (ii) the clause is subject to CNL template clauses 7.1 and 10.1, which limit the Landlord's access to situations where the Landlord gives prior reasonable written Notice, entry is at reasonable times and the Landlord is accompanied by a person nominated by the Tenant (if the Tenant requires); and
 - (iii) the clause requires the Landlord to use its best endeavours to ensure there is no interference with the Tenant's occupation, use and enjoyment of the Premises.

15.2 Hints for use

- (a) Whether or not the Tenant will be affected by Services passing through the Premises depends on the nature of the Premises. If the Tenant occupies the whole Building it is more likely that Services will be passed through parts of the Premises, because Services are commonly passed through walls or in ceiling cavities. If the Premises are only part of the Building then it is less likely Services will be passed through because in those circumstances the Premises generally extends from the interior face of walls, doors and windows and from the surface of the floor to the underside of the false ceiling on a particular floor.
- (b) Tenants should consider whether any particular security requirements necessitate an amendment to the standard provision. See paragraph 20 of this CNL User Guide for more information on the Landlord's access and security provisions in the CNL template.

16. Measurement (CNL template clause 6)

16.1 Purpose

This clause provides a methodology for measuring the Premises and requires the Landlord to provide appropriate plans to the Tenant within a certain timeframe.

16.2 Hints for use

- (a) Method of measurement is important if Rent is determined based on Net Lettable Area, if Outgoings are payable, or if the Tenant and the Landlord need to ascertain which Party has responsibility for certain parts of the Building or Premises.
- (b) The *Property Council of Australia Method of Measurement for Lettable Area of March 1997* is the most commonly used method of measurement for commercial office premises, however, the method of measurement may not be appropriate for certain types of tenancies.
- (c) Measurement of the Premises may also be required if the Lease is registered. A summary guide to registration requirements is located at paragraph 6.

17. Quiet enjoyment (CNL template clause 7)

17.1 Purpose

- (a) This clause is an explicit restatement of the implied covenant of quiet enjoyment. It provides that the Tenant may hold and enjoy the Premises for the Term without interruption by the Landlord, or a person claiming through the Landlord.
- (b) This right is subject to the rights of the Landlord in the Lease – for example, the Landlord can enter the Premises to conduct certain repairs in certain circumstances.

17.2 Hints for use

- (a) The Lease establishes agreed exceptions to the basic principle of quiet enjoyment. The Commonwealth's position is that this clause does not need to be amended because the right to quiet enjoyment is fettered by the agreed position in other clauses of the Lease.
- (b) This clause should only be amended in exceptional circumstances and Tenants should not agree to any amendment without appropriate legal advice.

18. Use of Premises (CNL template clause 8)

18.1 Purpose

This clause explicitly permits the Tenant to use the Premises for an identified permitted use. The Permitted Use for the Premises is to be inserted in Item 9 of the Information Table.

18.2 Hints for use

- (a) Unlike many commercial leases, the permitted use provisions in the CNL template are not expressed in negative terms (ie – the clause does not restrict the Tenant from using the Premises for any use other than the Permitted Use). This is the Commonwealth's preferred position because it allows the Commonwealth some flexibility in its use of the Premises. It is also considered to be uncontentious because it is unlikely that the Tenant's use of the Premises will be undesirable or offensive.
- (b) If this clause is amended, the agreed Permitted Use must be broad enough to capture the full range of uses contemplated by the Tenant and not too restrictive, in case the Tenant no longer requires the Premises. The Permitted Use must also be sufficiently flexible so that if there is machinery of government change or a restructure or abolition of the Commonwealth tenant entity, a new Commonwealth tenant entity may occupy the Premises and that new entity's future use can be accommodated.
- (c) Commonwealth tenant entities should resist amendments to this clause that prevent the Tenant from carrying on, or permitting to be carried on, any annoying or offensive business (as distinct from 'nuisance') as it is a subjective requirement.

19. Rights of access and use (CNL template clause 9)

19.1 Purpose

This clause establishes the Tenant's right to unrestricted access to the Premises and specifies that the Tenant's access to Common Areas can be restricted by the Landlord's reasonable directions.

19.2 Hints for use

- (a) A Landlord may only restrict the Tenant's access to Common Areas if the Landlord is genuinely concerned that the Tenant's access may impact on the Landlord's ability to operate and maintain the Building.
- (b) If the Tenant occupies the entire lettable area of the Building, but has not leased the entire Building, an alternative clause may be necessary to specify areas that do not form part of the Premises that the Tenant has an exclusive right to use (ie – bathrooms and tea rooms). The relevant alternative clauses are set out below.

19.3 Alternative clauses

The following clauses may be used instead of the existing subclauses in CNL template clause 9.1 if the Tenant requires the exclusive use of Common Areas:

1.1. ...

- b. *unrestricted access to and use of the toilets, tea rooms, lift lobbies and external balconies (which are not included in the Premises) on those floors of the Building of which the Tenant is the sole occupant.*

- #.1.2. *The Parties agree that:*
- a. *the rights of the Tenant in clause #.1.1.b apply to exclude access to and use of those areas by third parties and the Landlord without the Tenant's prior consent; and*
 - b. *while the rights of the Tenant referred to in clause #.1.1 exclude rights of access by third parties and the Landlord, they are not intended to give the Tenant any leasehold interest over those parts of the Building other than the Premises however they do confer on the Tenant appurtenant licence rights which run with the estate created by this Lease.*

20. Landlord's rights to inspect and enter (CNL template clause 10)

20.1 Purpose

- (a) This clause controls the Landlord's access to the Premises. Before entering the Premises the Landlord must:
 - (i) provide reasonable prior notice;
 - (ii) schedule access for a reasonable time (eg – during Normal Business Hours); and
 - (iii) be accompanied by an escort, provided by the Tenant, to ensure compliance with any security requirements.
- (b) If the Landlord satisfies these requirements, access can be given but it will be subject to the expressed limitations in the clause. For example, the Landlord may only inspect the Premises once every 6 months.
- (c) These limitations generally do not apply in the case of an emergency. In that case, a Landlord is entitled to enter at any time without prior notice (if giving notice is impracticable) and is required to advise the Tenant after access has occurred. This explicit permission allows the Landlord to ascertain and remedy the cause, or limit the effect of the emergency, which will likely benefit both Parties.
- (d) If the Landlord accesses the Premises it is required to minimise interference, to comply with all Laws, to use its best endeavours to avoid causing damage, and make good any damage caused. CNL template clause 10.3 requires the Landlord to indemnify the Tenant in respect of Claims resulting from the Landlord entering the Premises otherwise than in accordance with its right to do so in the Lease.

20.2 Hints for use

- (a) Commonwealth tenants often require restrictive Landlord access provisions, particularly due to security considerations. The CNL template clause will likely be appropriate for most office tenancies, but consideration should be given to the particular Commonwealth tenant entity's security requirements which might necessitate that a more restrictive alternative clause is used.
- (b) The CNL template requires the Parties to act cooperatively and reasonably in relation to performing their obligations under the Lease. This applies to the Landlord's rights to access the Premises, including in relation to providing Notice or providing an escort to accompany the Landlord. This ongoing obligation alleviates concerns that a Tenant could frustrate the Landlord's reasonable access expectations by refusing to provide an escort, or that a Landlord could provide short notice before an inspection or unreasonably exercise its rights to access.

20.3 Alternative clauses

If the Tenant's security requirements require restrictions in emergencies – then CNL template clause 10.2.1 can be replaced with the following alternative clause:

- #.2.1. *If there is a fire, flood or other emergency which poses a risk to life or affects the safety of the Building, the Landlord may permit or organise for emergency services*

(such as fire brigade, ambulance, state or federal emergency services and police) to enter the Premises unaccompanied by a representative of the Tenant:

- a. *at any time; and*
 - b. *without giving notice to the Tenant (if that is impracticable and the Landlord has used its best endeavours to contact the Tenant),*
- to ascertain and, if necessary, remedy the cause or limit the effect of the emergency.*

21. Alterations and Fittings (CNL template clause 11)

21.1 Purpose

- (a) This clause provides that the Tenant may not make most Tenant's Alterations without obtaining the Landlord's prior consent. However, the Landlord's consent is not required if the Tenant's Alterations:
 - (i) are necessary to comply with Laws and Requirements or for demonstrable health and safety reasons;
 - (ii) are not structural and do not impact on the Services; and
 - (iii) are sufficiently well described by the Tenant by providing reasonably detailed plans and specifications.
- (b) The clause sets out how the Tenant is to seek and obtain consent to any Tenant's Alterations, what conditions the Landlord may impose on consent, how the Tenant is to carry out work and how the Tenant's Alterations will be treated once finished.
- (c) The Landlord cannot unreasonably withhold or delay its consent to any proposed Tenant's Alterations.
- (d) When requesting consent, the Tenant must provide reasonable details of the planned Tenant's Alterations so the Landlord can make an educated decision to consent. The Tenant is also responsible for reasonable costs of that approval (eg – the Landlord having to engage a professional to properly consider the request).
- (e) The Tenant is to perform any Tenant's Alterations:
 - (i) in a proper manner;
 - (ii) complying with all relevant Laws or Requirements; and
 - (iii) without interfering with other aspects of the Building, such as the Services, unless permitted by the Landlord.
- (f) The ownership of the Tenant's Alterations, once they are completed, may affect the Tenant's end of lease considerations and make good obligations. Generally, the Tenant may remove the Tenant's Alterations (in which case it must repair any damage caused by the removal) whereas the Tenant may not remove any Fittings installed by the Tenant in the Premises which the Parties have agreed are owned by the Landlord.

21.2 Hints for use

- (a) It is common for Landlord consent to be required for Tenant's Alterations, subject to the requirement for a Landlord to act reasonably in giving or withholding its consent.
- (b) Generally, landlords impose conditions on the Tenant's Alterations. For example, the Landlord may require the Tenant to use reasonable endeavours to conduct disruptive work during certain hours of the day. The Landlord may have additional requirements for the way work has to be done that are not covered within the CNL template clause, which will need to be considered on a case by case basis.
- (c) If the Landlord uses a fitout guide, the fitout guide may set out standards for the design of tenancies in the Building to ensure that the tenancies are consistent, and of a particular quality, in the Building. Fitout guides may contain onerous provisions or costs. For example, a fitout guide may include restrictions to tenancy designs (resulting in less

usable space within the same lettable area), restrictions to building/tenancy access during fitout periods, or an inflated cost of utilising the Landlord's preferred contractor (ie – a lift driver). Commonwealth tenant entities should review any fitout guide proposed to be used by the Landlord during early negotiations to understand what is being agreed to, and its impact on, or impairment of, the Commonwealth tenant entities plans or budget and to ensure that the proposed fitout guide will not limit the Tenant's ability to reconfigure the Premises during the Term. If a proposed fitout guide is acceptable to the Commonwealth tenant entity, it should be included in a Schedule to the CNL template.

- (d) Commonwealth tenant entities should generally avoid limiting the provisions in CNL template clause 11.1.2. The Landlord's consent is not required where the Tenant's Alterations are necessary to comply with Laws and Requirements, for demonstrable health and safety reasons or if the Tenant's Alterations are not structural and do not impact on the Services. This provision, when read in conjunction with the Permitted Use (see paragraph 18 for more information), is intentionally broad to allow the Tenant to use the Premises for a variety of Government functions. For example, the Tenant will generally not be required to obtain the Landlord's consent to alterations relating to the reconfiguration of the layout of Premises to increase the efficiency of space or to allow for the Premises to be shared by other Commonwealth tenant entities (see also paragraph 55 in relation to the Tenant's ability to sublet or share the Premises with Commonwealth entities).
- (e) The word 'applicable' in CNL template clause 11.3.1.b is deliberately included to preserve the constitutional immunity of the Tenant, which provides for the Commonwealth's immunity from state laws. Non-corporate Commonwealth entities (entities which are not legally separate from the Commonwealth) will generally not agree to clauses which seek to bind the Commonwealth to comply with all Laws or Requirements. The preservation of constitutional immunity should be approached on a Whole-of-Australian-Government basis and concessions for individual transactions should not be made.
- (f) The CNL template clause assumes the Tenant will own the Fittings and Tenant's Alterations which allows the Tenant to elect to remove them at Lease end, or to leave them behind (see paragraph 52 for more information on make good). This might not be the case if, for example, the Tenant's Alterations are paid for by an incentive from the Landlord and the Landlord wants to own and depreciate the Fittings, in which case, the clause provides for a contrary agreement between the Parties that supersedes the allocation of ownership to the Tenant.
- (g) If Landlord-owned Fittings are installed in the Premises, the Lease must address who will repair and maintain them. The CNL template clause addresses this to some extent but it will need to be considered on a case by case basis.
- (h) Commonwealth tenant entities should consider the *Disability Discrimination Act 1992* (Cth) (**DDA**) and any associated legislation (such as the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) (**Premises Standards**)) when making decisions about alterations to the Premises. In particular, Commonwealth tenant entities may wish to consider:
 - (i) any reasonable adjustment the Commonwealth tenant entity is required to make by the DDA to ensure that its employees with disabilities can carry out the inherent requirements of their job;
 - (ii) whether the Building is a 'new building' or the Premises are a 'new part' as defined by the Premises Standards;
 - (iii) if the Permitted Use under the Lease is for a service centre or public facility element, the ability for prospective customers to access the Premises (taking into consideration section 23 of the DDA);
 - (iv) if the Building or the Premises do not comply with the Premises Standards or the DDA, ensuring that appropriate works are either undertaken, or procured to be undertaken, to comply with the Premises Standards, DDA or both.
- (i) Commonwealth tenant entities should pay particular attention to the application of the DDA and the Premises Standards when assessing prospective lease sites for service centres or public facilities that will form part of its Permitted Use.

21.3 Alternative clauses

If the Landlord will own an extensive list of Fittings installed as part of Tenant's Alterations, CNL template clauses 11.4.1 and 11.4.2 can be replaced with the following alternative clauses:

- #.4.1. The Fittings listed in Schedule ^add a Schedule and insert Schedule Number^ are owned by the Landlord and:*
- a. will be deemed to form part of the Premises;*
 - b. are not Tenant's Alterations or Tenant's Fittings; and*
 - c. to the extent practicable (given the nature of those Fittings), the respective obligations of the Parties relating to the Premises apply to those Fittings.*
- #.4.2. The Tenant agrees to maintain and repair all Fittings installed by the Tenant and the Tenant's Alterations.'*

Notes:

- (i) A case by case assessment of the best operational and value for money arrangement will need to be made.
- (ii) If the Tenant does not wish to take on a specific obligation to maintain and repair its Fittings and the Tenant's Alterations, alternative clause #.4.2 can be deleted.

21.4 Lease management

- (a) Tenants need to be aware that altering the Premises without consent may breach the Lease, and may cause the Tenant to be liable for significant damages to the Landlord. For example, a Tenant may be liable for the cost of restoring the Premises to the condition in which they would have been had the obligation not been breached.
- (b) Lease managers should take note of the ownership of Fittings installed in the Premises. Different obligations and cost consequences may arise at lease end depending on the ownership of Fittings. Any Fittings installed by the Tenant which are owned by the Landlord will not form the Tenant's Fittings or Tenant's Alterations and will be excluded from the Tenant's removal rights and obligations in the CNL template clauses. Any change to these clauses may change this outcome and require attention to the repair and maintenance obligations.
- (c) Lease managers should ensure any proposed Tenant's Alterations are compliant with the fitout guide (if any) before any works are undertaken.

22. Directory boards and signs (CNL template clause 12)

22.1 Purpose

This clause:

- (a) requires the Landlord to provide directory boards in the Building and maintain emergency and exit signage; and
- (b) permits the Tenant to affix signs:
 - (i) within the Premises which are not visible from outside the Building – without the Landlord's consent; and
 - (ii) within the Premises which are visible from outside the Building, or outside the Building – with the Landlord's consent.

22.2 Hints for use

- (a) Item 16 of the Information Table allows for a selection to be made if the Parties have agreed that the Tenant will have:
 - (i) the right to install External Signs with or without the Landlord's consent; and/or
 - (ii) naming rights for the Building.

- (b) If the Tenant has those rights, the applicable subclauses in CNL template clause 12 will apply to the Lease.

22.3 Alternative clauses

If the Parties negotiate controls relating to the content and location of advertising signs in the Premises or the Building which are inconsistent with CNL template clause 12, it may be appropriate for amendments to be made to the clause.

23. Car parking (CNL template clause 13)

23.1 Purpose

This clause applies if the Parties have agreed that the Tenant will have access to car parks. The number of bays and the cost per bay is to be included in Item 5 of the Information Table.

23.2 Hints for use

- (a) Item 5 needs to be considered on a case by case basis and marked as 'Not applicable' or amended if necessary (eg – if there is a separate licence, no specific bays or specifically reserved bays).
- (b) It is the Commonwealth's preferred position that any car parking arrangements are captured within the Lease and not in a separate licence.
- (c) The standard car parking clause in the CNL template provides the Tenant with a licence to use car parking bays in the Building. The car parking bays do not form part of the Premises.
- (d) If the licence fee for car parks is included in the Rent the relevant amount should be identified in Item 11 of the Information Table as 'Car Parking Rent', which is a component of Rent. CNL template clause 13.1.4 is an adjustment clause to cover situations where the car parking licence is terminated or the number of car parking spaces changes.
- (e) Where the licence fee is calculated separately to the Rent the alternative clause below should be used and the fee should be noted in the Information Table. The cost should be calculated as a cost per bay per annum.
- (f) Car parking details should be established in the initial negotiation phase and recorded in the heads of agreement.

23.3 Alternative clauses

Clause for separate car parking licence fee:

- (a) **Information Table:** *Item # \$ per bay per annum*

- (b) **Clause:**

#.1. Tenant has exclusive rights to the Car Parking Bays

#.1.1. *The Tenant is entitled to the use of the Car Parking Bays on the terms contained in this clause.*

#.1.2. *The Landlord agrees that the Tenant is entitled to unrestricted ingress and egress from the Car Parking Bays.*

#.1.3. *The Tenant must pay to the Landlord the car parking fee specified in Item # (Car Parking Fee) by equal monthly instalments at the same time and in the same manner as it pays the Rent, and, if necessary, pay the first and last instalments of Car Parking Fee apportioned on a daily basis.*

#.1.4. *The Tenant may at any time and upon giving no less than 20 Working Days' Notice to the Landlord terminate its use of any or all of the Car Parking Bays. If the Tenant terminates its use of any of the Car Parking Bays the Car Parking Fee will be reduced accordingly.*

#.1.5. The Landlord must ensure that any car parking contractor appointed by it is made aware of the Tenant's rights under this clause #.1.

24. Compliance with Laws and Requirements (CNL template clause 14)

24.1 Purpose

- (a) This clause requires the Landlord and the Tenant to comply with Laws and Requirements.
- (b) The compliance requirements for the Landlord and the Tenant are in different forms to deal with the Commonwealth's constitutional immunity from State laws.

24.2 Hints for use

- (a) A Whole-of-Australian-Government approach is encouraged in relation to these provisions to avoid waiving the Commonwealth's constitutional immunity in individual lease transactions in response to purely commercial drivers for a particular site.
- (b) Tenants must not agree to any amendments to the CNL template clause without seeking appropriate legal advice.
- (c) The compliance obligation in this clause is intentionally generic. If a Commonwealth tenant entity is concerned about compliance with specific legislation, specific drafting may be required. For example, if a Commonwealth tenant entity is concerned about landlord compliance with the *Modern Slavery Act 2018* (Cth) (**MS Act**) because of higher risk activities undertaken by the Landlord (such as the provision of security or cleaning services), it should prepare an appropriate compliance clause having regard to:
 - (i) the guidance published by the Australian Border Force at <https://www.homeaffairs.gov.au/about-us/our-portfolios/criminal-justice/people-smuggling-human-trafficking/modern-slavery>, which is designed to assist Commonwealth entities to comply with their obligations under the MS Act, including any applicable reporting requirements and modern slavery statements; and
 - (ii) any template modern slavery clauses:
 - (A) prepared or endorsed by the Australian Border Force; and
 - (B) referenced by the Finance at <https://www.finance.gov.au/government/procurement/clausebank/modern-slavery>.

24.3 Alternative clauses

If the final Lease arrangement attracts particular legal or Commonwealth policy considerations (for example, additional building works or service provisions clauses are included which attract the operation of policies, Laws or Requirements covering work health and safety, industrial relations or construction activities), then the Parties may benefit from agreeing to an additional clause along the lines of the optional clause set out below.

#.2.2. Without limiting any other of its obligations the Landlord agrees to comply with the following requirements:

^insert relevant Laws and Requirements appropriate to the situation^.

25. Rules (CNL template clause 15)

25.1 Purpose

This clause provides for the Landlord and Tenant to agree to observe the Rules applying to the Building, provided the Rules are not inconsistent with the rest of the terms and conditions of the Lease.

25.2 Hints for use

Depending on the nature of the type of accommodation there may or may not be Rules that the Landlord has created for the Building. This clause only applies if Rules are specified in Item 18 of the Information Table or if the Landlord introduces Rules for the Building in accordance with CNL template clause 15.4.

25.3 Lease management

Tenants should ensure that any existing Rules to be included in the Lease are reviewed and agreed at the start of negotiations.

26. Storage (optional CNL template clause)

26.1 Purpose

This clause can be used if the Parties have agreed that the Tenant will have access to a Storage Area that is separate to the Premises. The cost of the Storage Area is to be included in Item 11 of the Information Table and described as 'Storage Area Rent'.

26.2 Hints for use

- (a) It is the Commonwealth's preferred position that any storage arrangements are captured within the Lease and not in a separate licence.
- (b) The optional CNL template clause below contemplates that the Tenant will pay for the Storage Area in the same manner as Rent. If other arrangements are made (for example, the cost is included within the Rent) then the optional clause below will need to be amended.
- (c) If relevant, a definition for Storage Area should be included in the Definitions section of the Lease. The definition should describe the specific location and size of the Storage Area.

26.3 Optional clause

#. Storage Area

#.1. Licence of Storage Area

- (a) *The Landlord grants to the Tenant a licence to use the Storage Area during the Term on the terms and conditions contained in this clause #.*
- (b) *The Landlord will not grant rights to other persons to use the Storage Area for storage during the Term.*
- (c) *The Tenant will pay to the Landlord that part of the Rent specified in Item # for the occupation and use of the Storage Area.*
- (d) *The Storage Area may be used by the Tenant for the storage of the Tenant's property in connection with the Permitted Use.*

#.2. Licence conditions

- (e) *The Tenant must:*
 - (i) *keep and maintain the Storage Area in good repair and condition having regard to its condition at the Commencement Date;*
 - (ii) *maintain the Storage Area in a clean and tidy condition;*
 - (iii) *not store inflammable substances (other than for customary office use) or bring heavy equipment into the Storage Area;*
 - (iv) *not make any alteration or addition to (including erecting any signs on) any part of the Storage Area;*
 - (v) *comply with any reasonable security and fire safety requirements of the Landlord in relation to the Storage Area; and*

- (vi) *promptly repair any damage caused to any part of the Storage Area as a result of or in connection with the Tenant's usage.*
- (f) *The Tenant occupies and uses the Storage Area at the risk of the Tenant.*
- (g) *The licence to use the Storage Area ends when the Lease ends.*
- (h) *On or before the expiration or sooner determination of the licence to use the Storage Area, the Tenant must:*
 - (i) *vacate and leave the Storage Area in a clean and tidy condition free of rubbish;*
 - (ii) *repair any damage to the Storage Area resulting from any deliberate or negligent act or omission or default of the Tenant; and*
 - (iii) *remove the Tenant's property from the Storage Area and make good any damage caused by the removal. Any property not removed will be deemed abandoned and the Landlord will be at liberty to deal with such property in any matter it sees fit at the Tenant's cost.*
- (i) *The Tenant must not assign or novate the licence to use the Storage Area to any other person except with the Landlord's prior consent. The Tenant may assign its licence to use the Storage Area to a person to whom it is permitted to assign the Lease or sublease its interest in the Premises.*

27. Communication equipment (optional CNL template clause)

27.1 Purpose

- (a) This clause applies if the Tenant wishes to install Communication Equipment outside the Premises, or within the Premises, where the extent of the installation is not allowed by the Permitted Use or other clauses (eg – installing equipment on a rooftop, in ceiling space or in risers where the definition of the Premises excludes these areas).
- (b) The Tenant is granted a right to install the Communication Equipment and a licence to use the space in which the equipment is installed. The optional clause below does not contemplate an additional licence fee as it is assumed the Parties have had regard to the installation of Communication Equipment when negotiating the Rent.
- (c) Whether this right applies will be agreed at the negotiation stage and noted in the heads of agreement.

27.2 Hints for use

- (a) This optional clause should be assessed and, if necessary, amended to meet the Tenant's particular requirements. Some intended Communication Equipment sites may require separate licences, some will have different commercial and practical arrangements and some Tenants will have different security or other specifications to be included.
- (b) The optional clause grants rights to install Communication Equipment in the Building. If the Premises are on a site where there is open land and the Tenant wishes to secure installation rights over that land, legal advice should be sought on the appropriate approach in those circumstances. In larger buildings and where the installation requires a range of infrastructure or services and access to various parts of the Building or Land it is likely that more detailed arrangements will need to be agreed, and documented, either in the Lease or in a separate licence.
- (c) Where the Tenant seeks a licence to use Communication Equipment owned by the Landlord then the terms of that licence may need to be negotiated on a case by case basis. One optional clause appears below but this will not be suitable for all situations and a specific clause may need to be drafted.

27.3 Optional clause

#. *Communication Equipment*

#.1. *Tenant may install Communication Equipment*

#.1.1. *In this clause #:*

**Communication
Equipment**

means a satellite receiver antenna dish, antenna, communication and data equipment, electrical cabling and ducting supplying a video network system or other communication or data equipment or system for the benefit of the Premises.

#.1.2. *The Tenant may install Communication Equipment in the Building with the Landlord's prior consent.*

#.1.3. *The Landlord agrees to give consent to the installation of the Communication Equipment promptly where the Communication Equipment is necessary:*

- a. to comply with Laws and Requirements;*
- b. for health and safety reasons; or*
- c. to achieve functionality of equipment needed for the Tenant's activities in the Premises and the Permitted Use.*

#.1.4. *Prior to the installation of the Communication Equipment the Tenant agrees to provide to the Landlord copies of plans and specifications relating to the installation of the Communication Equipment (to the extent reasonable given the Tenant's security requirements).*

#.1.5. *The Tenant:*

- a. retains the property in the Communication Equipment;*
- b. may (but is not required to) remove the Communication Equipment at any time on or before the expiry or termination of this Lease or any holding over;*
- c. agrees to repair or make good all damage to the Building caused by the installation or removal of the Communication Equipment; and*
- d. may access the Communication Equipment for the purpose of servicing and maintenance.*

(a) If the Parties have agreed that the Tenant will have a licence to use Communication Equipment owned by the Landlord:

#.1.2. *The Landlord grants to the Tenant a licence to use the Communication Equipment specified in Schedule ^insert a Schedule to the Lease containing this information and insert Schedule Number here^ for the Term and at no additional cost to the Tenant.*

(b) If a licence fee is payable the words 'at no additional cost' are to be deleted and the following clause inserted:

#.1.3. *In consideration of the rights contained in this clause [#] the Tenant agrees to pay to the Landlord the following fee ^insert agreed fee, when it is payable and any agreed review mechanism during the Term or on the Commencement Date of an Option Term^.*

Part C – Financial obligations

28. Rent (CNL template clause 16)

28.1 Purpose

This clause sets out the Tenant's obligation to pay Rent under the Lease upon receipt of a correctly rendered tax invoice.

28.2 Hints for use

- (a) The standard position in the CNL template is that the Tenant is required to pay Rent in advance on the first day of each month during the Term after the Rent Commencement Date. This position can be changed if the Parties have agreed a different arrangement for payment.
- (b) The Rent Commencement Date needs to be agreed and specified in Item 11 of the Information Table. If the Parties have agreed a Rent free period, the Rent Commencement Date may be later than the Commencement Date.
- (c) CNL template clause 27 applies to all taxable supplies arising by virtue of the Lease. It is therefore unnecessary to address GST in the Rent clause (or any other payment clause).

29. Rent review (CNL template clause 16)

29.1 Purpose

- (a) The general purpose of rent review clauses is to allow landlords to obtain current market rent from time to time for the relevant premises following the passing of time from the commencement of the lease. However, market rent review mechanisms can be complex and time consuming and therefore it is common for changes in rent to be calculated in other ways, such as fixed or specified reviews, with the rental increase being expressed as a percentage of the total annual rent, or as being proportionate to an increase in consumer price indices.
- (b) The standard Rent review position in the CNL template is that the commonly used options for reviewing Rent are included in the document and the applicable review mechanism is selected in Item 12 of the Information Table. These common mechanisms are:
 - (i) no increase in Rent;
 - (ii) fixed increase in Rent (see CNL template clause 17.1);
 - (iii) review based on CPI movement (see CNL template clause 17.2); and
 - (iv) Market Review (see CNL template clause 17.3).
- (c) The alternative clauses for mixed reviews (ie – a combination of the mechanisms listed above) are included in this CNL User Guide and can be selected and inserted into the Lease, if applicable.

29.2 Hints for use

- (a) Which Rent review option provides best value can only be determined on a case by case basis. Long term leases with fixed or CPI increases may warrant considerations such as interposing a Market Review at some stage during the Term or on exercise of an option to level out unsustainable or excessive increases. However, short term leases may benefit from only simple fixed increases, or CPI increase reviews, without interposing Market Review.
- (b) Commonwealth tenant entities may wish to consult with their appointed PSPs and other advisors on these considerations.
- (c) Some general observations concerning rent review considerations are set out below:
 - (i) **Value and compliance:** The rent review regime is an important consideration in assessing compliance with Commonwealth requirements and Tenants should scrutinise the rent review options in the context of the whole lease framework to ensure:

- (A) the lease represents value for money (as defined in the Commonwealth Procurement Rules);
- (B) that it represents a proper use (being efficient, effective, ethical and economical use) of Commonwealth resources (see section 15(1)(a) of the PGPA Act); and
- (C) that compliance with Commonwealth policy and guidelines is not compromised (for non-corporate entities, this is compulsory under section 21 of the PGPA Act).

Regard should be had to the Resource Management Guides and any related or supplementary guidance published by the Department of Finance at <http://www.finance.gov.au>, which are designed to assist Commonwealth entities to comply with their obligations under the PGPA Act and PGPA Rules.

No single rent review mechanism can be characterised as representing best value for money in all circumstances. The rent review regime needs to be assessed in light of the entire lease framework, the location of the Premises, the current market, informed market forecasts and any special use features afforded by the Premises. Expert valuation advice may be required early in the lease procurement process, particularly where Commonwealth entities are leasing heritage or special purpose spaces.

- (ii) **Holistic approach to assessing value for money:** In assessing the rent review framework for value for money a holistic consideration of the entire lease is needed to assess not only up front but also 'hidden costs' (eg – what direct payments are the Tenant liable for, how broad or how limited is the Tenant's Outgoings responsibility, what costs can the Landlord 'claw back' or demand under a range of clauses and whether the Lease materially shifts risk from the Landlord to the Tenant thereby exposing the Tenant to potential additional costs).
- (iii) **'Cap and collar' provisions:** Cap and collar provisions impose upper and lower limits on reviewed rent. There may be financial risk with these clauses. Detailed consideration of the whole of lease impact of such clauses is recommended, and where doubt exists, expert valuation advice is recommended before committing to the arrangement. It is the Commonwealth's preferred position to avoid minimum rent or ratchet provisions, particularly in long term leases.
- (iv) **Market rent, fixed increase and CPI reviews:** Market Reviews present a less certain approach than fixed increases and also, to some extent, CPI increase rent review regimes. The process can be time consuming, additional administrative tasks are required, and there is a need for stringent lease management systems to ensure that Tenants make best use of the review process and are not disadvantaged.

Market Review clauses are often lengthy and complex. Lease negotiators should ensure that the Commonwealth's position is not compromised by Landlord oriented clauses. Market Review regimes will usually require appointment of one or two valuers (depending on the method chosen), necessitate an objection regime and a referral regime for determination in the event Rent is not agreed, and need to incorporate reasonable boundaries and timelines for notices. An insufficiently detailed Market Review process can have adverse consequences and could result in extended and costly disputes.

The CNL template Market Review clause is an example of an acceptable approach but it needs to be considered for suitability on a case by case basis, and appropriate legal and/or valuation advice may be sought as needed. There are a broad range of considerations for Market Review clauses which are driven by the nature of the commercial agreement and background financial considerations. Therefore, the CNL template provisions may need to be amended, or replaced, to meet the site specific situation.

- (v) **Fixed or CPI increases:** Fixed or CPI increases provide a simpler and more certain option (though good market forecasting is still required), and reduce the administrative and cost impost on Rent reviews. Considerations include whether

reality checks are warranted by way of introduction of a Market Review at an appropriate point during the Term, or at the start of an Option Term.

29.3 Alternative clauses

(a) The clauses below provide different options for mixed review methods, being:

- (i) greater of Fixed Increase and Increase in CPI;
- (ii) lesser of Fixed Increase and Increase in CPI;
- (iii) lesser of Market and Increase in CPI; and
- (iv) greater of Market and Increase in CPI.

Each will be defined as a 'Mixed Review Method' in Item 12 of the Information Table and can be included as a subclause of CNL template clause 17 or in a Schedule to the Lease.

(b) Greater of Fixed Increase and Increase in CPI:

#. Greater of Fixed Increase and Increase in CPI

#.1. *In this Lease a Mixed Review Date means a date specified as such in Item # of the Information Table.*

#.2. *On and from each Mixed Review Date the Rent payable will be the greater of:*

- a. the Rent increased by the percentage specified in Item #; and*
- b. the Rent calculated as follows:*

$$A = \frac{B \times C}{D}$$

where:

- A is the Rent payable on and from the Mixed Review Date;*
- B is the Rent payable immediately before the Mixed Review Date;*
- C is the CPI current at the relevant Mixed Review Date; and*
- D is the CPI current at the last Review Date (which, for the first Review Date, is the Commencement Date).*

(c) Lesser of Fixed Increase and Increase in CPI:

#. Lesser of Fixed Increase and Increase in CPI

#.1. *In this Lease a Mixed Review Date means a date specified as such in Item # of the Information Table.*

#.2. *On and from each Mixed Review Date the Rent payable will be the lesser of:*

- a. the Rent increased by the percentage specified in Item #; and*
- b. the Rent calculated as follows:*

$$A = \frac{B \times C}{D}$$

where:

- A is the Rent payable on and from the Mixed Review Date;*
- B is the Rent payable immediately before the Mixed Review Date;*
- C is the CPI current at the relevant Mixed Review Date; and*
- D is the CPI current at the last Review Date (which for the first Review Date, is the Commencement Date).*

(d) Lesser of Market and Increase in CPI:

#. Lesser of Market and Increase in CPI

#.1. In this clause:

Appointment Date	<i>means:</i> <ul style="list-style-type: none">a. <i>where the Valuer is appointed on time under clause #.7 of this Schedule #- 5 Working Days after the end of the Appointment Period;</i>b. <i>where the President appoints the Valuer under clause #.8 of this Schedule #- 5 Working Days after the Valuer is appointed by the President under clause #.8 of this Schedule #.</i>
Appointment Period	<i>means 20 Working Days after the end of the Mixed Review Consideration Period.</i>
Determination Period	<i>means a period of 20 Working Days after the end of the Appointment Date.</i>
Mixed Review Consideration Period	<i>means 20 Working Days after the giving of a Mixed Review Notice in accordance with clause # of this Schedule #.</i>
Mixed Review Notice	<i>means a Notice of the Rent proposed for the relevant Rent Period and given under clause #.5 of this Schedule #.</i>
Proposed Rent	<i>means the rent proposed in a Mixed Review Notice for the relevant Rent Period.</i>
Rent Period	<i>means:</i> <ul style="list-style-type: none">a. <i>for the first Rent Period, the period commencing on the Commencement Date and ending on the day before the first Mixed Review Date; and</i>b. <i>for each subsequent Rent Period, the period commencing on a Mixed Review Date and ending on the earlier of the day before the next Mixed Review date and the end of the Term.</i>
Valuation Rules	<i>means the rules, criteria and considerations in Schedule #.</i>

#.2. *In this Lease a Mixed Review Date means a date specified as such in Item 12 of the Information Table.*

#.3. *On and from each Mixed Review Date the Rent payable will be the lesser of:*

a. *the Rent calculated as follows:*

$$A = \frac{B \times C}{D}$$

where:

A is the Rent payable on and from the Mixed Review Date;

B is the Rent payable immediately before the Mixed Review Date;

C is the CPI current at the relevant Mixed Review Date; and

D is the CPI current at the last Mixed Review Date (which, for the first Mixed Review Date, is the Commencement Date); and

b. *if a Mixed Review Notice is given in accordance with clause #.4 of this Schedule #, the Market Rent (on an open market rental basis) agreed by the Parties or determined under clause #.*

- #.4. *If a Mixed Review Notice is not given within the time specified in clause #.5 of this Schedule #, the Rent payable on and from the commencement of the relevant Rent Period will be increased by CPI Review.*
- #.5. *Not earlier than 3 months before the commencement of the second and each subsequent Rent Period and no later than 3 months after the commencement of that Rent Period the Tenant or the Landlord may give a Mixed Review Notice to the other Party.*
- #.6. *If the Party receiving the Mixed Review Notice does not notify the other Party of its acceptance of the Rent set out in that Mixed Review Notice by the end of the Mixed Review Consideration Period or the Parties fail to agree the Rent within that period, the Rent will be determined by a Valuer appointed in accordance with clause #.7 or clause #.8 of this Schedule #.*
- #.7. *The Parties agree to use their best endeavours to agree on a Valuer by the end of the Appointment Period.*
- #.8. *If the Parties fail to agree on a Valuer by the end of the Appointment Period either Party may request the President to appoint a Valuer and advise the Parties of the name and contact details of the Valuer within 5 Working Days of that request.*
- #.9. *The Valuer must:*
 - a. *determine the open market rental value of the Premises at the Mixed Review Date;*
 - b. *apply the Valuation Rules;*
 - c. *apply clause #.3.b of this Schedule #;*
 - d. *act as an expert and not as an arbitrator; and*
 - e. *give a written determination with reasons within 20 Working Days of the Appointment Date.*
- #.10. *In making a determination the Valuer must consider the written and oral submissions of a Party received within 10 Working Days after the Valuer's appointment.*
- #.11. *The Valuer's fees and expenses must be paid by the Parties in equal shares.*
- #.12. *The Valuer's determination is final and binding.*
- #.13. *If the Valuer fails to make a determination within the Determination Period, a Party may request the President appoint another Valuer and the provisions of clause # of this Schedule # relating to the appointment of and determination by the Valuer will apply to the extent practicable to the other Valuer.*
- #.14. *The Rent agreed or determined under this clause # is payable from the beginning of the relevant Rent Period.*
- #.15. *Until the Rent is agreed or determined under this clause # of Schedule #, the Tenant agrees to pay the Rent which applies immediately prior to the relevant Mixed Review Date.*
- #.16. *If the Rent changes by the operation of this clause # of Schedule #, the Parties agree to make any necessary adjustment by payment or repayment within 20 Working Days after the date of agreement or determination under this clause # of Schedule #.*

(e) Greater of Market and Increase in CPI:

#. Greater of Market and Increase in CPI:

#.1. *In this clause:*

**Appointment
Date**

means:

- a. *where the Valuer is appointed on time under clause #.7 of this Schedule #- 5 Working Days after the end of the Appointment Period;*

- b. where the President appoints the Valuer under clause #.8 of this Schedule #- 5 Working Days after the Valuer is appointed by the President under clause #.8 of this Schedule #.
- Appointment Period** means 20 Working Days after the end of the Mixed Review Consideration Period.
- Determination Period** means a period of 20 Working Days after the end of the Appointment Date.
- Mixed Review Consideration Period** means 20 Working Days after the giving of a Mixed Review Notice in accordance with clause # of this Schedule #.
- Mixed Review Notice** means a Notice of the Rent proposed for the relevant Rent Period and given under clause #.5 of this Schedule #.
- Proposed Rent** means the rent proposed in a Mixed Review Notice for the relevant Rent Period.
- Rent Period** means:
- for the first Rent Period, the period commencing on the Commencement Date and ending on the day before the first Mixed Review Date; and
 - for each subsequent Rent Period, the period commencing on a Mixed Review Date and ending on the earlier of the day before the next Mixed Review Date and the end of the Term.
- Valuation Rules** means the rules, criteria and considerations in Schedule #.
- #.2. In this Lease a Mixed Review Date means a date specified as such in Item 12 of the Information Table.
- #.3. On and from each Mixed Review Date the Rent payable will be the greater of:
- the Rent calculated as follows:

$$A = \frac{B \times C}{D}$$

where:

A is the Rent payable on and from the Mixed Review Date;

B is the Rent payable immediately before the Mixed Review Date;

C is the CPI current at the relevant Mixed Review Date; and

D is the CPI current at the last Mixed Review Date (which for the first Mixed Review Date, is the Commencement Date); and
 - if a Mixed Review Notice is given in accordance with clause #.4 of this Schedule #, the Market Rent (on an open market rental basis) agreed by the Parties or determined under clause #.
- #.4. If a Mixed Review Notice is not given within the time specified in clause #.5 of this Schedule #, the Rent payable on and from the commencement of the relevant Rent Period will be increased by CPI Review.
- #.5. Not earlier than 3 months before the commencement of the second and each subsequent Rent Period and no later than 3 months after the commencement of that Rent Period the Tenant or the Landlord may give a Mixed Review Notice to the other Party.

- #.6. *If the Party receiving the Mixed Review Notice does not notify the other Party of its acceptance of the Rent set out in that Mixed Review Notice by the end of the Mixed Review Consideration Period or the Parties fail to agree the Rent within that period, the Rent will be determined by a Valuer appointed in accordance with clause #.7 or clause #.8 of this Schedule #.*
- #.7. *The Parties agree to use their best endeavours to agree on a Valuer by the end of the Appointment Period.*
- #.8. *If the Parties fail to agree on a Valuer by the end of the Appointment Period either Party may request the President to appoint a Valuer and advise the Parties of the name and contact details of the Valuer within 5 Working Days of that request.*
- #.9. *The Valuer must:*
 - a. *determine the open market rental value of the Premises at the Mixed Review Date;*
 - b. *apply the Valuation Rules;*
 - c. *apply clause #.3.b of this Schedule #;*
 - d. *act as an expert and not as an arbitrator; and*
 - e. *give a written determination with reasons within 20 Working Days of the Appointment Date.*
- #.10. *In making a determination the Valuer must consider the written and oral submissions of a Party received within 10 Working Days after the Valuer's appointment.*
- #.11. *The Valuer's fees and expenses must be paid by the Parties in equal shares.*
- #.12. *The Valuer's determination is final and binding.*
- #.13. *If the Valuer fails to make a determination within the Determination Period, a Party may request the President appoint another Valuer and the provisions of clause # of this Schedule # relating to the appointment of and determination by the Valuer will apply to the extent practicable to the other Valuer.*
- #.14. *The Rent agreed or determined under this clause # is payable from the beginning of the relevant Rent Period.*
- #.15. *Until the Rent is agreed or determined under this clause # of Schedule #, the Tenant agrees to pay the Rent which applies immediately prior to the relevant Mixed Review Date.*
- #.16. *If the Rent changes by the operation of this clause # of Schedule #, the Parties agree to make any necessary adjustment by payment or repayment within 20 Working Days after the date of agreement or determination under this clause # of Schedule #.*

29.4 Lease management

- (a) It is very important to follow the terms of the review clause, particularly a Market Review clause. The Market Review method includes consideration of market and non-market forces and may result in a Rent determination that is not exactly the 'market' Rent for the Premises.
- (b) In particular, the Market Review clause directs the Parties by setting out assumptions for the review and listing matters to be regarded or disregarded. For example, the clause specifically requires current market incentives to be considered in determining the Market Rent for the Premises.

30. Payment of interest (CNL template clause 18)

30.1 Purpose

- (a) The standard position in the CNL template is that interest is payable by the Tenant for a significant delay in the payment of Rent.
- (b) Non-corporate entities should be aware of Commonwealth policy to pay interest in certain situations (see guidance published on Finance's website <http://www.finance.gov.au> for further information). This policy does not apply to the procurement of real property including leases and licences, so it does not preclude non-corporate entities from agreeing to pay interest in leases.
- (c) The clause provides:
 - (i) that interest is not payable until a Notice of demand is issued and 20 Working Days (or other agreed period) have passed from the service of that Notice and payment has not been made; and
 - (ii) an objectively ascertainable mechanism for determining the interest rate.

30.2 Hints for use

There is no single acceptable commercial approach and Tenants will need to consider the commercial merits and risks of any alternative proposed by the Landlord. However, the CNL template position is considered to be a commercially balanced approach to the payment of interest and on that basis, the clause should only be amended in justifiable circumstances.

30.3 Alternative clauses

If the Tenant does not agree to pay interest, the clause is to be replaced with the following clause:

#.1.1. Any provision expressed or implied in this Lease obliging the Tenant to pay interest on any moneys, including Rent, has no effect.

30.4 Lease management

Tenants should keep in mind that failure to pay Rent on time should be avoided and appropriate management mechanisms should be in place to minimise the risk of late Rent payment and interest becoming payable.

31. Directory board costs (CNL template clause 19)

31.1 Purpose

This clause provides for the Landlord's costs of providing the Tenant's listings on the directory boards to be reimbursed by the Tenant.

31.2 Hints for use

It is unlikely that this clause will need to be amended other than by replacing it with the optional clause below.

31.3 Alternative clauses

If the Landlord is to provide directory listings at its cost the clause can be replaced with the below:

#.1.1. The Landlord agrees to provide the Tenant's listings on the directory boards at no cost to the Tenant.

32. Cost of operating Services (CNL template clause 20)

32.1 Purpose

This clause provides that, except to the extent that utilities are explicitly recoverable from the Tenant, the Landlord will pay for all electricity, gas and water consumed in operating the Services.

32.2 Hints for use

This clause should only be amended in exceptional circumstances and Tenants should not agree to any amendment without appropriate legal advice.

33. Cost of consumption of utilities (CNL template clause 21)

33.1 Purpose

This clause provides that the Tenant will pay separately metered utility charges directly to the supplier for utilities consumed by the Tenant on the Premises (except for utilities consumed or used in operating the Services).

33.2 Hints for use

The payment obligation is only triggered if the Landlord has provided separate metering to the Premises in accordance with CNL template clause 33. The metering arrangements will vary according to the type of accommodation, and therefore, the clause may need to be amended to account for the circumstances. Metering arrangements are discussed below at paragraph 46.

33.3 Alternative clauses

If the Parties have agreed that the Premises will not be separately metered the following subclauses should be included in CNL template clause 21:

- #.1.2. *If any utility is not separately metered to the Premises then the Landlord agrees it will charge the Tenant for its consumption of that utility on a proportionate basis (**Estimated Utility Cost**).*
- #1.3. *The Landlord agrees it will act reasonably when determining the cost charged to the Tenant.*
- #.1.4. *If required by the Tenant, the Landlord will provide its reasons and assumptions for calculating the Estimated Utility Cost to the Tenant.*
- #.1.5. *If the Tenant disagrees with the Landlord's calculation of the Estimated Utility Cost it may refer the calculation to an Expert in accordance with clause #.*

Note: The Expert determination clause in the CNL template is clause 46.

34. Tenant pays outside Normal Business Hours air-conditioning cost (CNL template clause 22)

34.1 Purpose

This clause requires the Tenant to pay for air-conditioning and ventilation Services consumed outside Normal Business Hours if they are provided by the Landlord.

34.2 Hints for use

- (a) The hourly cost of air-conditioning and ventilation will be that set out in Item 27 of the Information Table and should be agreed at the negotiation stage.
- (b) Ventilation and air-conditioning are separate because, if a GLS is applicable, the utilisation (of ventilation without chilling where possible) outside Normal Business Hours (location and climate permitting) can deliver energy and cost savings.
- (c) If it is agreed at the lease negotiation stage that the rate will be reviewed then the alternative clause set out below should be included. The method of review will also be determined at negotiation stage (eg – if it is to be reviewed in the same manner as Rent or if it will be subject to agreement between the Parties).

34.3 Alternative clauses

- (a) In smaller Premises where the air-conditioning is not zoned, or where the Tenant has agreed to non-zoned air-conditioning, CNL template clause 22.1.1 should be replaced with the following alternative clause:

#.1.1 Tenant pays cost of requested air-conditioning outside Normal Business Hours

If, at the Tenant's request, the Landlord provides air-conditioning and ventilation Services outside Normal Business Hours under clause # the Tenant agrees to pay to the Landlord within 20 Working Days after receipt of a tax invoice complying with the GST law the cost of:

- a. *providing conditioned air calculated at the rate in Item # per floor agreed by the Parties for each hour or part of an hour during which that Service is being provided to that floor; and*
- b. *providing ventilation calculated at the rate in Item # agreed by the Parties for each hour or part of an hour during which that Service is being provided to that floor.*

- (b) If the after hours air-conditioning rate will be reviewed the following clause, and corresponding amendments to the Information Table, can be included:

#.2. Review of outside Normal Business Hours rate

#.2.1. *In this clause #.2:*

- a. *Outside Normal Business Hours Review Dates means ^insert each when the rate is to be reviewed^;*
- b. *Notice Period means no earlier than 3 months before and no later than 6 months after the relevant Outside Normal Business Hours Review Date.*

#.2.2. *Within the relevant Notice Period either Party may give the other Party a Notice requesting that the hourly rates for the provision of air-conditioning and ventilation Services outside Normal Business Hours be reviewed with effect from the relevant Outside Normal Business Hours Review Date.*

#.2.3. *The new hourly rates for the provision of air-conditioning and ventilation Services outside Normal Business Hours will be*

^Pick the option that reflects the review:

increased by ^insert CPI or Fixed Review percentage^

as agreed by the Parties or, failing agreement within 20 Working Days of a Notice under clause #.2.1, those rates will be determined by the Expert in accordance with clause #.^

- (c) If the rate is agreed between the Parties, the following clauses can be used:

#.2.3. *In agreeing a new hourly rate under clause #.2.2. the Parties (and the Expert if the issue is referred to the Expert) will:*

- a. *take into account:*
 - i. *equivalent rates for comparable buildings in the vicinity of the Building;*
 - ii. *the period which will elapse between the relevant Outside Normal Business Hours Review Date and the next Outside Normal Business Hours Review Date;*
 - iii. *the savings occasioned by energy efficiency measures the Landlord and Tenant have implemented (or should have implemented pursuant to the terms of the Lease) ; and*
 - iv. *the terms and conditions of this Lease; and*

- b. *not take into account any increased costs occasioned by the failure of the Landlord to maintain the plant and equipment for the air-conditioning and ventilation Services in accordance with this Lease.*

35. Rates, taxes and operating expenses (CNL template clause 23)

35.1 Purpose

This clause provides that the Landlord will pay for all rates, taxes and other operating expenses in respect of the Land, the Building and the Premises, except to the extent that those costs are explicitly recoverable from the Tenant. This exception generally provides for the Tenant to pay the cost of utilities consumed by the Tenant which are separately metered to the Premises directly to utility retailers, in accordance with clause 21 of the CNL template.

35.2 Hints for use

This clause should only be amended in exceptional circumstances and Tenants should not agree to any amendment without appropriate legal advice.

36. Payment of Outgoings by Tenant (CNL template clause 24)

36.1 Purpose

The standard position in the CNL template is that the Parties agree that the Rent is a gross rent and that no Outgoings are payable by the Tenant.

36.2 Hints for use

- (a) The gross Rent provision is based on an assumption that the Rent payable in accordance with the Lease includes a component/allowance attributable to the value of the Landlord's operating expenses relating to the Land, the Building and the Premises at the commencement of the Lease term.
- (b) A gross Rent is the preferred Commonwealth approach because it is more effective in forecasting financial commitments under the Lease. Costs for repair and maintenance for the Building Services and plant and equipment outside the Premises are a Landlord responsibility and a gross Rent better manages the Tenant's exposure to such costs.
- (c) In the negotiation process, regard should also be had to the variety of terminology used in the market to describe different 'types' of rent. A true gross rent scenario means that no Outgoings are payable by the Tenant. However, there are situations where landlords propose a 'gross' Rent plus increases in Outgoings being payable by the Tenant (this situation is sometimes referred to as 'semi-gross' rent). Terms such as double gross, triple net, double net and single net do not have a fixed meaning. The key is to assess the actual financial arrangements regardless of terminology used in correspondence or landlord proposals to ensure that the intent is clear and the financial implications are properly assessed. Commonwealth tenant entities should avoid triple net leases (for which the Commonwealth is responsible for all building costs, including capital expenditure) unless the relevant Commonwealth tenant entity has determined that there is a strategic benefit to it in entering into a triple net lease.
- (d) Tenants will need to assess the relative advantages and disadvantages of a net versus a gross rent and, if necessary, obtain advice on which option represents best value for money.
- (e) Part of the value for money assessment in choosing a particular lease proposal involves addressing the outgoings regime. If a net rent (ie – Rent plus an obligation on the Tenant to reimburse the Landlord for a range of the Landlord's operating expenses in respect of the Landlord, the Building and the Premises) is agreed, a clearly defined list of those operating expenses (eg – see clause 36.3(d), below) must be agreed during negotiations to avoid the risk of the Landlord passing on an excessively broad range of costs. The agreed list of operating expenses will be included in the Information Table in the Lease in order to define the 'Outgoings' to be paid by the Tenant.

- (f) An excessively broad Outgoings regime might undermine the value for money assessment of the lease proposal. In negotiation, correspondence, and the heads of agreement, vague references such as “all building outgoings” or “all the usual outgoings” should be avoided and a specific list of 'Outgoings' agreed. This is a matter that may be considered in conjunction with advice from the Commonwealth tenant entity's appointed PSP.
- (g) A net lease arrangement may remove the incentive for the Landlord to manage the Building efficiently and there may be no incentive for the Landlord to decrease costs if operating expenses are passed on to the Tenant. This is particularly the case in relation to energy and water because a Landlord may not need to make the building energy and water efficient.
- (h) Tenants should be careful to ensure that there is no double dipping (eg – where the Tenant is charged a percentage increase overall in Rent, as well as paying the increase in a selection of base operating expenses). The alternative CNL template clause providing for the Tenant to pay increases in Outgoings provides appropriate protection against this risk.

36.3 Alternative clauses

- (a) The following alternative clauses can be used where a net lease is agreed and the Tenant agrees to reimburse its proportion of the Landlord's operating expenses in respect of the Land, the Building and the Premises.
- (b) There are many variable aspects to an outgoing recovery scheme and for this reason the alternative clauses below provide for optionality and flexibility. For example, users are required to select alternative clauses depending on whether Outgoings are payable on an estimate basis with an annual adjustment or an actual basis with reimbursement on production of evidence of payment.
- (c) The Outgoings payable should be listed in Item 19 of the Information Table. Broad references to 'all rates, taxes, charges, impositions and levies' should be avoided. Instead, the Outgoings should include specifically identified municipal rates, water rates and, where usual in the jurisdiction, land tax.

Net lease

- (d) If the Rent is net (ie – the Tenant will pay a proportion of the Landlord's operating expenses for the Building and the Premises based on the area that the Premises bears to the net lettable area of the Building):
 - (i) insert the recoverable Outgoings in Item 19 of the Information Table (omitting the guidance notes), based on the following example list of reasonable recoverable operating expenses. In each case the list of Outgoings needs to be specifically considered and agreed so that only the agreed Outgoings to be paid by the Tenant are included in Item 19:

Outgoings means the following costs, charges and expenses properly and reasonably paid, charged or otherwise incurred by the Landlord and directly attributable to the Land or the Building:

- (a) *all rates, charges, assessments payable to the ^insert name of local municipal Authority^ or any other Authority responsible for the provision of reticulation of water, sewerage, fire protection or drainage services and any other utilities to the Land or the Building;*

[Guidance note - If only statutory outgoings are reimbursable paragraphs b. to m. inclusive should be deleted. Water (and other utility) consumption costs which are separately metered to the Premises and payable directly to a water retailer are not statutory outgoings and should not be included in the definition of Outgoings.]

- (b) *the reasonable costs of cleaning and maintaining the carpark servicing the Building;*
- (c) *the reasonable cost of removing and disposing of rubbish and waste from the Building;*

- (d) *the reasonable cost of all repairs, painting, plumbing maintenance and replacements in keeping the Building in good and substantial repair and condition;*
- (e) *the reasonable cost of supplying, operating, maintaining and repairing all Services;*
- (f) *all electricity for the Common Areas;*
- (g) *the reasonable cost of provision of security and caretaking services for the Building;*
- (h) *the reasonable cost of cleaning all Common Areas and all external surfaces of the Building and windows;*
- (i) *payroll tax charged or payable for people employed for the purpose of managing, operating, maintaining or cleaning the Building;*
- (j) *the reasonable cost of control and extermination of pests in the Building;*
- (k) *premiums for insurance of or relating to the Building for such risks, in such amount and for such period as the Landlord from time to time reasonably requires (but not including loss of rent);*
- (l) *the reasonable cost of gardening and plant hire for the Building; and*
- (m) *the reasonable cost of auditing the Outgoings and providing annual estimates and statements of expenditure incurred in respect of the Outgoings,*

provided that Outgoings do not include:

- (n) *land tax payable on the Land [Guidance note - In some cases land tax may be agreed as a head of Outgoings but if so, it needs to be limited so that it is calculated on the assumption that the Landlord owns the land on a single holding and non-absentee owner basis or as otherwise relevant in the region.];*
 - (o) *expenditure of a capital nature including the amortisation of capital costs;*
 - (p) *contributions to a depreciation or sinking fund;*
 - (q) *insurance premiums for loss of profits;*
 - (r) *Landlord's contributions to promotion funds;*
 - (s) *payment of interest and charges on amounts borrowed by the Landlord;*
 - (t) *costs of effecting work of a structural nature;*
 - (u) *costs of replacement, refurbishment or redecoration not reasonably attributable to fair wear and tear;*
 - (v) *costs of replacing items of plant and equipment unless the replacement is due to fair wear and tear;*
 - (w) *costs of any work or material recoverable by the Landlord under a policy of insurance;*
 - (x) *interest charges, fines, penalties and damages imposed upon, incurred by, awarded against or payable by the Landlord;*
 - (y) *costs payable directly by the Tenant or which are recoverable from other tenants, occupiers or users;*
 - (z) *costs recoverable by the Landlord from insurance required to be effected under this Lease.*
- (ii) delete CNL template clause 24.1 and insert the following clause:

#.1. Tenant to pay a proportion of Outgoings

#.1.1. In this Lease:

Commencement Date of each Outgoings Year	<p>means</p> <p>a. in the case of an Outgoings Year which ends in the first year of the Term - the Commencement Date; and</p> <p>b. in other cases - each 1 July falling within the Term.</p>
Estimated Outgoings	means a reasonable estimate of the Tenant's Contribution to Outgoings for the relevant Outgoings Year; <u>[Guidance note - This should be deleted where Outgoings are payable only after the Landlord has paid them and has produced the tax invoice, assessment and receipt.]</u>
Estimated Outgoings Notice	means a Notice which specifies the Estimated Outgoings for the relevant Outgoings Year; <u>[Guidance note - This should be deleted where Outgoings are payable only after the Landlord has paid them and has produced the tax invoice, assessment and receipt.]</u>
Objection Notice	means a Notice from the Tenant to the Landlord in which the Tenant objects to the nature or any detail or the amount of any Outgoings which the Landlord advises are to be paid or reimbursed by the Tenant under this clause #.1.
Outgoings	means those outgoings listed in Item 19 of the Information Table.
Outgoings Commencement Date	means the later of the Commencement Date and the Rent Commencement Date.
Outgoings Year	means each period of 12 months commencing on 1 July and ending on 30 June even if part of that 12 month period does not fall within the Term.
Tenant's Contribution	<p>means the amounts determined from time to time in accordance with the following formula:</p> $C = \frac{P \times N \times I}{Y}$ <p>where:</p> <p>C is the Tenant's Contribution;</p> <p>P is the Tenant's Proportion expressed as a percentage;</p> <p>N is the number of days of the Term falling within the relevant Outgoings Year;</p> <p>I is the amount of Outgoings for the relevant Outgoings Year; and</p> <p>Y is 365 (or 366 in the case of a leap year).</p>
Tenant's Proportion	means the proportion that the net lettable area of the Premises bears to the net lettable area of the Building assuming that the whole of the net lettable area of the Building is being used as office accommodation.

[Guidance note – Subclauses #.1.2 to #.1.6 are to be used when Outgoings are payable on an 'estimate' rather than 'actual basis'. Delete those subclauses and reorder the remaining subclauses if the Parties have agreed that Outgoings are payable on an 'actual' basis.]

#.1.2. Subject to clause #.1.3 and clause #.1.5 the Tenant agrees to pay to the Landlord the Tenant's Contribution for each Outgoings Year.

- #.1.3. *The Landlord agrees to provide the Estimated Outgoings Notice to the Tenant on the Commencement Date of each Outgoings Year.*
- #.1.4. *The Tenant agrees to pay the Landlord the Estimated Outgoings set out in the Estimated Outgoings Notice by consecutive equal monthly instalments (or proportionately for any part of a month) in advance at the same time as the Tenant is required to pay the Rent.*
- #.1.5. *Within 3 months after the expiry of each Outgoings Year, the Landlord agrees to provide to the Tenant an audited statement of Outgoings specifying the actual amount of the Tenant's Contribution incurred for that Outgoings Year, and if requested by the Tenant, copies of all relevant invoices, accounts and assessments paid by the Landlord.*
- #1.6. *The Parties agree to make any necessary adjustment by payment or repayment, as the case may be within 1 month after:*
 - (a) *the Landlord provides to the Tenant the audited statement under clause #.1.5.; or*
 - (b) *the date of determination of a dispute under clause 46 in connection with a statement provided to the Tenant under clause #.1.5.,*
whichever date last occurs.

[Guidance note – Subclauses #.1.7 to #.1.8 are to be used when Outgoings are payable on an 'actual' rather than 'estimate' basis. Delete those subclauses and reorder the remaining subclauses if the Parties have agreed that Outgoings are payable on an 'estimate' basis.]

- #1.7. *If the Landlord provides the Tenant with receipted assessments evidencing payment of the Outgoings and a suitable tax invoice, the Tenant agrees to reimburse to the Landlord the Tenant's Contribution for the relevant Outgoings.*
- #.1.8 *The Tenant's Contribution is payable within 20 Working Days of receipt by the Tenant of the receipted assessments and tax invoice referred to in clause #.1.7.*
- #.1.9. *The Tenant may at any time give an Objection Notice. If the Tenant gives an Objection Notice the amount objected to (but only that amount) will not be paid or reimbursed to the Landlord until the Parties have reached agreement, or failing agreement, its amount has been determined in accordance with clause 46.*
- #.1.10. *If the Parties do not agree on any objection of the Tenant under clause #.1.9. within 20 Working Days of the Tenant's Objection Notice then the matter may be referred by either or both of the Parties for resolution in accordance with clause 46.*

Semi-gross lease

- (e) If the Rent is semi-gross (ie – the Tenant will pay increases in statutory outgoings over a base year) delete CNL template clause 24.1 and insert the following clause. The recoverable Outgoings should also be inserted in Item 19 of the Information Table (omitting the guidance notes), based on the example list of reasonable recoverable operating expenses set out in paragraph 36.3(d)(i) above. The list of Outgoings needs to be specifically considered and agreed so that only the agreed Outgoings to be paid by the Tenant are included in Item 19.

- (f) The following table should also be included in Item 19, populated with the relevant information on the method of recovery of increases in the agreed list of Outgoings:

Base Year	Base Year Amount	Outgoings Review Date	New Base Year
1/7/[insert year] to 30/6/[insert year]	[insert amount]	[insert date]	[insert Base Year reset date (eg – commencement date of option term)]

- (g) The Landlord should not be permitted to 'double dip' in a gross lease with increases in Outgoings payable and a fixed percentage increase in the Rent. A fixed percentage increase in Rent incorporates a component for Rent and the value of the Landlord's operating expenses, therefore, only increases in Outgoings over the fixed percentage increase should attract the operation of the alternative clause.
- (h) For example, the review clause provides that there is a gross Rent percentage increase of 3%. This essentially means the Landlord receives a 3% increase for both the Rent component and the Landlord's recoverable operating expenses component making up the gross Rent. Therefore, before the Tenant becomes liable to pay increases, the Base Year Amount needs to be increased by 3%.
- (i) The variables in the above clauses will not always be applicable. There are many different commercial arrangements available and clauses should be amended to reflect the commercial agreement reached. This clause is also structured on the assumption that payment is made on an estimate basis with annual adjustments. It also covers both statutory outgoings and other building operating expenses. The clause will need to be amended if the commercial agreement is otherwise.

#.1. Tenant to pay a proportion of increases in Outgoings over a Base Year

#.1.1. In this Lease

Base Year means the year specified in Item 19 of the Information Table as updated in accordance with clause #.1.10.

Base Year Amount means the amount specified in Item 19 of the Information Table ^increased by ^insert percentage^ as updated in accordance with clause #.1.10. calculated on the assumption that for the whole of the Base Year: [Guidance note – The variable in place markers will only apply where there are fixed percentage increases in the gross Rent.]

- the Building was fully completed, occupied and operational;
- the Landlord did not have the benefit of any guarantee or warranty relating to the Building; and
- all contracts for the maintenance of the Land and the Building were in place and operational.

Commencement means:

- Date of each Outgoings Year**
- in the case of an Outgoings Year which ends in the first year of the Term – the Commencement Date; and
 - in other cases – each 1 July falling within the Term.

Estimated Outgoings means a reasonable estimate of the Tenant's Contribution to Outgoings for the relevant Outgoings Year.

Estimated Outgoings Notice means a Notice which specifies the Estimated Outgoings for the relevant Outgoings Year.

Objection Notice means a Notice from the Tenant to the Landlord in which the Tenant objects to the nature or any detail or the amount of any Outgoings which the Landlord advises are to be paid or reimbursed by the Tenant under this clause #.1.

Outgoings means those outgoings listed in Item 19 of the Information Table.

Outgoings Commencement Date means the later of the Commencement Date and the Rent Commencement Date.

Outgoings Review Date means a date specified as such in Item 19 of the Information Table.

Outgoings Year means each period of 12 months commencing on 1 July and ending on 30 June even if part of that 12 month period does not fall within the Term.

Tenant's Contribution means the amount determined from time to time in accordance with the following formula:

$$C = \frac{P \times N \times I}{Y}$$

where:

C is the Tenant's Contribution;

P is the Tenant's Proportion expressed as a percentage;

N is the number of days of the Term falling within the relevant Outgoings Year;

I is the amount by which the Outgoings for the relevant Outgoings Year exceeds the Base Year Amount [^]by insert number and per cent[^]; and [Guidance note – The Parties may agree other limitations on the increases in Outgoings payable by the Tenant. For example, the commercial terms may be that increases are only payable once they are more than 2% over the Base Year Amount. In this case the variable placeholders are used.]

Y is 365 (or 366 in the case of a leap year).

Tenant's Proportion means the proportion that the net lettable area of the Premises bears to the net lettable area of the Building assuming that the whole of the net lettable area of the Building is being used as office accommodation.

#.1.2. Subject to clause #.1.3 and clause #.1.5., the Tenant agrees to pay to the Landlord the Tenant's Contribution for each Outgoings Year.

[Guidance note – Subclauses #.1.3. to #.1.6 are to be used when Outgoings are payable on an 'estimate' rather than 'actual basis'. Delete those subclauses and amend subclause #.1.5 if the Parties have agreed that Outgoings are payable on an 'actual' basis.]

#.1.3. The Landlord agrees to provide the Estimated Outgoings Notice to the Tenant on the Commencement Date of each Outgoings Year.

#.1.4. The Tenant agrees to pay the Landlord the Estimated Outgoings set out in the Estimated Outgoings Notice by consecutive equal monthly instalments (or proportionately for any part of a month) in advance at the same time as the Tenant is required to pay the Rent.

#.1.5. Within 3 months after the expiry of each Outgoings Year, the Landlord agrees to provide to the Tenant an audited statement of Outgoings specifying the actual amount of the Tenant's Contribution incurred for that Outgoings Year, and if

requested by the Tenant, copies of all relevant invoices, accounts and assessments paid by the Landlord.

#.1.6. *The Parties agree to make any necessary adjustment by payment or repayment, as the case may be within 1 month after:*

- (a) the Landlord provides to the Tenant the audited statement under clause #.1.5.; or*
- (b) the date of determination of a dispute under clause 46 in connection with a statement provided to the Tenant under clause #.1.5.,*

whichever date last occurs.

#.1.7. *The Landlord agrees to pay to the Tenant the Tenant's Proportion of any reduction (including a reduction by reason of abolition of statutory outgoings) in Outgoings below the Base Year Amount in respect of each period of 12 months following the Base Year (and pro rata for any balance period of less than 12 months).*

#1.8. *The Tenant may at any time give an Objection Notice. If the Tenant gives an Objection Notice the amount objected to (but only that amount) will not be paid or reimbursed to the Landlord until the Parties have reached agreement, or failing agreement, its amount has been determined in accordance with clause 46.*

#.1.9 *If the Parties do not agree on any objection of the Tenant under clause #.1.8. within 20 Working Days of the Tenant's Objection Notice then the matter may be referred by either or both of the Parties for resolution in accordance with clause 46.*

#.1.10. *On each Outgoings Review Date:*

- (a) the Base Year will be updated to the year specified in Item 19 of the Information Table as the Base Year applicable from that Outgoings Review Date; and*
- (b) the Base Year Amount will be updated to the amount of Outgoings paid or payable by the Landlord during the year specified in Item 19 of the Information Table as the Base Year applicable from that Outgoings Review Date increased by ^insert number^ percent. [Guidance note – See guidance note above dealing with the issue of double dipping where there are fixed increases in gross Rent in deciding whether this variable is applicable. The variable in this clause should be used to reflect the commercial agreement.]*

37. Costs of Lease (CNL template clause 25)

37.1 Purpose

- (a) This clause provides that:
 - (i) **cost of Lease:** each Party will bear its own costs of and incidental to the negotiation, settlement, preparation and execution of the Lease; and
 - (ii) **registration fees:** the Tenant agrees to pay the disbursement fee associated with registering the Lease on the title to the Land on which the Premises is located (as opposed the Landlord's legal costs of ensuring registration).
- (b) The clause also includes an acknowledgment that if a Law imposes duty on the Lease or the Tenant, the Tenant is only liable to pay that duty if that Law is binding on the Tenant.

37.2 Hints for use

- (a) It is common leasing practice for tenants to pay registration fees. Tenants should factor this cost into their assessment of the overall financial framework of the Lease.
- (b) Whether it is necessary to register the Lease depends on where the Premises is located (see paragraph 6 above).

- (c) Tenants must not agree to pay stamp duty as this is a tax and the constitutional position is that a State cannot levy tax on the Commonwealth.

37.3 Alternative clauses

If the Parties have agreed that the Landlord will pay the cost of registration of the Lease, CNL template clause 25.2.1 should be deleted and replaced with the following clause:

#2.1. *The Landlord agrees to pay all registration fees assessed in accordance with a Law.*

38. Tenant to reimburse for additional premiums (CNL template clause 26)

38.1 Purpose

This clause provides that the Tenant agrees to reimburse the Landlord for all additional premiums on the insurances in accordance with CNL template clause 42. See paragraph 54 for more information.

38.2 Hints for use

This clause is located in Part C because it contains an obligation for the Tenant to make payments to the Landlord.

39. GST (CNL template clause 27)

39.1 Purpose

This clause allows a Party to recover GST in addition to a payment required by the Lease.

39.2 Hints for use

- (a) The GST clauses have been prepared by reference to the GST law so that the legislation operates on its own terms and the definitions in the GST law (as updated from time to time) will apply to the relevant terms in the Lease. This reduces the need to update the clauses as the GST law is amended or rulings are issued.
- (b) Tenants should not accept any amendments to this clause without appropriate legal advice.

40. Black economy procurement connected policy (optional CNL template clause)

40.1 Purpose

The Black economy – increasing the integrity of government procurement: Procurement connected policy guidelines March 2019 (Black Economy Procurement Connected Policy) applies to Commonwealth Government procurements that are undertaken through an approach to market by open tender, are subject to the CPRs and have an estimated value of over \$4 million inclusive of GST. If the Black Economy Procurement Connected Policy applies to a lease procurement:

- (a) the successful landlord will be required to provide a satisfactory Statement of Tax Record (**STR**); and
- (b) the relevant Commonwealth tenant entity should consider including, and adapting, where appropriate, the model clauses set out in the Black Economy Procurement Connected Policy. Any adaptation of the model clauses should not be inconsistent with the Black Economy Procurement Connected Policy, the approach to market documentation and the RMG 500.

More information on the Black Economy Procurement Connected Policy and other Procurement Connected Policies is available at <https://www.finance.gov.au/government/procurement/buying-australian-government/procurement-connected-policies>.

Part D – Building services, condition, repair and maintenance

41. Tenant's obligations to maintain and repair (CNL template clause 28)

41.1 Purpose

- (a) Commercial leases generally include express covenants by the tenant to keep the leased premises in repair. This means that while the tenant is in possession of the premises, the tenant is required to maintain the premises in good condition, having regard to their condition at the commencement of the lease. Some types of damage outside the tenant's control (eg – damage caused by natural disasters) and “fair wear and tear” are usually excluded from the repair and maintenance obligations.
- (b) The standard position in the CNL template requires the Tenant to keep and maintain the Premises in good and tenantable repair and condition, subject to exceptions elsewhere in the Lease.

41.2 Hints for use

An extensive list of limitations to the general obligation for the Tenant to maintain the Premises is included in the CNL template, including exceptions for fair wear and tear and damage caused by unforeseeable events, damage to any part of the Services or the Structure of the Building and damage caused by the Landlord.

42. Landlord's obligation to maintain and repair (CNL template clause 29)

42.1 Purpose

- (a) The Tenant's obligation to maintain and repair the Premises is limited by the Landlord's maintenance and repair obligations.
- (b) The Landlord is required to:
 - (i) keep and maintain the Building (including the Structure and the Services and any gardens and landscaped areas) watertight, clean, in good and substantial repair, working order and condition, and pest free;
 - (ii) replace plant and equipment in certain circumstances; and
 - (iii) operate and maintain the Building and the Services efficiently.
- (c) The Landlord has responsibility for rectifying any defects in the Building which result from:
 - (i) faulty design;
 - (ii) inadequate or faulty supervision;
 - (iii) materials which are faulty, not compliant with Laws or Requirements or not fit for the purpose; or
 - (iv) a failure to construct the Building in a proper and workmanlike manner.
- (d) The Landlord is responsible for replacing the following items in the Building or on the Land if they become broken or damaged:
 - (i) glass in windows and doors of the Building (unless payment of insurance monies in respect of the damage cannot be recovered because of a Tenant act or omission); and
 - (ii) all electric light bulbs, tubes and other means of illumination (but not in the Premises).

42.2 Hints for use

The allocation of responsibility for repair and maintenance of the Building can be reviewed and amended if the Tenant is leasing the whole Building or if it has otherwise specifically agreed to take responsibility for some of these obligations. However, the Tenant will not assume obligations for maintaining the Structure and Services, for replacing or upgrading items, or for costs that are of a structural or capital nature.

43. Fitness of Premises and Building (CNL template clause 30)

43.1 Purpose

- (a) A warranty is a contractual term which gives rise to a right to claim for damages if it is breached.
- (b) **Fitness of Premises and Building**
 - (i) Under this clause the Landlord warrants that the Premises and the Building:
 - (ii) are fit for use and occupation for the Permitted Use;
 - (iii) comply with:
 - (A) all Laws and Requirements; and
 - (B) the specified Performance Standards in the Lease and the relevant Australian Standards effective at the Commencement Date; and
 - (iv) are and will be managed and operated at a standard commensurate with high quality, professionally maintained and managed office accommodation in the city or town in which the Building is located or, if there are no comparable premises in the city or town, then at a standard commensurate with high quality, professionally maintained and managed office accommodation in a comparable city or town.
- (c) **Combustible cladding and health and safety**
 - (i) This clause mitigates risk to the health and safety of occupants of the Premises by:
 - (A) requiring the Landlord to warrant that no materials containing Asbestos or any other Hazardous Chemicals exist in the Land or the Building and that there is no Combustible Cladding on the Building;
 - (B) ensuring that the air-conditioning system and any other relevant parts of the Services are compliant with relevant health and safety legislation and have been appropriately treated and maintained to limit the risk of Hazardous Disease;
 - (C) requiring the Landlord to inform the Tenant if any Asbestos, Hazardous Chemicals or Hazardous Disease or Combustible Cladding is at any time discovered in the Land or the Building, to remove or eradicate the Hazardous Chemicals or Hazardous Disease and Combustible Cladding promptly and in a safe manner; and
 - (D) requiring the Landlord to provide information, consultation, co-operation and co-ordination for compliance with health and safety legislation.
 - (ii) This clause also grants the Tenant a right to vacate the Premises and claim Relocation Expenses if the Premises are determined to be unsafe following the discovery of any Hazardous Chemicals or Hazardous Disease or Combustible Cladding.

43.2 Hints for use

- (a) **Fitness of Premises and Building**
 - (i) It is important that the Lease clearly specifies the applicable standards to set a compliance benchmark for the Premises and the Building. Schedule 6 of the CNL

contains the Premises specific Building and Services Performance Standards. The Tenant should ensure that the Building and Services Performance Standards are compatible with any GLS used with the Lease.

- (ii) These standards should not be prepared by the Tenant's legal adviser as they are technical and need sign off by an appropriately skilled building adviser. They should be addressed and agreed at the site selection and lease procurement stage and not at the later legal documentation stage.
- (iii) There are risks with generic standards as different building locations and uses attract different requirements and for this reason a template set of standards is not currently provided.

(b) Combustible cladding and health and safety

- (i) The warranties in the health and safety clause are subject to the limitation that the warranty is given to the best of the Landlord's knowledge, having made diligent enquiries.
- (ii) The clause sets out the Commonwealth's expectations in respect of the identification and disclosure of, and ongoing response to the discovery of, any Combustible Cladding, Hazardous Chemicals or Hazardous Disease in the Premises, the Building or the Land.
- (iii) Notwithstanding the Landlord's obligations in respect of the identification, disclosure and eradication of any Hazardous Chemicals or Hazardous Disease in the Premises, the Building or the Land, the parties are required to use reasonable endeavours to ensure that they do not bring any Hazardous Chemical or Hazardous Disease on to the Land or in to the Building.
- (iv) The Commonwealth generally does not consider that any amendments are required to this clause, except as set out below and otherwise in exceptional circumstances.

43.3 Alternative clauses

Health and safety

The provisions relating to the treatment and maintenance of a central air-conditioning plant (CNL template clause 30.3.1.b.) may not apply in office accommodation in smaller buildings where there is no central air-conditioning. In that case, template clause 30.31.b. may be deleted or amended as appropriate in the circumstances. The clause should be reviewed in the context of the particular Premises.

43.4 Lease management

- (a) Best practice lease management will involve pro-active monitoring of compliance with Performance Standards, the Lease requirements and the GLS (if applicable).
- (b) Tenants should be aware of their obligations under the *Work Health and Safety Act 2011* (Cth), WHS Regulations and any codes approved pursuant to section 274 of the *Work Health and Safety Act 2011* (Cth), and should be aware of the ramifications for them if the CNL template health and safety provisions are diluted or removed to an extent where the Tenant's risk is increased and its compliance obligations adversely impacted.

44. Cleaning the Premises, the Building and the Land (CNL template clause 31)

44.1 Purpose

This clause allocates responsibility for cleaning the Premises, the Building and the Land (including exterior windows in the Building).

44.2 Hints for use

- (a) Item 20 of the Information Table allows the selection of the Party responsible for cleaning the Premises and the minimum frequency for the cleaning of the exterior surfaces of the Building by the Landlord.
- (b) If the Tenant is the Building's sole tenant and it agrees to clean those parts of the Building which are not leased, an appropriate clause will need to be drafted and amendments made to the remaining CNL template clauses that deal with the commercial and practical arrangements. However, where possible, the definition of the actual leased premises should not be expanded beyond the standard CNL template definition of Premises.

44.3 Lease management

- (a) At times Tenants prefer to engage, or the Landlord requires that the Tenant engage, the Landlord's cleaning contractor. Tenants need to consider the procurement implications, including compliance with the Commonwealth Procurement Rules and other procurement connected policies, the need to achieve and demonstrate value for money and, at times, security considerations.
- (b) If the Landlord cleans the Premises for the Tenant then consideration should be given to:
 - (i) whether additional clauses are needed to address any relevant Commonwealth policies. Further information can be found at <http://www.finance.gov.au/procurement/>; and
 - (ii) the application of the *Modern Slavery Act 2018* (Cth) (**MS Act**) and any related or supplementary guidance published by the Department of Home Affairs at <http://www.homeaffairs.gov.au>, which are designed to assist Commonwealth entities to complying with their obligations under the MS Act, including any applicable reporting requirements and modern slavery statements. While the risks of modern slavery existing in the relevant supply chain for transactions that necessitate use of the template CNL are generally low, if a Commonwealth tenant entity is concerned about modern slavery risks, or would like additional input and guidance (including appropriate alternative clauses addressing modern slavery risks), it should contact Australian Border Force at: slavery.consultations@abf.gov.au.
- (c) Any template modern slavery clauses developed by the Australian Border Force are made available from the Department of Finance at <https://www.finance.gov.au/government/procurement/clausebank/modern-slavery>.

45. Green Lease Schedule and Building Energy Efficiency Disclosure (CNL template clause 32)

45.1 Purpose

- (a) This clause requires the Parties to comply with a GLS prepared in accordance with the Energy Efficiency in Government Operations policy (**EEGO**). More information on the EEGO and the content of the GLS is available at <https://www.energy.gov.au/government-priorities/energy-productivity-and-energy-efficiency/government-buildings>.
- (b) The type of GLS that applies depends on the percentage of the Building occupied by the Tenant, whether it is a gross or net lease arrangement and the size of the Premises.
- (c) The purpose of a GLS is to ensure that the Parties comply with environmental and sustainability objectives in relation to the management of the Premises under the Lease.
- (d) This clause also requires the Landlord to warrant that the Landlord is, and will remain, compliant for the Term of the lease, with its obligations (if any) under the *Building Energy Efficiency Disclosure Act 2010* (the **BEED Act**).

45.2 Hints for use

- (a) This clause will apply if Item 22 of the Information Table is completed. Item 22 will also specify what type of GLS applies.

- (b) Whether and which GLS applies should be determined at the Lease negotiation stage so that the Parties are aware of their obligations under the GLS.

45.3 Alternative clauses

- (a) A Party to the Lease may request additional BEED Act related information to be provided. This may occur when:
 - (i) a Landlord wants to achieve particular environmental goals in addition to its obligations under the BEED Act, including by having evidence of its energy efficiency performance throughout the Term; or
 - (ii) a Commonwealth tenant entity requires additional information on the environmental performance or energy efficiency of the Premises and the Building.
- (b) In those cases, the following alternate clause 32.1.3 can replace the existing CNL template clause 32.1.3:

*#.1.3. The Landlord warrants that the Landlord is compliant with any obligations it may have under the Building Energy Efficiency Disclosure Act 2010 (Cth) (**BEED Act**) in relation to all buildings owned or leased by the Landlord. The Landlord agrees:*

 - a. to continue to be so compliant throughout the Term;*
 - b. to maintain a current Building Energy Efficiency Certificate (**BEEC**) for the Premises and the Building throughout the Term whether or not the Building is a disclosure affected area as defined by the BEED Act; and*
 - c. on the Commencement Date, on each anniversary of the Commencement Date and at other times when reasonably requested by the Tenant, to provide the Tenant with a copy of the BEEC for the Premises and Building.*
- (c) This additional disclosure obligation may also support the preparation of the Energy Management Plan required by the GLS for buildings falling under EEGO policy GLS requirements. Each GLS includes minimum requirements for the Energy Management Plan. Those minimum requirements vary slightly between each GLS but they all are geared towards agreeing to strategies for maintaining the required NABERS energy rating, for effectively managing Energy Intensity and for achieving Energy Intensity Improvements. It is open to the Parties to agree to any additional steps to achieve those Energy Intensity Improvements.

46. Metering for electricity, gas and water (CNL template clause 33)

46.1 Purpose

- (a) This clause describes the metering arrangements for electricity, gas and water in the Premises and central Services of the Building.
- (b) The Landlord is required to ensure, from the Commencement Date, that the Premises are separately metered for electricity, gas and water and that those meters are accurate for customer billing and easily accessible. The Commonwealth prefers that digital meters are used, which is a GLS requirement. This is reflected in Item 23 of the Information Table.
- (c) The Landlord is also required to ensure that the Building and Common Areas have separate metering for central Services. This obligation is linked to the provisions relating to the Parties' respective obligations to pay utility costs relating to the Premises and the Services directly to the supplier, so that the Parties do not need to rely on estimates or proportions for utility payments.

46.2 Hints for use

- (a) The metering requirements should be determined in negotiations and in the lease proposal. If the Landlord or Building cannot meet the specific requirements then the Tenant will need to consider how the utilities will be charged. Any changes to the standard metering requirements can be noted in Item 23 of the Information Table.

- (b) If the Premises are covered by the EEGO policy and a GLS is required, this clause and the meter specifications in Item 23 cannot be amended or deleted as it is necessary to comply with that policy.
- (c) If there are no Common Areas (eg – because the Tenant is leasing the whole Building without central Services) then those arrangements will not apply. As noted above, this will be determined in negotiations and noted at Item 23 of the Information Table.
- (d) CNL template clause 33.1.4 reflects the approach in the GLS. It should not be deleted or amended to ensure that any inconsistency between the Lease and the GLS is addressed by allowing the GLS to prevail.
- (e) Reference should be made to the EEGO policy and the GLS in negotiating each Lease to ensure the appropriate GLS is selected and that there is consistency with the CNL template.

46.3 Lease management

The standard position in the CNL template includes provisions that:

- (a) the responsibility for management of the utility meters rests with the Tenant; and
- (b) the Tenant is entitled to purchase its own electricity.

47. Repainting and recarpeting (CNL template clause 34)

47.1 Purpose

These clauses cover the Landlord's obligations to recarpet and repaint the Premises and specify how and when those obligations are to be carried out.

47.2 Hints for use

- (a) Items 24 and 25 of the Information Table allow for the selection of the minimum frequency of repainting and recarpeting in the Premises by the Landlord. The Landlord must repaint and recarpet as often as may become necessary due to fair wear and tear, but not less often than specified in Items 24 and 25.
- (b) The timeframe for the minimum frequency will necessarily vary for each Premises. When determining these timeframes in negotiations, regard must be had to the age and condition of the Premises, the Permitted Use, whether any fitout works are being undertaken and the length of the Term.
- (c) The Landlord's obligation to repaint the Building or Common Areas is to do so only as often as necessary and is not subject to the minimum frequency. This obligation should be considered alongside the Landlord's other general repair and maintenance obligations for the Building and the requirement to maintain the Building to the agreed standards.
- (d) Where Tenants have specific carpet requirements they should be specified in the Performance Standards and disclosed to the Landlord at the negotiation stage.

47.3 Lease management

- (a) If the replacement of carpet is required because the Tenant has caused damage then the obligation to replace, and the cost of replacement, will be borne by the Tenant.
- (b) If the Landlord recarpets the Premises, the Tenant is required to remove Fittings that can be moved at the Landlord's cost to allow the Landlord to do so, but it is not required to dismantle Fittings which are fixtures (ie – attached to the Premises and not able to be easily removed).
- (c) The Tenant will generally require the work to be done outside of Normal Business Hours to limit disruption.
- (d) Tenants should keep contemporaneous records of repainting and recarpeting timeframes so that accurate information can be considered when negotiating renewals of the Lease and ensuring that the Landlord is complying with its maintenance and repair obligations.

48. Maintenance and service contracts (CNL template clause 35)

48.1 Purpose

This clause is an extension of the Landlord's general obligation to repair and maintain the Building and the Land and operate it efficiently. It requires the Landlord to:

- (a) take out and maintain contracts for the repair and maintenance of Services as required by Australian Standards to ensure that the Services are appropriately maintained during the Term; and
- (b) to provide the Tenant with:
 - (i) a certificate by the Landlord's air-conditioning maintenance contractor certifying the performance of the air-conditioning (and that the air-conditioning has been maintained) on the Commencement Date, on each anniversary of the Commencement Date and at other times when reasonably requested by the Tenant; and
 - (ii) a copy (which may remove or obliterate confidential commercial terms) of each of the current contracts for the maintenance and repair of the Services on request.
- (c) Consistent maintenance and repair is required for specific Services such as air-conditioning, which may have health implications if it is not adequately serviced. Accordingly, there is a specific obligation on the Landlord to provide evidence that the air-conditioning complies with the Performance Standards and has been maintained in accordance with the relevant contract.

48.2 Hints for use

This clause is a separate obligation to the requirement in clause 36 of the CNL template for the Landlord to rectify the failure of Services within a certain time. That rectification obligation is discussed at paragraph 50.

48.3 Lease management

Copies of contracts should be received and reviewed at the Commencement Date and requested as necessary – for example, at their renewal date, on the exercise of an option or renewal of the Lease, or if the Landlord changes a provider.

48.4 Alternative clauses

- (a) If the Tenant is concerned about the consistent operation of the Services, the clause can be strengthened by requiring copies of the Services maintenance contracts to be provided at the same time as air-conditioning certifications.
- (b) In that case, CNL template clause 35.2 can be replaced with the following:

#.2. Landlord to provide information on Services contracts

#.2.1. *On the Commencement Date, on each anniversary of the Commencement Date and at other times when reasonably requested by the Tenant, the Landlord agrees to provide to the Tenant:*

- a. *a copy (which may remove or obliterate confidential commercial terms) of each of the current contracts for the maintenance and repair of the Services; and*
- b. *a certificate by the Landlord's air-conditioning maintenance contractor that:*
 - i. *the performance and maintenance of the air-conditioning system complies with the requirements of this Lease and all Laws and Requirements; and*
 - ii. *the maintenance and repair of the air-conditioning system has been carried out in accordance with the current air-conditioning maintenance contract.*

49. Heritage (CNL template clause 36)

49.1 Purpose

- (a) This clause deals with the heritage status of the Building and Land.
- (b) Landlords who own a heritage listed building may have specific obligations under State and Federal legislation such as the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and the Land or Building may have restrictions on its use, alterations that can be made, and specific requirements to promote and preserve its significance.

49.2 Hints for use

- (a) Tenants need to satisfy themselves that heritage obligations do not apply to the proposed tenancy, or, if they do apply, that any heritage obligation will not adversely impact the Tenant's proposed use of the Premises.
- (b) If the Building is not on a Heritage List this clause will not apply but does not need to be deleted. Whether a Building is heritage listed at the Commencement Date of the Lease should be determined in the negotiation stage of the Lease.

49.3 Alternative clauses

If it is known at the Commencement Date that the Building or Land is heritage listed:

- (a) delete clause 36.1 (Landlord's representations);
- (b) replace clause 36.2 (Landlord's heritage obligations) with the following:

#.2. Landlord's heritage obligations

#.2.1. The Landlord agrees to:

- a. *comply with any Law or Requirement (including any management plan) relating to the listing of the Building and/or Land on a Heritage List;*
- b. *provide the Tenant with a copy of the heritage management plan; and*
- c. *provide the Tenant with all other information in respect of the Building and/or Land, its heritage value and on-going management strategy as the Tenant reasonably requires.*

50. Air-conditioning and other Services (CNL template clause 37)

50.1 Purpose

This clause sets out the Landlord's responsibility to provide and operate the Services (other than air-conditioning) at all times and provide and operate air-conditioning during Normal Business Hours with warming up/cooling down outside those hours, in accordance with:

- (a) Laws and Requirements;
- (b) Performance Standards; and
- (c) relevant Australian Standards effective at the Commencement Date.

50.2 Hints for use

- (a) The Tenant's expectations in relation to Performance Standards should be settled in the heads of agreement or lease negotiation stage so that both Parties are sure that the Building and Premises are capable of meeting those standards.
- (b) The air-conditioning requirements in this clause may not be relevant if the Premises do not have central Landlord controlled air-conditioning (eg – if there is a self-contained system in the Premises).
- (c) The Tenant will only exercise step in rights to fix Services that are located in the Premises if they are not fixed within 5 Working Days of providing Notice to the Landlord. This right is only enlivened when the Landlord has failed to meet its obligation to repair the failure. For more information on rectification of Services, see paragraph 51.

- (d) If the Landlord does provide after hours air-conditioning the Tenant may be required to reimburse the Landlord for the cost of doing so. The hourly cost will be set out in Item 27 of the Information Table and is discussed at paragraph 34.

50.3 Lease management

The Tenant is entitled to install equipment to monitor the performance of the air-conditioning and ventilation systems to ensure the Landlord meets its obligations. The Landlord must produce records of the system's operation and performance.

51. Premises unfit for use and occupation (CNL template clause 38)

51.1 Purpose

- (a) This clause sets out the rights and obligations of the Landlord and Tenant in the event that the Premises become unfit for the Tenant's use and occupation of the Premises for the Permitted Use.
- (b) It is usual for commercial leases to have rent abate, or be reduced, if the Tenant is unable to use the Premises (unless the Tenant is responsible for that unfitness).
- (c) This clause also covers the Tenant's rights if the Services malfunction or are not available. If a malfunction of Services in the Premises continues uncorrected for 5 Working Days the Tenant may step in to carry out repairs and can recover the cost of doing so from the Landlord.

51.2 Hints for use

- (a) This clause defines when the Premises will be considered to be 'unfit', what actions the Tenant may take (abatement, relocation or termination), what actions the Landlord can take and what the consequences of termination are.
- (b) The Premises will be considered to be wholly or partially unfit if one of the following circumstances arise:
 - (i) the Services have malfunctioned or are not provided in accordance with the Lease;
 - (ii) the presence of Combustible Cladding, Asbestos, a Hazardous Disease or a Hazardous Chemical in the Building, unless the Landlord can demonstrate there is no risk to the occupants and users of the Building from that presence;
 - (iii) there is a structural fault or defect in the Building or the Services;
 - (iv) there is the destruction of or damage to the Building or the Services;
 - (v) the Building is wholly or substantially inaccessible;
 - (vi) the Premises is wholly or partially inaccessible; or
 - (vii) the Landlord has breached its obligations to provide quiet enjoyment to the Tenant.
- (c) There are different consequences for different types of 'unfitness' as follows:
 - (i) if the unfitness arises for a reason which is not related to the Services, the Rent and other moneys payable by the Tenant will either:
 - (A) abate; or
 - (B) will be reduced by a fair and just proportion according to the nature and extent of the effect of the unfitness upon the Premises,from the date the unfitness commences until the Premises are made fit;
 - (ii) if the Premises are unfit because of a Services malfunction, then abatement will apply only if the Tenant has given Notice to the Landlord and the unfitness continues 2 Working Days after the Notice. This is considered reasonable on the basis that the Tenant's requirements in relation to Services are disclosed in the Lease and the Landlord is obliged to provide those Services.

- (d) If the Premises are unfit, the Tenant may elect to vacate the Premises (and the Landlord will be responsible for Relocation Expenses) and may terminate the Lease if:
 - (i) an Expert certifies the Premises will remain wholly or partially unfit for use and occupation for the Permitted Use for 3 months or more after the date of the certificate;
 - (ii) an appropriate Authority condemns the Building as dangerous; or
 - (iii) the Premises remain wholly or partially unfit for use and occupation for the Permitted Use for a period of 3 months after the date on which the Premises became unfit.
- (e) The Tenant's rights in this clause are limited by the overarching obligation to act reasonably. Amendments to this clause need to be considered within the whole context of the Lease and the obligations and rights of the Parties, rather than as a standalone provision.
- (f) The Landlord may terminate the Lease if the Premises are rendered wholly unfit, and that unfitness is not attributable to an act or omission of the Landlord, and the Notice:
 - (i) is given within 40 Working Days after unfitness commences; and
 - (ii) the Notice is accompanied by a certificate given by the Expert that the Premises are likely to remain wholly unfit for use and occupation for the Permitted Use for 3 months or more after the date of the certificate.
- (g) The 3 month period is the same timeframe as the Tenant has for termination. Amendments made to this timeframe should be reciprocal.
- (h) If an act or omission of the Tenant caused the unfitness then the Tenant may exercise its rights under this clause only to the extent the Landlord is entitled to be indemnified from insurance, or would have been indemnified if the Landlord had insured in accordance with the requirements in the Lease. This clause is required because the Landlord's insurance costs should be recovered by the Landlord either within the gross Rent or within Outgoings.
- (i) Any requests to change this clause should be carefully considered in light of an appropriate risk assessment.
- (j) Relocation Expenses are defined broadly and may be significant if the Tenant elects to relocate. However, the Tenant is required to act reasonably in relation to the Relocation Expenses incurred. Paragraph 60 has more information on the Parties' obligation to act reasonably.

Part E – Lease end obligations

52. Deliver up at Lease end (CNL template clause 39)

52.1 Purpose

This clause sets out the condition that the Tenant is to return the Premises to the Landlord at the end of the Term and how signs, Fittings and Tenant's Alterations (if any) will be dealt with at the end of the Term.

52.2 Hints for use

- (a) The Tenant's end of Term obligations will be listed in Item 28 of the Information Table. The default position in the CNL template is that the Tenant is not obliged to make good, reinstate, redecorate, repaint, recarpet or restore the Premises or remove its Fittings or Tenant's Alterations (apart from its obligations to make good any damage caused by the removal of its Fittings and Tenant's Alterations, having elected to do so).
- (b) The Tenant is required to return the Premises in good and tenantable repair and condition, taking into account the condition of the Premises at the Commencement Date.
- (c) The Tenant is required to remove signs if it was a condition of the Landlord's consent to their installation that they would be removed at the end of the Lease in accordance with the Landlord's reasonable requirements.
- (d) It is not mandatory for the Tenant to remove its Fittings or Tenant's Alterations but the Tenant may do so. If so, then the Tenant will repair damage where:
 - (i) the damage is material; and
 - (ii) the damage is in a location and of a type and extent which would disadvantage the Landlord in reletting the Premises.
- (e) Reinstatement obligations affect the value for money assessment of any lease proposal as they have the potential to significantly add to expenditure at Lease end. There are also important environmental considerations as adaptive reuse and efforts to avoid unnecessary waste arising from fitout removal are desirable. It is not sustainable to require a Tenant to make good and reinstate when fitout for the incoming tenant will demolish the outgoing tenant's make good. Another example is where the Tenant's fitout can be reused or adapted by or for the incoming tenant. This issue needs to be addressed early in negotiations and fully reflected in any heads of agreement.
- (f) Any property that is not removed by the end of the Term becomes the property of the Landlord. Tenants should plan for the end of the Term so that they comply with any obligations and vacate by the Expiry Date.
- (g) The clause may need to be reviewed and amended depending on the commercial arrangements agreed. If there are any variations to the CNL template clause, the make good obligations noted in Item 28 of the Information Table should be varied.

52.3 Alternative clauses

- (a) If a Tenant agrees to a make good obligation after having factored in value for money considerations and efficient, effective, ethical and economical use of Commonwealth resources then the Tenant should also consider:
 - (i) limiting those obligations to removal and make good only;
 - (ii) avoiding a reinstatement back to base building or the condition of the Premises at the Commencement Date;
 - (iii) allowing exclusions for any fittings or fitout capable of adaptive reuse by an incoming tenant or the Landlord;
 - (iv) the time frame needed to effect reinstatement and allow a sufficient lead time;

- (v) if the Tenant could make payment in lieu of removal and make good and agreeing a specific methodology or approach for determining that amount at the time the Lease is signed. This potential liability should be capable of reasonable quantification at the outset to avoid undue risk, to ensure value for money is maintained and to ensure any necessary approvals are secured.
- (b) Alternative clauses to be used in Item 28 of the Information Table:
 - (i) The clause below should be used if the Parties agree that the make good should be to a standard consistent with a condition report:

Apart from its obligations under clause 39.3.2 (if any), the Tenant must deliver up the Premises consistent with the condition of the Premises as documented in the Condition Report.

Condition Report means the condition report prepared prior to the Commencement Date and set out in Schedule # to this Lease.
 - (ii) The clause below should be used if the Tenant agrees to remove workstations and loose furniture:

Apart from its obligations under clause 39.3.2 (if any), the Tenant is not obliged to make good, reinstate, redecorate, repaint, recarpet or restore the Premises on or before the expiry or termination of this Lease or any holding over, however, the Tenant must remove its workstations and any loose furniture.
 - (iii) The clause below should be used if the Tenant agrees to remove workstations and loose furniture and its fitout:

Apart from its obligations under clause 39.3.2 (if any), the Tenant is not obliged to make good, reinstate, redecorate, repaint, recarpet or restore the Premises on or before the expiry or termination of this Lease or any holding over, however, the Tenant must remove its workstations and any loose furniture and its Fittings and Tenant's Alterations.
 - (iv) The clause below should be used if the Tenant agrees to remove its fitout, recarpet and repaint:

Apart from its obligations under clause 39.3.2 (if any), the Tenant must remove all of its Fittings and Tenant's Alterations and subject to fair wear and tear will replace the carpet with carpet of an equivalent standard, and repaint the internal base building walls of the Premises on or before the expiry or termination of this Lease or any holding over.
- (c) If a form of make good is agreed the following sustainability clause should be included in clause 39:

#.4.2. *The Parties agree to consult no later than 3 months before the Expiry Date to explore whether, in furtherance of the objective of minimising waste and encouraging adaptive reuse, the Tenant should leave any Fittings installed by or for it in the Premises without being liable for the payment of costs or compensation.*

52.4 Lease management

- (a) Tenants should be aware of any make good conditions in the Lease when installing signs, Fittings and Tenant's Alterations to ensure they comply with obligations at the end of the Lease to remove them (if applicable).
- (b) Tenants must ensure they have allowed appropriate lead time to comply with any make good requirements before the Expiry Date.

Part F – Risk and insurance

53. Indemnity by Tenant (CNL template clause 40)

53.1 Purpose

- (a) An indemnity is a contractual obligation by which one party undertakes to accept the risk of loss or damage that another party might suffer.
- (b) In this clause, the Tenant undertakes to accept the risk (ie – indemnify the Landlord) for Claims that the Landlord may become liable for that arise from specific circumstances.

53.2 Hints for use

- (a) Indemnities can have a significant impact on the value for money considerations for a lease and may only be granted on behalf of the Commonwealth by the Minister for Finance in accordance with section 60 of the PGPA Act (although the power has been delegated, in part, to accountable authorities).
- (b) The Commonwealth has specific guidelines and requirements relating to the granting of indemnities, how indemnities should be constructed and what approvals are required before the Tenant can agree to an indemnity.
- (c) This clause has been prepared in accordance with these guidelines and no amendments should be agreed to until the following have occurred:
 - (i) legal advice has been provided;
 - (ii) a risk assessment has been undertaken by the Commonwealth tenant entity;
 - (iii) the Resource Management Guide No. 414 has been considered and any required internal approvals have been given; and
 - (iv) if required, the Tenant has confirmed with Comcover (or if applicable, other insurer) that Claims under a proposed indemnity will be covered. Information regarding Comcover is available at <http://www.finance.gov.au/comcover/>.
- (d) A Commonwealth tenant entity must seek agreement to cover from Comcover if the risk assessment undertaken indicates that:
 - (i) the likelihood of the indemnity being triggered and relied upon by the Landlord is greater than or equal to 5%; or
 - (ii) the most probable expenditure in those circumstances is greater than or equal to \$5 million.
- (e) The Tenant's indemnity relates to specified events 'caused or contributed to' by the 'negligent act or omission' of the Tenant. Where there is contributory negligence the Tenant's liability is limited to the extent of its contribution. This means the Tenant is not liable under this clause for the negligence or acts of third parties, nor for its own acts if they are not negligent.
- (f) The indemnity extends to all Claims for which the Landlord becomes liable arising from the following specified circumstances:
 - (i) the negligent use or misuse by the Tenant of the Services;
 - (ii) overflow or leakage of water in or from the Premises to the extent caused or contributed to by the negligent act or omission of the Tenant; or
 - (iii) loss, damage or injury to property or to a person within or outside the Premises or the Building to the extent caused or contributed to by the negligent act or omission of the Tenant in connection with the Tenant's use of the Premises.
- (g) The Landlord can only claim for amounts the Landlord has a legal obligation to pay rather than voluntary expenditure.
- (h) Expanding the scope of the indemnity affects value for money and this should be considered in deciding whether to accept a lease proposal. Commonwealth tenant

entities should also be aware that risk and exposure to the Tenant can be increased by the Landlord seeking to add other clauses, such as clauses which provide that the Tenant uses and occupies the Premises at its risk in all respects, and express or implied releases which have the effect of removing or limiting the Landlord's liability.

- (i) The Tenant's indemnity is capped at \$10 million in the aggregate. The indemnity ends when the Lease expires.
- (j) The CNL template clause 40.1.4 grants the Commonwealth the right to the conduct of any Claim where the Commonwealth has liability under the indemnity on behalf of the Landlord. This enables the Commonwealth to manage any cost, expense and sensitivities associated with the Claim.
- (k) The cap on the indemnity given by the Tenant in the CNL template clause does not act as a general limit on the liability of the Tenant.

54. Landlord to insure (CNL template clause 41)

54.1 Purpose

This clause sets out the general insurance framework for the Landlord and Tenant. This covers:

- (a) the types of insurance the Landlord and the Tenant are required to hold under the Lease;
- (b) the form that insurance will take;
- (c) warranties by the Landlord about the insurance it takes out;
- (d) a framework for applying insurance proceeds if the Building is destroyed and a limitation on the Tenant's liability in the event that the Building is destroyed;
- (e) an obligation on the Tenant not to do anything that would void the Landlord's insurance; and
- (f) a requirement on the Tenant to reimburse the Landlord for additional premiums, if they are caused by the Tenant's requirements in the Lease.

54.2 Hints for use

- (a) Item 29 of the Information Table is completed with the required Public Risk Insurance amount (the default is \$20 million) and any other particular insurance requirements of the Tenant relating to:
 - (i) whether the insurance is to be in joint names;
 - (ii) if the insurance will note the Tenant's interest under the Lease; or
 - (iii) if the insurance will contain a waiver by the insurer of its rights of subrogation against the Tenant.
- (b) While the Tenant maintains arrangements for risk coverage through Comcover (or another successor), the Tenant is not required to take out insurance under the Lease. The Landlord should note that:
 - (i) as Comcover arrangements are not the same as private insurance the Tenant will not be able to agree to positive insurance obligations that might be included in usual commercial leases;
 - (ii) Tenants cannot insure the Landlord under the Comcover arrangements; and
 - (iii) Tenants cannot agree to clauses requiring the Tenant to include the Landlord in its policies of insurance.
- (c) The Landlord is required to take out Building Insurance, Public Risk Insurance and Plate Glass Insurance that meets the following requirements:
 - (i) is taken out with a reputable insurer;
 - (ii) is in the general form of policy issued by the insurer for that class of insurance, subject only to any special terms required by the insurer to provide for the matters set out in this clause; and

- (iii) in relation to Public Risk Insurance, is for at least the public liability amount listed in Item 29 of the Information Table.
- (d) Tenants should obtain specific advice from Comcover or legal advice on insurance arrangements where the Landlord is unable to comply with the Lease.
- (e) CNL template clause 41.3.1 requires the Landlord to warrant that its insurance will not be rendered void or voidable by the Tenant's Permitted Use and that the Lease clauses do not impact the Landlord's right to be indemnified by the insurance. The purpose of the insurance is to protect against risk and the key reason that the Tenant is using the Premises for, or the Lease itself, cannot invalidate the policy.
- (f) The Landlord must, if requested by the Tenant, produce proof of the insurance and must notify the Tenant promptly if the insurances lapse or become void, voidable or otherwise unenforceable.
- (g) CNL template clause 41.6 establishes a framework for how insurance proceeds are to be applied if:
 - (i) the Building is damaged or destroyed by a risk that the Landlord is required to insure against;
 - (ii) the payment of moneys has not been refused because of an act or omission by the Tenant; and
 - (iii) the Tenant has notified the Landlord that it requires the Building to be reinstated.

The Landlord will be required to act promptly and do its best to reinstate the Building including claiming any insurance moneys, obtaining permissions or consents to reinstate the Building and using all insurance proceeds (except for sums relating to loss of Rent) to reinstate the Building, making up the difference between the cost of reinstatement and the insurance proceeds.

- (h) The intention of CNL template clause 41.6 is to require the Landlord to apply any insurance proceeds to reinstating the Premises for the benefit of the Tenant, on the basis that the Landlord recovers the cost of taking out the Building Insurance from the Tenant through the gross Rent amount or through Outgoings.
- (i) CNL template clause 41.8 creates a limitation on the Tenant's liability to the Landlord to the extent that the Landlord is entitled to be indemnified by an insurance policy required by the Lease, or would not have been entitled if the Landlord had insured in accordance with the requirements to the Lease. This clause prevents the Landlord from claiming from the Tenant in circumstances where the Landlord can claim from its insurance, which is paid for using the gross Rent or Outgoings received from the Tenant.
- (j) CNL template clause 41.9 creates an obligation on the Tenant to reimburse additional premiums to the Landlord if these premiums are incurred due to:
 - (i) the Tenant being named as a co-insured; and
 - (ii) a waiver by the insurer of its rights of subrogation against the Tenant.

This allows the Landlord to pass on additional premiums to the Tenant where they might not be able to be recovered under the gross Rent. This clause will not apply in the case of a net Lease as the Landlord will be recovering those premiums by way of Outgoings, which would potentially allow the Landlord to pass costs on twice. This clause can be deleted if the Tenant does not want these insurance features, or does not want to bear additional premiums associated with them, or if the Landlord cannot reasonably secure them.

54.3 Lease management

Tenants should request and verify the certificates of currency at lease execution and ask for annual evidence of the insurances required under the Lease.

Part G – Dealings with lease

55. Assignment and subletting (CNL template clause 42)

55.1 Purpose

- (a) This clause deals with circumstances where the Tenant wishes to assign, sublease, license or part with possession of its interest in the Lease and the procedural requirements the Tenant must comply with to do so.
- (b) An assignment is a transfer of the Lease (all of the Premises and all the Tenant's rights and obligations are transferred to an incoming entity). The assignee will take the Lease for the balance of the Term and the extent of any residual liability in the assignor, party/party releases and indemnities are usually governed by the terms of the deed of assignment.
- (c) A sublease is where the Tenant sublets whole or part of its interest to another entity and remains responsible to the Landlord under the head lease. The area demised may be the whole or part of the Premises under the head lease but the term must be less than the Term in head lease (and expire at least 1 day before the expiry date of the head lease). Sublease terms may also differ from the head lease terms, but should not create inconsistencies or risk of breach. In a sublease arrangement, the Tenant's relationship with the Landlord and their respective obligations under the head lease remain on foot for the whole Term.
- (d) This clause covers two scenarios:
 - (i) when the Tenant deals with its interest in the Lease to a Corporate Commonwealth Entity, a Non-corporate Commonwealth Entity or a Commonwealth Company; and
 - (ii) when the Tenant deals with its interest in the Lease to an entity that is not a Corporate Commonwealth Entity, a Non-corporate Commonwealth Entity or a Commonwealth Company.

55.2 Hints for use

- (a) In the scenario in paragraph 55.1(d)(i), the Tenant is not required to obtain the Landlord's consent but must notify the Landlord of any action taken under the clause. This clause is required, without limitation, in the event that there is a machinery of government change which means the Commonwealth tenant entity performing the task of the Tenant is shifting to another type of Corporate Commonwealth Entity, a Non-corporate Commonwealth Entity or a Commonwealth Company. In this circumstance, the Tenant will have no control over the change and if the Landlord was able to withhold consent it would force the Tenant to be in breach of the Lease. Tenants will, however, notify the Landlord as a courtesy.
- (b) In the scenario in paragraph 55.1(d)(ii), the Tenant is required to seek the Landlord's prior written consent and comply with the procedural requirements for assignment or subletting in the Lease.
- (c) The Landlord must promptly give its consent to an assignment if the following requirements are met:
 - (i) the Tenant satisfies the Landlord that the proposed assignee is financially secure and has the ability to carry out the Tenant's obligations under the Lease;
 - (ii) the proposed assignee:
 - (A) signs a deed or agreement in which it covenants with the Landlord and the Tenant to perform the obligations of the Tenant under the Lease; and
 - (B) if the Landlord requests, gives reasonable security;
 - (iii) the Tenant complies with any other reasonable requirements of the Landlord;
 - (iv) the Tenant is not in breach of the Lease; and

- (v) the Tenant pays the Landlord's reasonable costs of giving its consent
- (d) These requirements are intended to demonstrate to the Landlord that a proposed assignee is able to comply with the Tenant's obligations under the Lease – such as paying Rent and giving security.
- (e) The Lease provides that from the date of assignment the Tenant will be released from its obligations under the Lease. Tenants must seek a release from the assignment date as the Commonwealth cannot be exposed to potentially uncapped contingent liabilities that are out of the Tenant's control once they have vacated the Premises. Tenants must seek legal advice before considering amendments to this clause.
- (f) In the event of subletting, the Landlord will consent if the Tenant:
 - (i) complies with the reasonable requirements of the Landlord;
 - (ii) is not in breach of the Lease; and
 - (iii) pays the Landlord's reasonable costs of giving its consent.
- (g) Under a sublease the Commonwealth tenant entity remains liable to the Landlord for the performance of the Lease and cannot require a release as in the case of an assignment. The Commonwealth tenant entity must instead protect itself in the sublease (or licence) by imposing relevant liability on to the sublessee (or licensee).
- (h) While the Tenant will need to consider ensuring that its Comcover arrangements (or other insurance if it does not use Comcover) covers it for risks associated with the subleasing arrangement, the subleasing arrangement in turn will require the subtenant to have relevant insurance. The terms of the subleasing arrangement are critical and should be finalised before any access is given to a subtenant. Legal advice should be obtained before a subleasing arrangement is entered into.
- (i) There are limitations placed on the Landlord's costs that can be recovered from the Tenant in relation to consent. These costs must be directly related to consenting and making enquiries about the proposed subtenant's respectability, financial soundness and reputation.

56. Consent of mortgagee (CNL template clause 43)

56.1 Purpose

- (a) This clause requires the Landlord to obtain the unconditional consent of a mortgagee if the Land is subject to a mortgage, charge or other encumbrance and the Lease would not be binding on the mortgagee, chargee or encumbrancee if consent was not obtained.
- (b) Upon giving consent, the rights of the mortgagee are subject to the Lease and the interests of the Tenant contained in the Lease cannot be overridden by the mortgagee. The failure to obtain consent does not directly affect the validity of the Lease between the Landlord and Tenant, but it does mean that it will not be binding against the mortgagee.
- (c) In some states it is not possible to register leases without the mortgagee consenting and producing the title. Accordingly, this clause can also be necessary for registration.

56.2 Lease management

Tenants should request the consent be provided at the outset of the Lease if they wish to review it and keep a record on file.

57. Landlord Dealing (CNL template clause 44)

57.1 Purpose

This clause provides that the Landlord will not allow the Tenant's interest in the Lease to be terminated because a Landlord Dealing occurs. For example, this will apply if the Landlord transferred its interest in the Building and the Lease was terminated as a result.

57.2 Hints for use

This clause should only be amended in exceptional circumstances and Tenants should not agree to any amendment without appropriate legal advice.

Part H – Breach or dispute

58. Default and termination (CNL template clause 45)

58.1 Purpose

- (a) This clause establishes a framework for what is to happen and what remedies and rights either Party will have in the event that a Landlord Act of Default or a Tenant Act of Default occurs.
- (b) The definitions of what constitutes a default differs for the Landlord and the Tenant, as do the consequences of the default.

58.2 Hints for use

- (a) Before action can be taken in relation to default, the Party who has defaulted is given an opportunity to rectify or remedy the Act of Default by receiving Notice from the other Party which specifies the Act of Default and requires the Party to remedy it within a timeframe specified in the Notice. These Notice periods are built into the Act of Default definitions and should not be amended.
- (b) Landlords are required at law to take reasonable steps to mitigate their loss following termination of a lease due to a tenant's default. This is usually done by reletting the Premises at a reasonable rent, based on comparable evidence, and on reasonable terms.
- (c) The law surrounding breach and default is complex and there are regional laws that impact it. Tenants should promptly seek legal advice if issues arise around acts of default.
- (d) An *ipso facto* clause is a contractual provision that allows one party to terminate or modify the operation of the contract (or provides for this to occur automatically) upon the occurrence of a specified insolvency related event. Subclause (c) of the definition of Landlord's Act of Default provides that the Landlord is in default of the Lease if an administrator or controller is appointed, or a resolution is passed, or proceedings are commenced for the winding up of the Landlord. The Tenant is entitled to terminate the Lease in the event of a Landlord's Act of Default. However, the Tenant's right to terminate in clause 45.2 of the CNL template is expressly subject to the application of sections 415D, 434J and 451E of the *Corporations Act 2001* (Cth). That legislation gives effect to the *ipso facto* regime, which provides for an automatic moratorium on the enforcement of certain *ipso facto* rights against companies the subject of any of the following insolvency regimes:
 - (i) a creditors' scheme of arrangement (including certain steps leading up to the scheme);
 - (ii) a voluntary administration; or
 - (iii) a receivership, but only where the receiver is appointed over the whole or substantially the whole of the property of the company,

if those rights have become enforceable as a result of the fact of the counterparty becoming subject to that insolvency regime. Although the *ipso facto* regime applies automatically, clause 45.2 of the CNL template has been drafted to encourage the consideration of the *ipso facto* regime before enforcement action is taken by a Tenant.

58.3 Lease management

It is important that there is strict compliance with the Notice clause (discussed below at paragraph 69) in the event that either Party chooses to act on its rights in this clause.

59. Resolution of disputes (CNL template clause 46)

59.1 Purpose

This clause provides a regime for how disputes under the Lease are to be negotiated and, potentially, resolved.

59.2 Hints for use

- (a) The CNL template dispute resolution clause allows for mutual agreement to be reached by nominated representatives before the Parties agree that either of them can refer the dispute to an Expert. If they do not agree that the dispute is to be referred to an Expert then the Parties are free to institute court proceedings. If the Parties do agree that the dispute is to be referred to an Expert, then the decision of the Expert is final and binding.
- (b) Before an Expert can be retained the following steps apply:
 - (i) the Party claiming that there is a dispute will give the other Party a Dispute Notice setting out the nature of the dispute;
 - (ii) each Party will nominate a representative that has not had any prior involvement in the dispute;
 - (iii) the representatives will try to settle the dispute by direct negotiation between them;
 - (iv) if either:
 - (A) the representatives cannot agree; or
 - (B) if one or both Parties fail to nominate a representative within the timeframe,the Parties may agree that the dispute may be referred by either Party for determination by an Expert; and
 - (v) if the Parties have been unable to agree to refer the dispute to an Expert either Party may commence legal proceedings.
- (c) This clause also establishes how the costs are to be shared between the Parties, and provides an alternative if an Expert fails to deliver a decision within the required timeframe.
- (d) The Parties may agree on some types of disputes which, if listed in Item 31 of the Information Table, can be dealt with through legal proceedings either instead of, or as well as, Expert determination (eg – a dispute about the Commonwealth's constitutional position). Tenants should seek legal advice on what types of disputes are more appropriately dealt with by legal proceedings.

59.3 Alternative clauses

- (a) If agreed by the Parties, the following alternative clause can be used in the place of CNL template clause 46.1. The clause below allows for immediate referral by either Party for appointment of an Expert, and in this case (apart from interlocutory relief), the decision of the Expert is final and binding:
 - #.1.1. *Subject to any provision of this Lease to the contrary any dispute between the Parties which is not resolved within 10 Working Days after one Party gives the other Party a Dispute Notice may be referred by either Party for determination by an Expert.*
 - #.1.2. *Following the Expert's appointment the Expert must:*
 - a. *immediately advise both Parties in writing of the date of appointment; and*
 - b. *deliver the Expert's determination within 20 Working Days from the date of appointment.*
 - #.1.3. *Each Party may make a submission either orally or in writing to the Expert within 10 Working Days after the date of appointment of the Expert.*

- (b) If for any reason a Tenant does not intend that the decision of the Expert is final and binding (eg – a particular transaction may have elements that carry a higher risk and the Tenant may wish to leave the door open for referral to a Court) then these clauses will need to be considered by the legal adviser and amended accordingly.

59.4 Lease management

Regard should be had to the dispute resolution process if a dispute arises to ensure that it is dealt with appropriately and efficiently.

Part I – Co-operative performance of Lease

60. Co-operative performance of Lease (CNL template clause 47)

60.1 Purpose

This clause sets out a framework for the Parties to deal with each other in a co-operative and reasonable way, including in relation to consenting or approving matters arising out of the Lease.

60.2 Hints for use

- (a) The Parties have an explicit obligation to act co-operatively and reasonably in relation to the Lease. This obligation applies to all clauses in the Lease and should be considered during negotiations and over the life of the Lease.
- (b) Any consents and approvals given by either Party (unless explicitly stated otherwise) requires the Party to:
 - (i) consider and respond to the request promptly;
 - (ii) not unreasonably withhold or delay the consent or approval;
 - (iii) (if necessary) require the requesting Party to comply with reasonable conditions before giving its consent or approval;
 - (iv) not impose conditions in giving consent or approval which would have the effect of being inconsistent with the Lease; and
 - (v) not make payment of its costs a condition of its consent or approval unless a provision of the Lease specifically allows it to do so.
- (c) CNL template clause 47.3 specifies how the Lease obligations will be performed:
 - (i) where appropriate, if a Party is required to do something or not do something, the Party will also arrange for its officers, employees, agents and contractors to do or refrain from doing the relevant thing; and
 - (ii) unless otherwise stated, a Party will perform its obligations at its cost and throughout the Term and during a holding over period.

60.3 Lease management

Lease managers and administrators should ensure that employees, agents and contractors are aware of the behavioural requirements to avoid a breach of the Lease occurring.

Part J – General provisions

61. Applicable law (CNL template clause 48.1)

61.1 Purpose

This clause establishes what Law applies to the Lease and requires the Parties to submit to the Law in the Jurisdiction (unless it would not otherwise apply to the Tenant).

61.2 Hints for use

It may be appropriate for some jurisdictional leasing laws to be excluded from applying to the Lease. If so, these Laws will be listed in Item 32 of the Information Table and agreed upon during lease negotiations.

62. Landlord to register Lease (CNL template clause 49.2)

62.1 Purpose

This clause requires the Landlord to promptly do all things required to arrange for the Lease to be registered as soon as practicable, if required by the Tenant to do so.

62.2 Hints for use

Unless there is an identifiable reason not to (eg – jurisdictional registration considerations), Commonwealth tenant entities should require the Lease to be registered. More information on lease registration is set out in paragraph 6.

63. Entire Agreement (CNL template clause 49.3)

63.1 Purpose

- (a) This clause provides that the Lease is the entire agreement between the Parties and overrides all previous agreements or understandings between the Parties on the subject matter, unless a Prior Agreement is specified in Item 33 of the Information Table.
- (b) A Prior Agreement exists, for example, where there is an Agreement for Lease or Agreement to Design, Construct and Lease that the Lease arose from.

63.2 Hints for use

- (a) Any Prior Agreements must be listed in Item 33 of the Information Table.
- (b) Tenants should ensure that the whole commercial and legal agreement is fully captured in the Lease. Incorporation of documents into the Lease by reference may create inconsistency between the referenced document and the Lease.
- (c) Tenants must fully and completely instruct their appointed legal adviser at the lease preparation stage of all related agreements, relevant terms and material. There should be a full written record of negotiations and terms agreed and care must be taken to avoid conflicting outcomes or uncertainty.
- (d) Where pre-contractual representations are made and a Party considers that it may later seek to rely on such representations (eg – in a response to a request for tender) the Tenant should incorporate those representations into the Lease.
- (e) If there is any doubt about whether complete information is available the Tenant must inform their legal adviser so appropriate guidance can be given.

64. When things can be done (CNL template clause 48.4)

64.1 Purpose

This clause provides that if a payment or thing is due to be done on a day that is not a Working Day then it will be done on the following Working Day.

65. Waiver and variation (CNL template clause 48.5)

65.1 Purpose

- (a) This clause provides that the terms of the Lease will only be varied if the Parties have agreed in writing to vary the terms.
- (b) It also provides that a Party may only waive (give up) a right or rights that it has under the Lease by doing so expressly and in writing.
- (c) This means that:
 - (i) a Party will not be taken to have waived a provision or right if it has not exercised that right;
 - (ii) a waiver by a Party of a breach of one clause of the Lease does not extend to be a waiver of any other breaches or rights; and
 - (iii) the failure to enforce a right of the Lease is not a waiver of that clause or that right.

66. Time for compliance (CNL template clause 48.6)

66.1 Purpose

This clause provides that any Notice given to the Tenant which requires it to do something will always have a minimum compliance period of 20 Working Days. This is a standard Commonwealth requirement and should not be amended.

67. Sale and Power of Attorney (CNL template clause 48.7)

67.1 Purpose

This clause provides that any express or implied clause in the Lease which enables the Landlord to act as an attorney for the Tenant to sell property, sign documents or make other decisions will have no effect.

68. Confidentiality (CNL template clause 48.8)

68.1 Purpose

This clause requires the Landlord to acknowledge that the Tenant's activities in the Premises are confidential and can only be disclosed to a third party in the following circumstances:

- (a) to a Commonwealth Minister or Parliamentary Secretary;
- (b) if the disclosure required by a Law or Requirement which is applicable to the Commonwealth of Australia; or
- (c) if it is a disclosure to professional advisers for the purposes of administering the Lease, provided that before it makes the disclosure, the Landlord ensures that those professional advisers are bound by the same duty of confidentiality which applies to the Landlord.

69. Notices (CNL template clause 48.9)

69.1 Purpose

- (a) This clause provides how Notices are to be served under the Lease. The Landlord and Tenant's address for service details are included in Items 1 and 2 of the Information table.
- (b) This clause sets out the formalities for Notices to be valid and when they are deemed to be received.

69.2 Lease management

Tenants should maintain accurate service details for the Landlord and ensure that the Tenant details are also up to date so no Notices are missed or served incorrectly.

70. Notices on Change of Landlord (CNL template clause 48.10)

70.1 Purpose

- (a) This clause provides that the Landlord will give the Tenant prompt notice if:
 - (i) the Landlord sells the Land;
 - (ii) the Landlord changes its address for service; or
 - (iii) another person becomes entitled to Rent or other payments under the Lease or the Landlord's rights and obligations under the Lease.
- (b) This clause protects the Tenant if the Tenant becomes responsible to a third party under the Lease by making the Tenant aware of the change in arrangements.
- (c) If the Landlord fails to give notice to the Tenant it releases and indemnifies the Tenant from any Claims that the Tenant may become liable for due to the delay.

71. Landlord as a trustee (CNL template clause 48.11)

71.1 Purpose

This clause addresses issues associated with entering into a lease with a landlord acting in its capacity as a trustee to a trust.

71.2 Hints for use

- (a) Item 34 in the Information Table is to be completed with the details of the Trust.
- (b) Trusts can have complex structures, and it is recommended that this clause be considered closely. Legal consultation may be necessary should there be any uncertainty or where extensive complexity exists.
- (c) As a general proposition, Tenants should resist entering into leases with trustees if the lease includes a trustee limitation of liability clause that:
 - (i) unfairly limits the trustee's liability to a negligible amount; or
 - (ii) limits the trustee's liability to an amount that is not readily able to be determined by the Tenant.

Part K – Schedules

72. Schedule 1 Rules

- (a) This schedule will attach a copy of the Rules applying to the Building.
- (b) The Tenant's obligation to comply with the Rules is discussed at paragraph 25 above.

73. Schedule 2 Plan or Plans of Premises

- (a) If plans are in a registerable form (or do not impact registration) then they should be included in this Schedule.
- (b) This is discussed at paragraph 6 above.

74. Schedule 3 Plan of Car Parking Bays

- (a) If plans are in a registerable form (or do not impact registration) then they should be included in this Schedule.
- (b) This is discussed at paragraph 6 above.

75. Schedule 4 Market Review Method

- (a) This Schedule outlines the Market Review Method if that method is to apply on a Rent Review Date, including the commencement date of a further term upon the exercise of an Option.
- (b) This is discussed at paragraph 29 above.

76. Schedule 5 Valuation Rules

- (a) This Schedule outlines the matters that a Valuer will take into account to determine Market Rent.
- (b) This is discussed at paragraph 29 above.

77. Schedule 6 Performance Standards

- (a) This Schedule will contain the relevant Performance Standards for the Building.
- (b) This is discussed at Part D above.

78. Schedule 7 Green Lease Schedule

- (a) This Schedule will contain the GLS (if any).
- (b) This is discussed at paragraph 45.

Annexure A – Flexibility clauses

1. Flexibility clauses

1.1 Pre-commencement contraction rights clause

- (a) The below clause provides for the reduction in size of premises to be leased by a Commonwealth tenant entity prior to the commencement of the lease. Although the template clause refers to the surrender of all or part of the Premises, the clause really provides for the reduction in size of premises to be let to the Commonwealth tenant entity because the contraction of the premises occur before the Commonwealth tenant entity receives the grant of a leasehold interest in the premises.
- (b) The below clause is drafted for use with the Commonwealth National Lease (CNL) template and is in a form that can be inserted into that document. Users are reminded that terminology may need to be changed to align with their lease documents.

1.2 Drafting notes for Pre-commencement contraction rights clause

- (a) This clause can be used in pre-commitment lease documents where the Commonwealth tenant entity will foreshadow in its approach to market that it will retain the ability to reduce the size of the premises to be leased prior to the commencement of the lease.
- (b) This clause provides that the Commonwealth tenant entity may 'surrender' all or part of the Premises (to be specified when the pre-commitment lease documents is prepared) by giving written notice to the Landlord. If the Commonwealth tenant entity gives a 'Pre-commencement Surrender Notice', it must:
 - (i) vacate the relevant part of the Premises;
 - (ii) leave the relevant part of the Premises clean and tidy; and
 - (iii) sign a deed of surrender (if required to do so by the Landlord).
- (c) Rent for the term of the Lease will be reduced in proportion to the reduction in the net lettable area of the Premises.
- (d) Capitalised terms (unless otherwise defined) are based on the definitions in the Lease.

Pre-commencement contraction right

"X.1. Tenant's right to surrender

X.1.1. At any time on or before [insert date], the Tenant may deliver to the Landlord a notice (a Pre-commencement Surrender Notice) giving the Landlord notice of the Tenant's intention to surrender [specify the area that the Tenant may surrender – eg ~the whole of the Premises ~that part of the Premises located on level [insert level no.] of the Building ~a part of the Premises which is not less than [insert percentage]% of the Premises ~the part of the Premises identified in the plan in Annexure [annexure no.]] (the Surrender Area) with effect from a date specified in the Pre-commencement Surrender Notice (which date must be before the Commencement Date and must not be more than 10 Working Days after the date the Pre-commencement Surrender Notice is given) (Pre-commencement Surrender Date).

X.2. Multiple surrenders

X.2.1. The Tenant may give notice under clause X.1 more than once.

X.3. Tenant's obligations on surrender

X.3.1. If the Tenant delivers to the Landlord a Pre-Commencement Surrender Notice, the Tenant must:

- a. if the Tenant has been given access to the Surrender Area:
 - i. on or before the Pre-Commencement Surrender Date vacate the Surrender Area; and
 - ii. surrender that area to the Landlord in a clean and tidy the condition; and
- b. if required by the Landlord, execute and return to the Landlord within 15 Working Days of receipt a deed of surrender (or partial surrender as the case may be) and variation of this Lease in such form as the Tenant (acting reasonably) requires, such document prepared by the Tenant at its cost.

X.4. Rent following partial surrender

X.4.1. If the Surrender Area is surrendered under clause X.3, with effect from the Pre-commencement Surrender Date, the Rent payable under this Lease will be reduced in proportion to the reduction in the net lettable area of the Premises."

1.3 Expansion rights

- (a) The table below sets out two versions of template expansion rights for inclusion in the lease. The clauses allow for the Commonwealth tenant entity to increase the size of premises by:
 - (i) incorporating a right of first refusal to lease additional space in the building; and
 - (ii) providing an option to take identified additional space.
- (b) **Option 1** – provides the Commonwealth tenant entity with a right of first refusal to lease Additional Space in the Building.
- (c) **Option 2** – provides an option to take identified additional space at pre-agreed dates (eg – at years 5 and 7 of the Lease). This clause provides the Commonwealth tenant entity with certainty as to its ability to increase the size of its Premises during a term and can provide the Commonwealth tenant entity with certainty in the development of accommodation strategies.
- (d) The below clauses have been drafted for use with the Lease and are in a form that can be inserted into that document. Each clause also includes brief drafting notes. Users are reminded that terminology may need to be changed to align with their lease documents.

1.4 Drafting Notes for Option 1 – First right of refusal

- (a) This clause can be used in lease documents where the Commonwealth tenant entity requires a right of first refusal to lease additional space in the building.
- (b) This clause provides that the landlord offer the Commonwealth tenant entity a lease of an identified area in the building (not leased to the Commonwealth tenant entity) at any time during the term that the additional space becomes available.
- (c) The Landlord's Offer must be:
 - (i) for a term equal to the balance of the term of the lease (with options for renewal matching those available under the Lease);
 - (ii) for the Rent determined by reference to pre-agree criteria; and
 - (iii) otherwise, generally, on the same terms as the lease.
- (d) Capitalised terms (unless otherwise defined) are based on the definitions in the Lease.

Option 1 – First right of refusal

"X.1. Additional Space

X.1.1. In this clause X:

- a. Additional Space means an area on Level(s) [list level/s] of the Building not leased to the Tenant or leased to or occupied by an Existing Tenant; and
- b. Existing Tenant means a tenant of the Building who occupies premises in the Building which the Landlord agrees that tenant can continue to occupy.

X.2. Tenant's right of refusal

X.2.1. If at any time during the Term:

- a. any Additional Space becomes available for lease for lease;
- b. the Landlord received an offer to lease, licence or otherwise occupy the Additional Space from a genuine third party; and
- c. any other party that holds a right of refusal over the Additional Space predating the date of this Lease elects not to take a lease of the Additional Space,

the Landlord must offer a lease of that Additional Space to the Tenant on the terms set out in clause X.3.

X.2.2 This clause X does not preclude the Landlord making an offer of the Additional Space to a third party or accepting an offer to lease the Additional Space from a third party which is subject to the Tenant not exercising the Tenant's rights under this clause X.

X.3. Landlord's offer

X.3.1. The terms of the Landlord's Offer will be:

- a. for a term equal to the balance of the Term together with options for renewal to match those (if any) remaining available under this Lease;
- b. at a commencing rent which is the same rate per square metre as the Rent [insert a description of what will be the rent for the Additional Space. For example, ~which is the same rate per square metre as the Rent ~agreed between the Landlord and the Tenant or failing agreement then determined in the manner set out in clause 17.3 (Market Rent Review) ~which is the lesser of the amount which is the same rate per square metre as the Rent and the market rent of the Additional Space determined in accordance with clause 17.3 (Market Rent Review)];
- c. otherwise on the same terms as this Lease:
 - i. including in relation to any incentive provided to the Tenant adjusted in accordance with the proportion that the balance of the Term bears to the full Term); and
 - ii. except that:
 - A. [consider whether there are clauses which should not apply to the Additional Space or which need to be varied. In particular, consider carefully any clauses dealing with landlord's works, make good, surveys]; and
 - B. this clause X will be deleted.

X.3.2. The terms of the Landlord's Offer will be on terms not less favourable than the terms offered to the third party.

X.4. Landlord's offer to remain open

X.4.1. The Landlord's Offer must be open for acceptance for [insert acceptance period] Working Days. If the Tenant wishes to accept it, the Tenant must do so in writing.

X.5. If Tenant accepts

X.5.1. If the Tenant accepts the Landlord's Offer, the parties must enter into a new lease in respect of the Additional Space on the terms of the Landlord's Offer. The necessary documentation will be prepared by the Tenant.

X.6. If Tenant does not accept

X.6.1. If the Tenant does not accept the Landlord's Offer in accordance with clause X.4, the Landlord may lease the Additional Space to a third party at any time within the [insert period] month period commencing on the date the Landlord's Offer was delivered by the Landlord to the Tenant. If a lease of the Additional Space is not signed by the Landlord and a third party on terms acceptable to the Landlord within that period, the Landlord must not lease the Additional Space to any third party without again complying with the provisions of this clause X."

1.5 Drafting Notes for Option 2 – Option to expand into identified expansion space

- (a) This clause can be used in lease documents where the Commonwealth tenant entity requires a right to expand the premises by taking an additional identified premises during the term or any further term in the lease.
- (b) This clause provides that the Commonwealth tenant entity may provide an 'Expansion Notice' to the Landlord at an agreed time to take up additional premises on the same terms as the lease (but for the Expansion Rent) for the balance of the Term.
- (c) Capitalised terms (unless otherwise defined) are based on the definitions in the Lease.

Option 2 – Option to expand into identified expansion space

"X.1. Tenant's option to expand

X.1.1. In this clause X.1:

- a. *Expansion Lease means a lease of the Expansion Premises granted by the Landlord to the Tenant in accordance with clause X.2.*
- b. *Expansion Premises means [insert description of premises that the Commonwealth tenant entity has an option right to].*
- c. *Expansion Notice means a Notice given by the Tenant to the Landlord in accordance with clause X.2 to the effect that the Tenant wishes to lease the Expansion Premises for the Expansion Term starting on the [insert agreed commencement date for expansion expiry of the Term granted by this Lease].*
- d. *Expansion Term means period commencing of the [insert the Term for Expanded Premises by reference to the 5th or 7th anniversary of the Commencement Date] anniversary of the Commencement Date and ending on the Expiry Date.*

X.2. Grant of option

X.2.1. If:

- a. *the Tenant wishes to lease the Expansion Premises for the Expansion Term;*
- b. *the Tenant gives an Expansion Notice to the Landlord:*
 - i. *no earlier than [6 months] prior to the commencement of the Expansion Term; and*
 - ii. *no later than [3 months] prior to the commencement of the Expansion Term; and*
- c. *when the Tenant gives the Expansion Notice:*
 - i. *it is not in breach of this Lease; and*
 - ii. *any Prior Breach has either been waived or rectified or, in the case of a negative covenant, has been discontinued,*

then the Landlord agrees to grant to the Tenant a lease of the Expansion Premises for the Expansion Term on the same terms contained in this Lease except that:

- d. *the Rent for the Expansion Term will be [insert a description of what will be the rent for the Expansion Premises. For example, ~which is the same rate per square metre as the Rent ~agreed between the Landlord and the Tenant or failing agreement then determined in the manner set out in clause 17.3 (Market Rent Review) ~which is the lesser of the amount which is the same rate per square metre as the Rent and the market rent of the Expansion Premises*

determined in accordance with clause 17.3 (Market Rent Review)] (Expansion Rent). The Expansion Rent will be paid at the same time and in the same method as the Rent under this Lease;

- e. clauses X.1 and X.2 will be omitted;*
- f. the Review Dates in the Expansion Term will be [insert the Review Dates for the Rent for Expansion Term]; and*
- g. any other consequential amendments to the Items will be made as appropriate.*

X.3. Further action

X.3.1. Each party must use its best efforts to do all things necessary or desirable to give full effect to this clause X, including by promptly do all things required to arrange for the Expansion Lease to be:

- a. prepared;*
- b. executed; and*
- c. if required by the Tenant, registered,*

as soon as practicable after the Tenant gives the Landlord an Expansion Notice."