



Australian Government

Commonwealth National Lease – Divestment Guide

Notes on using the Commonwealth National Lease suite divestment documents

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Part A General guidance

1. The Commonwealth National Lease – Divestment Guide

1.1 Background

- (a) The Commonwealth National Lease – Divestment Guide (**Divestment Guide**) provides Commonwealth entities with guidance notes and support tools for conducting a lease divestment.
- (b) The Divestment Guide is designed for use where a Commonwealth tenant entity proposes to dispose of its interest in an existing lease by way of:
 - (i) surrender of lease;
 - (ii) assignment of lease to an entity other than another Commonwealth tenant entity; or
 - (iii) sublease to an entity other than another Commonwealth tenant entity.
- (c) The Divestment Guide is not designed for use where there are 'dealings' in an existing lease between non-corporate Commonwealth entities, for example when one non-corporate Commonwealth tenant entity proposes to effectively 'assign' a lease to another non-corporate Commonwealth tenant entity or effectively 'sublease' part of its premises to another non-corporate Commonwealth tenant entity. The Commonwealth National Lease suite (**CNL Suite**) includes memoranda of understanding and related guidance for those situations.
- (d) Commonwealth tenant entities can access the most recent version of CNL Suite documents from the Finance website available at <https://www.finance.gov.au/government/property-construction/commonwealth-property-management-framework>. The template divestment documents in the CNL Suite are not mandatory and provide a general framework only on which to build transaction specific details.

1.2 Objectives of the Divestment Guide

The objectives of this Divestment Guide are to:

- (a) provide guidance on the divestment documents in the CNL Suite;
- (b) assist Commonwealth tenant entity staff to understand the relevant issues relating to the documentation of a lease divestment;
- (c) identify situations where the divestment documents in the CNL Suite may require amendment; and
- (d) provide explanatory information on the Commonwealth's approach to lease divestment transactions.

1.3 Scope and limitation

- (a) The Divestment Guide is intended to provide general guidance notes and explanatory material only. It is not a substitute for legal or other advice necessitated by the circumstances.
- (b) The commercial, operational and practical considerations around each lease divestment will necessitate a well thought out assessment of requirements, opportunities, constraints and risk which goes beyond the scope of this Divestment Guide.
- (c) Advice can be sought from the Commonwealth tenant entity's legal adviser or an appointed Whole-of-Australian-Government Property Service Provider.

1.4 Contents

The Divestment Guide comprises:

- (a) Chapter 1 Commonwealth National Lease – Divestment Guide - General Guidance;
- (b) Chapter 2 Commonwealth National Lease – Surrender Deed - Guidance Notes;
- (c) Chapter 3 Commonwealth National Lease – Deed of Assignment of Lease - Guidance Notes; and
- (d) Chapter 4 Commonwealth National Lease – Sublease - Guidance Notes.

2. Circumstances for a lease divestment

- (a) A wide range of circumstances can give rise to a need to consider a lease divestment. For Commonwealth entities these may include:
 - (i) exploring more efficient and cost-effective accommodation options;
 - (ii) operational change;
 - (iii) merger;
 - (iv) separation of functions; and
 - (v) cessation of an activity.
- (b) Ongoing management of a Commonwealth tenant entity's functions and resources should include opportunities to review the impacts of leased accommodation on its operational and financial targets.
- (c) Information on whole of life costing is available in Resource Management Guide No. 500: *Overview of the Commonwealth Property Management Framework (RMG 500)*.

3. Identifying the need for divestment

There are a multitude of considerations that may indicate that a Commonwealth tenant entity should divest leased premises. For example, and without limitation, the following issues may be relevant:

- (a) **Operational need:** for example, is there an operational need that supports consolidation of existing premises resulting in the need of divestment of surplus space? Assessing operational need includes considering any special use requirements and compatibility opportunities or constraints for shared premises, such as:
 - (i) particular security or technology requirements;
 - (ii) requirements for public access and associated amenities;
 - (iii) the need to be in particular locations; and
 - (iv) the extent to which particular activities and functions impact the viability of co-location.
- (b) **Financial objectives:** for example, the objective to deliver savings and optimise value by exploring more efficient and cost-effective accommodation options.

4. Developing the lease divestment plan

- (a) Once operational and financial needs have been identified that support a divestment, a lease divestment plan should be prepared.
- (b) A lease divestment plan should include:
 - (i) a well-considered divestment strategy including a cost-benefit analysis, options for divestment (including alternative Commonwealth use as well as open market options);

- (ii) the process for assessing the options;
- (iii) timing (ensuring sufficient time is allowed for in the entire process to optimise value and remove risk associated with 'rushed' outcomes);
- (iv) securing approval on the divestment strategy; and
- (v) implementing and reviewing that strategy as needed.

5. Assessing lease divestment strategies: cost-benefit analysis

5.1 Analysis

- (a) As a part of its lease procurement process, a Commonwealth tenant entity will have conducted a whole of life costing and considered the likely disposal costs (including the costs associated with procuring a new site if required, removing fit-out and make-good costs) associated with the lease. However, it is likely that this costing will have been based on the assumption that those costs would not be incurred until the expiry of the lease.
- (b) Where a Commonwealth tenant entity is considering early disposal of its interests under a lease, a cost-benefit analysis of all available divestment options should be conducted early in the planning process.
- (c) A cost-benefit analysis will weigh the estimated costs against the likely benefits and risks of a given divestment strategy, as applied to the individual circumstances of the lease.
- (d) As part of undertaking the cost-benefit analysis it may be desirable to obtain external expert advice. Examples include considering whether to engage a property consultant to advise on current local market conditions as this may impact the viability of the various divestment options, or obtaining legal advice on whether the terms of the lease to be divested are either advantageous to or adversely impact the divestment options. Divestment costs may vary significantly and will be affected by the considerations below:
 - (i) **Legal terms and conditions of the lease**
 - (A) Do the lease terms permit early surrender, assignments or subleases without landlord consent?
 - (B) What (if any) are the Commonwealth tenant entity's make-good obligations?
 - (C) Does a proposed divestment strategy require negotiation of amendments to the lease terms (for example, to the permitted use)?
 - (D) Did the landlord provide any financial incentive (for example, a fit-out contribution or rent-free period, which may be dealt with in a separate fitout or incentive deed) in the lease procurement process, and does any portion of that incentive need to be paid back in the event of a surrender, assignment or sublease?
 - (ii) **Timing of the divestment**
 - (A) The willingness of a landlord to accept a particular divestment strategy (or how onerous are the conditions a landlord is inclined to impose on consent) may in part be influenced by the length of time remaining in the term of the lease.
 - (B) If the Commonwealth tenant entity has made significant investment in the lease procurement process (for example, in fitting out the premises), best value for money may not be achieved by ending the lease early.

- (C) Further, a short lead time from the divestment decision to implementation could reduce the range of options available to the Commonwealth tenant entity and increase costs.
- (iii) **Operational requirements and risk appetite of the Commonwealth tenant entity**
 Bearing in mind the Commonwealth tenant entity's responsibilities to ensure proper use of Commonwealth resources, the Commonwealth tenant entity's disposal options analysis should consider:
 - (A) potential costs (for example, payment of a surrender fee or the landlord's consent costs); and
 - (B) lowering the risk profile of the transaction (for example, by securing a full release from performing the Commonwealth tenant entity's obligations under the lease).
- (iv) **Prevailing market conditions**
 In a market where conditions are more favourable to tenants (for example, low rents and high vacancies), landlords may be reluctant to consent to any or a particular divestment strategy, or may seek to impose onerous conditions on consent. Such a market may also make it difficult for the Commonwealth tenant entity to procure a suitable assignee or sub-tenant on favourable terms.

5.2 Disposal options analysis - weighing up the benefits and costs

The benefits, costs and risks associated with a given divestment strategy will vary according to the individual circumstances of the lease disposal. Below are some general matters which Commonwealth entities should consider when conducting a disposal options analysis.

- (a) **Transfer to another Commonwealth tenant entity**
 - (i) Because non-corporate Commonwealth entities are obligated to consider Whole-of-Australian-Government outcomes in property management decision-making, a Commonwealth tenant entity may wish to consider the option of transferring all or part of its leased premises to another Commonwealth tenant entity in preference to approaching the landlord about a surrender of the lease or exploring options available in the open market.
 - (ii) Commonwealth entities should contact the Department of Finance in relation to any opportunities for surplus property.
 - (iii) Many Commonwealth leases allow assignments or subleases to other Commonwealth entities without the consent of the landlord, which could provide significant costs savings.
 - (iv) The proposed use of the premises by the incoming Commonwealth tenant entity may be better aligned with the existing permitted use under the lease than that of a private entity, and there is potential to gain efficiencies in the document negotiation process, and to streamline the lease procurement process for the incoming Commonwealth tenant entity.
- (b) **Surrender**
 - (i) A surrender will often be preferred to an assignment or sublease, as it may enable the Commonwealth tenant entity to be fully released from its obligations (and ongoing risk) under the lease from the date of surrender.
 - (ii) Depending upon market conditions, a surrender is often the least attractive option from the landlord's perspective, and accordingly this carries the risk that the landlord will refuse to agree to a surrender, or impose onerous conditions on consent.
 - (iii) The increased costs which may be occasioned by securing landlord agreement should be weighed against the benefit to the Commonwealth tenant entity of achieving the lower risk profile associated with a surrender, as

opposed to an assignment or sublease (provided that appropriate releases are in place, as set out in the Commonwealth National Lease – Surrender Deed template).

- (iv) The Commonwealth tenant entity should take into account the cost of complying with any end of lease obligations (for example, the costs associated with removing fit-out and/or reinstating the premises) – unlike other lease divestment options, there is not generally an opportunity to defer or transfer these kinds of obligations with a surrender of lease.

(c) **Assignment**

- (i) From a risk perspective, an assignment containing a release in favour of the Commonwealth tenant entity is preferable to a sublease where the whole premises are surplus to requirements.
- (ii) This benefit will not be realised unless appropriate releases and indemnities in favour of the Commonwealth (as set out in the Commonwealth National Lease – Deed of Assignment of Lease template) are in place.
- (iii) Costs associated with obtaining landlord consent may be higher with an assignment than with another divestment method (for example, the costs of the landlord conducting due diligence in assessing the financial capacity or business experience of a new tenant).

(d) **Sublease**

- (i) A sublease is generally the least preferred option where the whole premises are surplus to requirements because it carries the greatest risk for the Commonwealth tenant entity.
- (ii) In the case of a sublease the Commonwealth tenant entity remains liable to the landlord for the performance of the tenant's obligations under the head lease, and there is a risk that it will incur liability to the landlord or third parties as a result of a sub-tenant's actions.
- (iii) These risks will also apply to a sublease of part of the premises, but the Commonwealth tenant entity may be in a better position to manage some or all of them if it remains in occupation of the remaining part of the premises.
- (iv) Depending upon the nature of the sub-tenant entity, the Commonwealth tenant entity may mitigate the risks associated with the grant of the sublease by securing guarantees of performance (such as directors' or bank guarantees) from the sub-tenant.
- (v) Landlord consent costs may be lower than with other divestment options, as the landlord may take some comfort from the fact that the Commonwealth will remain liable for performance of the tenant's obligations in the head lease.

6. Approvals required

6.1 *Lands Acquisition Act 1989 (LAA) and LAA Delegation*

- (a) The surrender or assignment of a lease, or the grant of a sublease, by a Commonwealth tenant entity is the disposal of an interest in land and (subject to some exceptions) requires the written authority of the Finance Minister (or his or her delegate) under the LAA.
- (b) The LAA applies to the acquisition or disposal of an 'interest' in land by an 'acquiring authority'.
- (c) Non-corporate Commonwealth entities contracting as 'the Commonwealth of Australia' are acquiring authorities, as are corporate Commonwealth entities incorporated by or under a law of the Commonwealth or Territory. There are circumstances where because of the terms of the LAA or regulations under the LAA,

or other Commonwealth legislation, an approval under the LAA to dispose of an interest in land is not required.

- (d) An 'interest' in relation to land under the LAA includes any legal or equitable estate or interest in the land, a restriction on the use of the land or any other right, charge, power or privilege over or in connection with the land or an interest in the land.
- (e) A lease typically confers legal or equitable rights in land.
- (f) By surrendering or assigning its interest in leased premises or granting a sublease of leased premises (whether the whole or part only of those premises), the Commonwealth tenant entity is disposing of its interest in land to:
 - (i) the landlord, in the case of a surrender;
 - (ii) the assignee, in the case of an assignment; and
 - (iii) the sub-tenant, in the case of a sublease.
- (g) Certain officials within Commonwealth entities may give the written authority required by the LAA in specific circumstances, (see current Lands Acquisition Delegation).
- (h) The written LAA authority is to be obtained before any binding agreement to enter into the surrender, assignment or sublease arrangement comes into existence.
- (i) A binding agreement may not only arise on signing of the formal legal documents. It may also arise where a heads of agreement or other correspondence is entered into between the parties. As the particular circumstances determine whether a binding agreement has come into existence legal advice may be needed to ascertain if the signing of heads of agreement or other correspondence is sufficient to create a binding agreement.

6.2 *Public Governance, Performance and Accountability Act 2013 (PGPA Act) and Public Governance, Performance and Accountability Rule 2014 (PGPA Rule)*

- (a) Approval under the PGPA Act and PGPA Rule will be required if a lease divestment arrangement involves:
 - (i) the commitment of relevant money; or
 - (ii) a contingent liability, including:
 - (A) the grant of an indemnity, guarantee or warranty on behalf of the Commonwealth; or
 - (B) in certain circumstances, the grant of a release from or cap on the liability of a third party (such as a landlord) to the Commonwealth.
- (b) Examples of such arrangements may include an agreement to:
 - (i) **Surrender:** pay a surrender fee or reimburse consent costs to the landlord or to grant a release in favour of the landlord from liability or the obligation to perform its obligations under the lease.
 - (ii) **Assignment:** reimburse the landlord's consent costs; to release the landlord from liability / the obligation to perform its obligations under the lease; to accept a less favourable release from liability / the obligation to perform the Commonwealth tenant entity's obligations under the lease, or forego such a release altogether; or to accept a less favourable indemnity from the assignee, or forego receiving an indemnity altogether.
 - (iii) **Sublease:** reimburse the landlord's consent costs; or accept rent from a sub-tenant which is less than the rent (on a pro-rata basis, if relevant) that the Commonwealth tenant entity is liable to pay the landlord under the head lease.

6.3 Statutory approvals generally

Approvals need to be obtained prior to any binding arrangement coming into place (whether by execution of a deed of surrender or assignment, a sublease, binding heads of agreement or an exchange of correspondence which may constitute a legally binding arrangement).

6.4 Other relevant Commonwealth policies

- (a) In relation to assignments and subleases (depending upon the size and nature of the premises to be assigned or sublet), the Commonwealth tenant entity may need to provide the assignee or sub-tenant (as the case may be) with a Building Energy Efficiency Certificate (**BEEC**) under the Commercial Building Disclosure (**CBD**) Program.
- (b) Non-corporate entities must comply with the Commonwealth Property Disposal Policy and RMG 500 requirements. Relevant obligations include:
 - (i) developing a property management plan;
 - (ii) having regard to value for money and efficient and effective design;
 - (iii) implementing appropriate accountability measures;
 - (iv) implementing co-operative Commonwealth property management measures; and
 - (v) taking a Whole-of-Australian-Government approach to property management.

6.5 Further guidance

- (a) For further guidance on LAA requirements, contact the Department of Finance.
- (b) For further guidance regarding the PGPA Act and PGPA Rule see the Department of Finance Resource Management page at <http://www.finance.gov.au/resource-management/> - where you will find the Resource Management Guide series including a guide to approving commitments of relevant money (see *Department of Finance Resource Management Guide No. 400* available at <https://www.finance.gov.au/publications/resource-management-guides/commitment-relevant-money-rmg-400>)
- (c) For further information regarding the CBD Program, see <http://www.cbd.gov.au/>. For information about energy efficiency generally, see Energy Efficiency in Government Operations policy (**EEGO**). More information on the EEGO and the content of the Green Lease Schedules is available at <https://www.energy.gov.au/government-priorities/energy-productivity-and-energy-efficiency/government-buildings>.
- (d) A copy of the Commonwealth Property Disposal Policy is available from the Department of Finance at <https://www.finance.gov.au/government/property-and-construction/commonwealth-property-disposal-policy>.
- (e) For the Overview of the Commonwealth Property Management Framework requirements and guidance on property management planning, see *Department of Finance Resource Management Guide No. 500* available at <https://www.finance.gov.au/government/property-and-construction/commonwealth-property-management-framework/resources>.

Part B Guidance notes on Surrender Deed

7. Introduction

7.1 Use of the Commonwealth National Lease – Surrender Deed

- (a) The Commonwealth National Lease – Surrender Deed is not mandatory when a Commonwealth tenant entity is surrendering its interest in a lease.
- (b) The commercial, operational and practical considerations around each lease divestment will necessitate a well thought out assessment of requirements, opportunities, constraints and risk. The template document will in each case need to be prepared to suit the actual requirements for the particular lease divestment.

7.2 Background considerations

- (a) A lease grants the tenant a proprietary interest in the premises and it creates an interest in land.
- (b) A lease will stipulate a 'term' of occupation, it may contain option rights and it will usually provide for an overholding right at lease end (typically, but not always, from month to month).
- (c) Unless the lease contains express rights allowing a party to voluntarily end the lease before the expiry date, a party is not entitled to unilaterally end the lease. A commercial negotiation can be commenced to secure mutual agreement to end a lease early (this is what is commonly referred to as a 'surrender' because it results in the tenant surrendering its proprietary interest in the premises), but there is no obligation on a party to agree to an early surrender. Where agreement is reached, it is usually subject to a surrender fee being paid by the tenant and possibly other conditions.
- (d) Approvals under the LAA will be required for the surrender of the lease and under the PGPA Act and / or PGPA Rule for any commitment of relevant money.

8. Developing a lease divestment plan

Once it has been determined that the premises are surplus to need the Commonwealth tenant entity should develop a well-considered lease divestment plan. A lease divestment plan should take into account the below questions.

8.1 Is the whole or only part of the premises surplus to need?

- (a) This impacts not only the legal nature of the transaction but could have other cost and liability impacts. For example, the landlord could use the giving of consent to surrender part of the premises as leverage for imposing a more onerous lease for the retained premises.
- (b) Well considered negotiations are needed to avoid the introduction of unintended risk into the surrender process. This is a matter that may be considered in conjunction with advice from the Commonwealth tenant entity's appointed PSP.

8.2 Timing

- (a) Ensure the lead time allows the exit strategy to be implemented.
- (b) If a relocation is to occur allow enough time to ensure the new accommodation is ready before the surrender is due to take effect.
- (c) Negotiating an extension to occupation rights in existing premises once a surrender deal has been struck is likely to place the Commonwealth tenant entity in a disadvantageous position and could result in high costs associated with extending the surrender date of the lease.

8.3 Market opportunities and risks

- (a) Is the leasing market such that the landlord is likely to engage in agreeing to early surrender of the lease on reasonable and acceptable financial and legal terms? If not, the Commonwealth tenant entity needs to factor in the likely time and cost impacts of protracted negotiations and an unfavourable risk load in the surrender deal and this may lead to a review of the divestment strategy.
- (b) For example, would an assignment or sublease yield a better outcome or is the remainder of the term and associated expenditure and liability such that it is more economical to retain the leasehold interest for an alternative use without legal divestment (this would be particularly relevant where only a short term remains under the lease).

8.4 Legal opportunities and risks under existing and potential lease arrangements

- (a) Does the lease already allow for early surrender and, if not, what strategies are to be implemented in negotiating a surrender?
- (b) What surrender fee is the Commonwealth tenant entity able to accommodate?
- (c) Is the landlord likely to agree to an early surrender on acceptable terms – factors influencing this include whether the landlord is likely to be able to readily re-let the premises for an equivalent or better return or is it likely to encounter difficulties in re-letting the premises?
- (d) Are there any unresolved disputes?

8.5 Financial impacts and risk on a whole-of-project basis

- (a) A whole of life costing for the lease acquisition would have been undertaken at the initial lease procurement stage. Disposal costs would have been one of the factors assessed at that stage, however, that assessment is likely to be on the

basis that the disposal costs would be those associated with expiry of the lease by the passage of time rather than a pre-expiry date divestment.

- (b) As part of the lease divestment strategy the Commonwealth tenant entity will undertake a cost benefit analysis to quantify the cost and benefit of the proposed options.
- (c) When considering a surrender of lease, the analysis should include not only up-front costs such as the surrender fee, but also indirect costs.
- (d) Indirect costs can include the cost of:
 - (i) yielding up, make good and reinstatement obligations (or a payment in lieu of these obligations plus the cost associated with identifying and agreeing what this amount is to be);
 - (ii) ownership of fittings (including removal and re-use rights);
 - (iii) reimbursement of part of an incentive which contemplated a full term;
 - (iv) payment of remaining amortization contributions for the term;
 - (v) payment of landlord costs;
 - (vi) payment of re-letting fees;
 - (vii) whether a full release is secured or does a contingent liability remain;
 - (viii) are any indemnities or ongoing contingent liabilities imposed as a pre-condition to consent to surrender.
- (e) For more information refer to RMG 500.

9. Effect of a surrender

- (a) Once a surrender becomes effective, the tenant's obligations to pay rent and observe the terms of the lease cease.
- (b) Unless the surrender document contains a release from prior obligations, the parties are still entitled to sue for breaches of the lease occurring before the surrender and recover damages.
- (c) The surrender document itself can impose future obligations on a party, for example, an obligation to pay re-letting fees or landlord legal costs.

10. Important note for users

- (a) The template Surrender Deed provides a basic framework only. It does not cover every possible scenario and it should always be fully assessed and amended to suit the particular circumstances.
- (b) Leases vary widely in the terminology used and it is therefore imperative that comprehensive due diligence on the form and content of the lease being surrendered is undertaken and that the terminology used in the template Surrender Deed is changed to reflect that in the actual lease being surrendered. Some examples include whether the lease refers to a lessor rather than landlord, to lessee rather than a tenant or how the premises are named.

11. Guidance on specific clauses

Capitalised terms in this part of the Divestment Guide have the same meaning given to them in the Commonwealth National Lease – Surrender Deed.

11.1 Definitions (clause 1.1)

- (a) **Retained Premises:** if the lease divestment involves the surrender of the whole of the Premises then this defined term is to be deleted. If the surrender is for part of the Premises this constitutes a surrender and re-grant of a lease for the part of the Premises to be retained and in that case this defined term is to be included in the Surrender Deed.
- (b) **Varied Lease:** if the lease divestment involves the surrender of the whole of the Premises then this defined term is to be deleted. If the surrender is for part of the Premises this defined term is to be included in the Surrender Deed.

11.2 Surrender (clause 2.1)

This clause effects the surrender of the whole of the Commonwealth tenant entity's interest in the Surrendered Premises. It is critical that the Surrendered Premises is properly identified / defined in the Information Table.

11.3 Payment of Surrender Sum (clause 2.2)

- (a) Surrenders may involve the Tenant paying a surrender sum to the Landlord as compensation for the early ending of the lease, and also possibly, in lieu of reinstatement or make good obligations, reimbursement of part of a lease incentive or payment of amortised amounts over the residue of the term (or for other transaction specific issues).
- (b) An assessment should be made during the negotiation process as to whether the costs associated with the surrender unduly erode the overall value of the surrender arrangement. If no Surrender Sum is payable this clause should be deleted.

11.4 Tenant's Release (clause 3.2)

- (a) The Surrender Deed is prepared on the basis that each of the parties are fully releasing the other from their respective obligations under the surrendered lease.
- (b) The effect of a full release is that:
 - (i) on and from the Surrender Date each Party is no longer required to carry out any of its obligations under the Lease;
 - (ii) if a Party has any existing action or claim against the other then that action or claim is no longer enforceable; and
 - (iii) if a Party is entitled to take an action or make a claim against the other and is not aware of this at the Surrender Date, then this too is not enforceable whether that party becomes aware of that entitlement before or after the Surrender Date.
- (c) The benefit of this approach there is certainty for both parties that once the Surrender Deed is signed, any residual liability in connection with the Lease and their respective obligations is removed.
- (d) The Commonwealth tenant entity should be certain that there are no potential issues with the Premises or other issues that arose during the term that may give rise to a need to make a claim after surrender.
- (e) Template clauses for partial release have not been provided as they should be assessed and drafted specifically for each particular circumstance. Legal advice should be sought in this instance.

11.5 Grant of Lease of Retained Premises (clause 4)

- (a) This clause can be deleted if the surrender is for the whole Premises.
- (b) The Lease is the current lease being surrendered. The Varied Lease is the new lease being granted under this clause and which is defined to mean the lease granted by the Landlord to the Tenant pursuant to the Surrender Deed and which

is on the same terms and conditions as the Lease, as varied by clause 4.3 of the Surrender Deed.

- (c) If the term of the Varied Lease is to end on a date which is not the same as the expiry date of the Lease, then the above clause will need to be amended. See also clause 7.2 which provides the place for listing any other variations to the Lease which are to apply to the Varied Lease.

11.6 Variations (clause 4.2)

- (a) All variations should be listed and where possible, the schedule of the Lease should be replaced in its entirety to reflect the new Premises description, replacement of Premises plan, rental, net lettable area of Premises, Tenant's proportion of outgoings if this is separately expressed and changes to car parking numbers.
- (b) If the Tenant ceases to occupy the whole of the building then changes that may be required to reflect this including scope of cleaning obligations in relation to common areas, gardens, land, and any signage rights, together with any other changes required to reflect commercial negotiations.
- (c) The Lease needs to be assessed in detail to identify all variations required (including those needed due to changes in legislation, practical circumstances or legal necessity) to ensure the Varied Lease is accurate and appropriate in all respects.

11.7 Costs of deed (clause 7)

The Surrender Deed provides that each Party will pay their own legal costs in connection with the Surrender Deed. Legal advice should be sought if amendments are requested to the costs clause.

Schedule 1 Surrender - State and Territory registration requirements

Note – This information is current as at 20 August 2019 and is in summary form only and not comprehensive. Changes in law and procedure occur from time to time and applicable requirements should be checked for each transaction

SURRENDER REQUIREMENTS							
State	Is registration required and on what form?	Do commercial terms need to be recorded in a deed?	Is a partial surrender permissible in this region (alternatively, is a surrender and re-grant required?)	If there is a partial surrender (and re-grant of the balance) is a survey plan or other type of plan of the premises required?	Who can lodge the surrender form?	If the lease is not registered does the deed of surrender alone suffice to extinguish the lease?	Is stamp duty payable? If so, by which party
ACT	Registration required if lease is registered to remove the lease from the title.	Additional covenants are to be recorded in a deed (noting that the statutory form is still required for registration purposes).	Yes.	Yes.	Either party may lodge. Original CT and consent of any mortgagee is required.	Yes.	No.
NSW	Registration required if lease is registered to remove the lease from the title.	Additional covenants are to be recorded in a deed (noting that the statutory form is still required for registration purposes).	No, a surrender and re-grant of the lease is required.	N/A.	Either party may lodge. Original CT and consent of any mortgagee is required.	Yes.	The surrender form must be stamped by Revenue NSW for nominal duty of \$10. The transferee (in the case of a surrender, the landlord) is liable to pay the stamp duty.
VIC	No – leases in Victoria are generally not registered.	Yes.	A partial surrender is allowed if it applies to all land in the folio.	N/A.	Either party may lodge. Original CT and consent of any mortgagee is required.	Yes.	Certain lease arrangements over land will incur duty under the <i>Duties Act 2000</i> (Chapter 2). The transferee (in the case of a surrender, the landlord) is liable to pay any stamp duty.
TAS	Registration required if lease is registered to remove the lease from the title.	Additional covenants are to be recorded in a deed (noting that the statutory form is still required for registration)	Yes, if the lease is unregistered. If the Lease is registered, a surrender and re-	N/A.	Either party may lodge. Original Lease, duplicate of CT and any consent of	Yes.	Certain surrender of lease arrangements over land will attract duty under Chapter 2 of the <i>Duties Act 2001 (Tas)</i> The transferee (in the case

SURRENDER REQUIREMENTS							
State	Is registration required and on what form?	Do commercial terms need to be recorded in a deed?	Is a partial surrender permissible in this region (alternatively, is a surrender and re-grant required?)	If there is a partial surrender (and re-grant of the balance) is a survey plan or other type of plan of the premises required?	Who can lodge the surrender form?	If the lease is not registered does the deed of surrender alone suffice to extinguish the lease?	Is stamp duty payable? If so, by which party
		purposes).	grant is required.		an encumbrance holder to be lodged.		of a surrender, the landlord) is liable to pay any stamp duty.
QLD	Registration required if lease is registered to remove the lease from the title.	Additional covenants are to be recorded in a deed (noting that the statutory form is still required for registration purposes).	Yes.	Yes, however exceptions apply to surrenders involving a whole building or a whole floor of a building.	Either party may lodge. Consent of any encumbrance holder required.	Yes.	Stamp duty calculated on the consideration for the surrender paid by the Lessee (if any) The parties are joint and severally liable for stamp duty. Parties should ensure that the deed or other instrument recording the commercial terms of the surrender is clear as to which party is required to pay a stamp duty.
WA	Registration required if lease is registered to remove the lease from the title.	Additional covenants are to be recorded in a deed (noting that the statutory form is still required for registration purposes).	Yes.	Generally, yes. However, a new plan may not be required if the area being surrendered and remaining area are both delineated on the existing plan.	Either party may lodge. Certificate of Title not required. Surrender cannot be registered if any encumbrances on lease.	Yes.	Stamp duty may be payable if consideration is paid by the landlord in exchange for the surrender of the lease. If stamp duty is payable, it is payable by the landlord.
SA	Registration required if lease is registered to remove the lease from the title.	Additional covenants are to be recorded in a deed (noting that the statutory form is still required for registration purposes).	Yes.	Generally, yes. However, a new plan may not be required if the area being surrendered and remaining area are both delineated on the existing plan.	Either party may lodge. The original Certificate of Title must be lodged with the surrender form.	Yes.	Stamp duty may be payable if consideration is paid by the landlord to the tenant in exchange for the surrender of the lease. If stamp duty is payable, it is payable by the landlord.
NT	Registration required if lease is registered to remove the lease from the title.	Additional covenants are to be recorded in a deed (noting that the statutory form is still required for registration purposes).	Yes.	Yes.	Either party may lodge. If mortgagee consent given to lease it may be	Yes.	The Surrender of Lease form needs to be lodged with the Territory Revenue Office, however stamp duty is only payable if an additional premium for the

SURRENDER REQUIREMENTS							
State	Is registration required and on what form?	Do commercial terms need to be recorded in a deed?	Is a partial surrender permissible in this region (alternatively, is a surrender and re-grant required?)	If there is a partial surrender (and re-grant of the balance) is a survey plan or other type of plan of the premises required?	Who can lodge the surrender form?	If the lease is not registered does the deed of surrender alone suffice to extinguish the lease?	Is stamp duty payable? If so, by which party
		purposes).			required for surrender.		surrender is paid by the parties. The landlord is liable to pay any stamp duty.

Part C Guidance notes on Deed of Assignment

12. Introduction

12.1 Purpose and scope

- (a) The purpose of the template Commonwealth National Lease – Deed of Assignment is to assist Commonwealth entities to effect the assignment of existing commercial office accommodation premises leases to non-Commonwealth entities. The template Deed of Assignment assumes retail leasing legislation does not apply to the lease.

12.2 Use of the Deed of Assignment

- (a) The Commonwealth National Lease – Deed of Assignment is not mandatory when a Commonwealth tenant entity is assigning a lease.
- (b) The commercial, operational and practical considerations around each lease divestment will necessitate a well thought out assessment of requirements, opportunities, constraints and risk which goes beyond the scope of the template Deed of Assignment. The template document will in each case need to be prepared to suit the actual requirements for the particular lease divestment.
- (c) An assignment may or may not leave the Commonwealth tenant entity with some residual liability. This will depend on the assignment terms agreed between the parties. As part of the lease divestment strategy the Commonwealth tenant entity will have first considered whether it is feasible to have another Commonwealth tenant entity take up occupation of the premises and, failing that, whether a surrender of the lease can be reasonably achieved.
- (d) It should be noted that site and use specific considerations may necessitate changes to the document.
- (e) Except where optional or alternative clauses are provided, legal advice should be obtained before making amendments. Even when optional or alternative clauses are provided any doubt as to whether they are appropriate should be addressed on the basis of legal advice.

12.3 Background considerations

- (a) A lease grants the tenant a proprietary interest in the premises and it creates an interest in land. Approval is required to dispose the interest in the Lease.
- (b) Depending upon the size and nature of the premises to be assigned, the Commonwealth tenant entity may need to provide the assignee with a BEEC under the CBD Program.

13. Developing a divestment plan

Commonwealth entities should develop a well-considered change management plan for the accommodation needs that addresses the below considerations.

13.1 Operational needs

Will the existing fit-out be transferred to the assignee?

13.2 Market opportunities and risks

- (a) What is the state of the rental market for the particular type of premises?
- (b) Is a suitable assignee likely to be found in a reasonable time?

- (c) Will the assignment of the lease to a third party be more cost-effective in the current market than negotiating a surrender of lease with the landlord?
- (d) A cost-benefit analysis of the divestment options and the options available in the market should be undertaken by the Commonwealth tenant entity as part of the development of its lease divestment strategy.

13.3 Legal opportunities and risks under the assignment arrangements

- (a) Does the lease permit assignments?
- (b) If so, is landlord consent required?
- (c) Is the Commonwealth tenant entity liable to pay any of the landlord's costs in connection with consenting to an assignment?
- (d) If assignment is expressly forbidden in the lease, what strategies are to be implemented in negotiating variations to the lease to allow the assignment to occur?

13.4 Financial impacts

- (a) What are the financial impacts? Examples include the costs of:
 - (i) procuring consent; and
 - (ii) ongoing risk and continuing liability under the lease if a full release cannot be obtained.
- (b) What are the arrangements to be around ownership or transfer of fit-out, and the transfer of make-good obligations? Is the Commonwealth tenant entity liable to pay any of the landlord's costs in connection with consenting to an assignment of lease?
- (c) Are there consultant fees to be factored in (such as engaging an agent to source a new tenant/assignee and negotiate the assignment deal, engaging legal advisers, due diligence searches on potential assignees)?
- (d) If there was an initial incentive and there are ongoing amortisation payments, does the proposed assignment adequately cover these arrangements?

13.5 Permitted Use

- (a) A lease will specify the particular use for which the tenant can occupy and use the premises. This is usually referred to as the 'Permitted Use'.
- (b) The Permitted Use can be described broadly (such as 'office accommodation') or it can be quite specific (such as 'office accommodation for ABC Pty Ltd').
- (c) Even if the lease allows dealings with the lease without consent, the Commonwealth tenant entity is not entitled to unilaterally alter the Permitted Use.
- (d) The proposed use of the premises by the incoming tenant is a relevant consideration in assessing an assignment proposal.

13.6 Managing the risk of continued liability

- (a) The Deed of Assignment provides for a full release is provided on assignment.
- (b) This means that the landlord will then have no further right to make a claim on the Commonwealth tenant entity if the assignee breaches the lease and the Commonwealth tenant entity is also released from pre-assignment liability.
- (c) Prudent risk management also supports obtaining an indemnity from the incoming assignee in favour of the Commonwealth tenant entity.
- (d) Depending upon the nature of the incoming assignee, the Commonwealth tenant entity and/or the landlord may seek security from the incoming tenant (such as director's guarantees where the incoming tenant is a company limited by shares, or a bank guarantee).

- (e) This will need to be assessed on a case-by-case basis, taking into account the individual circumstances of the assignment proposal (for example, security may not be required where the incoming tenant is a publicly listed company).
- (f) The existence or otherwise of the above mitigating measures will be relevant to the Commonwealth tenant entity's risk assessment of the assignment proposal and should be taken into account when preparing a request for approval under the LAA and / or the PGPA Act.

13.7 Fit-out and make-good

- (a) Consideration should be given to whether the existing fit-out is owned by the landlord or the Commonwealth tenant entity, who installed it, and (if owned by the Commonwealth tenant entity) any contribution provided by the landlord.
- (b) Will the existing fit-out be transferred to the incoming assignee?
- (c) If so, will the Commonwealth tenant entity be seeking to recover any costs from the incoming assignee?
- (d) Does the Commonwealth tenant entity have the right to remove the fit-out under the terms of the lease?
- (e) Does the Commonwealth tenant entity have any make-good obligations under the terms of the lease, or any other contractual arrangement (for example, a separate agreement relating to fit-out)?
- (f) If the Commonwealth tenant entity has any such separate contractual obligations, they may not automatically be transferred to the incoming tenant and therefore should be detailed in the Deed of Assignment or another document.

13.8 Landlord consent costs

- (a) When assessing an assignment proposal, the consent and other requirements under the lease need to be taken into account, including the costs (if any) recoverable by the landlord from the Commonwealth tenant entity in considering a request for consent to an assignment.
- (b) If the landlord is able to require the Commonwealth tenant entity to pay or contribute to its costs, it will need to consider whether it requires the incoming assignee to reimburse all or a portion of those costs.

13.9 Further consents

Depending upon individual circumstances, additional consents such as Ministerial or mortgagee consents may be required.

13.10 Registration and other jurisdiction-specific issues

A reference table is attached summarising the registration requirements and stamp duty liability for assignments of lease in each State and Territory. It should be borne in mind that an assignment of lease will not be registrable if the lease being assigned is unregistered.

14. Important note for users

- (a) The template Deed of Assignment provides a basic framework only. It does not cover every possible scenario and it should always be fully assessed and amended to suit the particular circumstances.
- (b) Leases vary widely in the terminology used and it is therefore imperative that comprehensive due diligence on the form and content of the lease being assigned is undertaken and that the terminology used in the Deed of Assignment is changed to reflect that in the actual lease being assigned. Some examples include whether the lease refers to a lessor rather than landlord, to lessee rather than a tenant or how the premises are named.

15. Guidance on specific clauses

Capitalised terms in this part of the Divestment Guide have the same meaning given to them in the Commonwealth National Lease – Deed of Assignment.

15.1 Consent of Landlord (clause 3)

- (a) The Landlord's consent is likely to be required under the terms of the Lease. There may also be costs associated with procuring consent.
- (b) If the parties have agreed that the incoming Assignee will make a contribution to these costs, this should be set out at clause 8 of the Deed of Assignment.
- (c) Depending on the terms of the Lease governing the Landlord's consent, the Landlord may seek to impose conditions on the giving of its consent. If relevant and appropriate, any agreed conditions should be included in the Deed of Assignment (for example, an obligation to pay the Landlord's capped or reasonable legal costs connected with the consent).

15.2 Release (clause 5.1)

- (a) The template Deed of Assignment is prepared on the basis that each of the Parties to the Lease fully releases the other from their respective obligations under the surrendered lease.
- (b) The benefit of this approach is certainty for both Parties that once the Deed is signed, any residual liability in connection with the Lease and their respective obligations is removed.
- (c) If either Party has a pre-existing claim against each other which that Party became aware of later, then that Party could not pursue that claim against the other Party (unless there was another common law basis for making the claim, such as negligence). The Commonwealth tenant entity should be certain that there are no potential issues with the Premises or other issues that arose during the term that may give rise to a need to make a claim after assignment.
- (d) Landlords will often prefer not to release the Commonwealth tenant entity because this gives them an additional avenue for recourse in the event of breach by the Assignee. The risk in not obtaining a full release is that the Commonwealth tenant entity retains an ongoing contingent liability and the Landlord may look to it if it identifies a 'pre-assignment' breach by the Commonwealth tenant entity or if the Assignee does not comply with the Lease. The level of risk is heightened if post assignment liability is retained because the Commonwealth tenant entity has no control over the Assignee and will be unaware of circumstances which may give rise to a liability (for example a failure to pay rent, breach of maintenance and repair covenants or an insolvency event occurring).
- (e) While this risk is to some extent reduced by good due diligence in the process of sourcing the Assignee (financial viability, prior rental history and the like) and by securing an indemnity from the Assignee, the Landlord remains free to make a claim against the Commonwealth tenant entity. The Commonwealth tenant entity would then need to rely on the indemnity from the Assignee to recover its loss if the claim relates to a breach by the Assignee.
- (f) Legal advice should be sought if amendments are requested to the release clause.

15.3 Costs (clause 8)

- (a) This clause will require amendment if the parties have agreed that one party will make a contribution to the other party's legal costs of entering into the Deed of Assignment.
- (b) The Deed of Assignment provides that each party will pay its own legal costs. It is however, not unusual for a Landlord to require payment of its legal costs. Legal advice should be sought if amendments are requested to the costs clause.

Schedule 2 Assignment - State and Territory registration requirements

Note – This information is current as at 20 August 2019 and is in summary form only and not comprehensive. Changes in law and procedure occur from time to time and applicable requirements should be checked for each transaction

ASSIGNMENT REQUIREMENTS					
State	Does an assignment of lease need to be registered?	Can the commercial and other terms (e.g. assignment fee, releases, indemnities etc.) be included in the statutory form or are they recorded separately in a deed?	Can either party lodge the assignment or does it need to be the party which is the tenant under the registered lease or the incoming assignee?	If the lease is not registered does the deed of assignment alone suffice to effect the assignment?	Is stamp duty payable? If so, by which party?
ACT	Registration required if lease is registered to transfer the lease into the assignee's name.	Additional covenants are to be recorded in a deed (noting that the statutory form is still required for registration purposes).	Either party may lodge.	Yes.	No.
NSW	Registration required if lease is registered to transfer the lease into the assignee's name.	Additional covenants are to be recorded in a deed (noting that the statutory form is still required for registration purposes).	Either party may lodge.	Yes.	An assignment of lease may be dutiable – the statutory form must be assessed for stamp duty and stamped by the NSW Office of State Revenue prior to registration. The transferee (in the case of an assignment, the incoming tenant) is liable to pay any stamp duty.
VIC	No – leases in Victoria are generally not registered.	Yes.	Either party may lodge.	Yes	Stamp duty may be payable where consideration is paid in relation to the assignment. The transferee (in the case of an assignment, the incoming tenant) is liable to pay any stamp duty.
TAS	Registration required if lease is registered to transfer the lease into the assignee's name.	Additional covenants are to be recorded in a deed (noting that the statutory form is still required for registration purposes).	Either party may lodge.	Yes	Stamp duty may be payable if any premium is paid in respect of the assignment. However, an assignment is exempt from duty if the premium is less than \$3,000. The transferee (in the case of an assignment, the incoming tenant) is liable to pay any stamp duty.

ASSIGNMENT REQUIREMENTS					
State	Does an assignment of lease need to be registered?	Can the commercial and other terms (e.g. assignment fee, releases, indemnities etc.) be included in the statutory form or are they recorded separately in a deed?	Can either party lodge the assignment or does it need to be the party which is the tenant under the registered lease or the incoming assignee?	If the lease is not registered does the deed of assignment alone suffice to effect the assignment?	Is stamp duty payable? If so, by which party?
NT	Registration required if lease is registered to transfer the lease into the assignee's name.	Additional covenants are to be recorded in a deed (noting that the statutory form is still required for registration purposes).	Either party may lodge.	Yes.	Yes. The conveyee (in the case of an assignment, the incoming tenant) is liable to pay any stamp duty.
QLD	Registration required if lease is registered to transfer the lease into the assignee's name.	Additional covenants are to be recorded in a deed (noting that the statutory form is still required for registration purposes).	Either party may lodge.	Yes.	The parties are joint and severally liable for stamp duty. Parties should ensure that the deed or other instrument recording the commercial terms of the assignment is clear as to which party is required to pay a stamp duty
WA	Registration required if lease is registered to transfer the lease into the assignee's name.	Additional covenants are to be recorded in a deed (noting that the statutory form is still required for registration purposes).	Either party may lodge.	Yes.	Stamp duty may be payable if consideration is paid in respect of the assignment. The transferee (in the case of an assignment, the incoming tenant) is liable to pay any stamp duty.
SA	Registration required if lease is registered to transfer the lease into the assignee's name.	Additional covenants are to be recorded in a deed (noting that the statutory form is still required for registration purposes).	Either party may lodge.	Yes.	Yes. The transferee (in the case of an assignment, the incoming tenant) is liable to pay any stamp duty.

Part D Guidance notes on Sublease

16. Introduction

16.1 Purpose and scope

- (a) The template Commonwealth National Lease – Sublease provides a basic framework for Commonwealth entities to effect the grant of subleases of existing commercial office accommodation premises to non-Commonwealth entities. The template Sublease assumes retail leasing legislation does not apply.
- (b) The template Sublease assumes that the Commonwealth tenant entity has determined to grant the sublease on largely the same terms and conditions as the head lease. The template is designed to incorporate the terms and conditions of the head lease into the Sublease (as varied or amended by the Sublease).
- (c) As a sublease means the Commonwealth tenant entity will have ongoing obligations under the head lease and the sublease, as part of the lease divestment strategy the Commonwealth tenant entity will have first considered whether it is feasible to have another Commonwealth tenant entity take up occupation of the premises and, failing that, whether a surrender of the lease can be reasonably achieved.

16.2 Use of the Commonwealth National Lease – Sublease

- (a) The Commonwealth National Lease – Sublease is not mandatory when a Commonwealth tenant entity is granting a sublease.
- (b) The commercial, operational and practical considerations around each lease divestment will necessitate a well thought out assessment of requirements, opportunities, constraints and risks which go beyond the scope of the template Sublease. The template document will in each case need to be prepared to suit the actual requirements for the particular lease divestment.
- (c) It should be noted that site and use specific considerations may necessitate changes to the Sublease.
- (d) Except where optional or alternative clauses are provided in this document, legal advice should be obtained before making amendments to this document. Even when optional or alternative clauses are provided any doubt as to whether they are appropriate should be addressed via legal advice.

16.3 Background considerations

- (a) A lease grants the tenant a proprietary interest in the premises and it creates an interest in land.
- (b) Approval is required to dispose the interest in the Lease. Not all of the head lease interest is being disposed of because the term of the sublease is to be shorter than the head lease (this is because at law the sublease must be shorter than the head lease term). Additionally in some cases the sublease may not be over the entire premises under the head lease.
- (c) Depending upon the size and nature of the premises to be assigned, the Commonwealth tenant entity may need to provide the assignee with a BEEC under the CBD Program.

17. Developing a divestment plan

Commonwealth entities should develop a well-considered plan for the proposed sublease which addresses the below considerations.

17.1 Head lease requirements

- (a) The type and content of the head lease must be considered when subletting arrangements are made. The head lease may be the Commonwealth National Lease, the Commonwealth tenant entity's standard lease or a landlord lease.
- (b) The nature of the leasing market means that there will be different 'versions' of the CNL which form the head lease and these in turn are likely to have been amended by transaction specific negotiations.
- (c) Consequently, the type and content of head leases is highly varied and will differ from site to site. It is therefore imperative that when preparing a sublease a comprehensive due diligence exercise is undertaken to fully assess the form of head lease and to draft the sublease in a manner which complements the head lease, is clear about variations and avoids ambiguity arising.
- (d) Unless the head lease contains express or conditional prohibitions on subletting a tenant is generally permitted to sublet without the landlord's consent. However, it is typical that a lease will contain either an express complete prohibition on subletting (that is no subletting is permitted at all) or a conditional subletting regime (that is, subletting is permissible provided certain stipulated conditions are satisfied).
- (e) The due diligence tasks undertaken as part of the lease divestment process should include a full analysis of the head lease. This will identify what conditions attach to the subletting right and these will need to be factored into the divestment process.

17.2 Head landlord involvement

- (a) The template Sublease assumes that the sublease will not be a tri-partite document between the head landlord, sub-landlord and sub-tenant. However, a provision for head landlord's consent (which is the more typical approach) is included.
- (b) Legal advice should be sought if there are practical or legal issues specific to the particular lease and premises which may warrant the inclusion of the head landlord as a party to the sublease.

17.3 No release

- (a) Unlike a surrender, a sublease does not operate to release the Commonwealth tenant entity from liability under the head lease.
- (b) The Commonwealth tenant entity remains fully liable for performance of its obligations under the head lease. The landlord is entitled to enforce the head lease against the Commonwealth tenant entity as tenant even if the right relates to an area that has been sublet.
- (c) It is therefore essential that the sublease addresses this risk and that it contains sufficient protection for the Commonwealth tenant entity as sub-landlord to:
 - (i) reduce the risk of a sub-tenant's act or omission creating a liability for the sub-landlord (as tenant under the head lease); and
 - (ii) provide sufficient remedies to afford the Commonwealth tenant entity sufficient compensation and redress in the event it incurs a liability.

17.4 Securing performance

- (a) Given that the sublease scenario contemplated by the Sublease template is one where the sublease will not be to a Commonwealth tenant entity, the due diligence on the prospective tenant will need to be sufficient to address financial viability and prior rental history.
- (b) Further protections which do not apply to Commonwealth entities also need to be considered. This includes provision of directors' guarantees (where commercially feasible – for example these are more likely to be secured with smaller to medium sized companies but not for a large public company), parent company guarantees (if appropriate – for example the sub-tenant company has limited resources, such as a subsidiary of a larger parent company) and bank guarantees (these are more appropriate where high rental streams need to be protected).

- (c) Regardless of the terms of the head lease, the Commonwealth tenant entity sub-landlord will usually wish to impose very tight controls around any assignment or further subletting of the sublease premises. This is to avoid the substitution of the sub-tenant which the Commonwealth tenant entity has assessed as suitable with one which may not satisfy the Commonwealth tenant entity's risk management criteria.

17.5 Sublease premises

- (a) The approach taken to a sublease of the whole premises under the head lease is different to the approach required where only part of the premises are to be leased to the sub-tenant.
- (b) If the Commonwealth tenant entity is subletting only part of its premises, a plan which adequately delineates the part of the premises to be demised under the sublease will be required. Where registration is required the plan needs to be in registrable form.
- (c) Other considerations include costs associated with physical separation of the premises, security and shared amenities (such as utilities, discussed in greater detail below under the heading of *Services and utilities*). Particular physical layouts and the functions of the Commonwealth tenant entity will also inform whether a sublease of part of the premises is feasible.
- (d) The Commonwealth tenant entity will need to consider the arrangements it has in place for services such as security or cleaning, and depending on whether these services are provided by the head landlord or a third party, determine an approach to deal with these services in the sublease (this is discussed in greater detail below under the heading of *Services and utilities*).

17.6 Permitted Use

- (a) A lease will specify the particular use for which the tenant can occupy and use the premises. This is usually referred to as the 'Permitted Use'.
- (b) The Permitted Use can be described broadly (such as 'office accommodation') or it can be quite specific (such as 'office accommodation for ABC Pty Ltd').
- (c) Even if the head lease allows dealings with the head lease without consent, a sub-landlord cannot grant a sub-tenant any rights that are broader than or inconsistent with the Permitted Use. Accordingly, the proposed use of the premises (or a part of them, as the case may be) by the sub-tenant is a relevant consideration in assessing a sublease proposal.

17.7 Operational needs

Is the whole or only part of the premises surplus to need? Will any of the existing fit-out be transferred to the sub-tenant?

17.8 Market opportunities and risks

- (a) What is the state of the rental market for the particular type of premises?
- (b) Is a suitable tenant likely to be found in a reasonable time?
- (c) If only part of the premises is being sublet are there any security implications associated with the sub-tenant sharing the Commonwealth tenant entity's premises?
- (d) Are there additional fit-out costs associated with 'separating' the sublease premises from the head lease premises?
- (e) A cost-benefit analysis of the options available in the market should be undertaken by the Commonwealth tenant entity as a part of developing its lease divestment strategy.

17.9 Legal opportunities and risks under the head lease and potential sublease arrangements

- (a) Does the head lease permit subletting? If so is head landlord consent required?
- (b) If subletting is expressly forbidden in the head lease, what strategies are to be implemented in seeking to negotiate variations to the head lease to allow subletting (bearing in mind there is no requirement on the head landlord to agree)?

17.10 Financial impacts

- (a) What are the financial impacts? Examples include:
 - (i) costs of procuring consent;
 - (ii) ongoing risk and continuing liability under head lease;
 - (iii) cost of separation of the premises (if only part of the premises are being sublet);
 - (iv) what are the arrangements to be around ownership or transfer of fit-out;
 - (v) is the Commonwealth tenant entity liable to pay any of the head landlord's costs in connection with consenting to a sublease;
 - (vi) are there consultant fees to be factored in (such as engaging an agent to source a sub-tenant and negotiate the sublease deal, engaging legal advisers;
 - (vii) due diligence searches on potential sub-tenants;
 - (viii) lease management arrangements and cost over the term of the sublease); and
 - (ix) if there was an initial incentive and there are ongoing amortisation payments does the proposed sublease rent adequately cover these costs (pro-rata if appropriate) for the period of the sublease?
- (b) The Commonwealth tenant entity's initial cost-benefit analysis of a subleasing proposal should consider whether the probable cost, or degree or likelihood of risks (including the risk of the sub-tenant not performing its obligations under the sublease) associated with the proposal outweigh the likely benefits.

17.11 Incorporating the terms of the head lease

- (a) The template assumes that the Commonwealth tenant entity has assessed the head lease and is prepared to grant the sublease substantially on the same terms as the head lease (with the tenant under the head lease being the sub-landlord under the sublease).
- (b) A Commonwealth tenant entity sub-landlord should ensure that it does not inadvertently take on obligations of the head landlord under the head lease which are not appropriate – for example, where the head landlord has obligations in relation to a building (such as common areas, services external parts of the building/land) of which the head lease premises are only a part. Commonwealth entities should also avoid taking on obligations to comply with laws or to pay State taxes which may undermine the Commonwealth's position regarding constitutional immunities.
- (c) Therefore it is necessary to complete the variation elements in the template Sublease to clearly vary or exclude 'landlord obligations' which the Commonwealth cannot absorb legally due to its particular status, or operationally (for example, the Commonwealth sub-landlord should avoid taking on the head landlord's obligations relating to areas of the building or the services which the Commonwealth tenant entity cannot access or control).

18. Commercial considerations

18.1 Term

- (a) The term of a sublease cannot exceed the term of the head lease. Typically a sublease should expire at least one day before the expiry of the head lease.
- (b) In some jurisdictions, a sublease will not be accepted for registration unless it expires at least one day prior to the expiry of the head lease.

18.2 Option terms

- (a) Regard should also be had to the structure of terms under the head lease when considering the grant of option terms under a sublease. The sublease should specifically address the expectation of the parties around options.
- (b) For example, is the Commonwealth tenant entity prepared to be compelled to exercise further options under the head lease to secure an extended term for the sub-tenant?
- (c) Alternatively, does the Commonwealth tenant entity reserve to itself rights to not exercise its option to renew and to effectively end the sublease at the end of the first term?
- (d) If it is commercially feasible the latter approach presents less risk for the Commonwealth tenant entity as at that stage it can 'step out' of the arrangement and it is up to the sub-tenant to negotiate any further tenure with the head landlord, having been on notice from the outset that it has no security of tenure beyond the initial term. The extent to which this is feasible will be influenced by the length of the initial sublease term, rent payable and other circumstances applying to the particular situation.

18.3 Rent review

- (a) The template does not contain rent review clauses, as the manner of rent review will often be largely influenced by the rent review terms of the head lease.
- (b) However, it is open to the parties to agree upon an alternative rent review regime to apply to the sublease, and in that case it should be set out clearly in the sublease.
- (c) When considering rent review options, care should be taken to avoid unintended consequences as a result of rent reviews occurring under the head lease – for example, if a market review is due under the head lease, it would be prudent that rent be reviewed to market for the sublease at around the same time to enable the Commonwealth tenant entity to recoup the cost of increases of rent.
- (d) When conducting contemporaneous market reviews under the head lease and the sublease, it is prudent to ensure that the outcome of the market review under the head lease is known prior to the finalisation of the review under the head lease.

18.4 Outgoings

- (a) If outgoings are payable under the head lease and are to be passed on to the sub-tenant, regard should be had to the following issues:
 - (i) Does the head lease require outgoings to be reimbursed to the head landlord on an 'actual' or 'estimate' basis?
 - (ii) What categories of outgoings (e.g. municipal rates, air conditioning costs) are included in the scope of the head lease?
 - (iii) If only part of the head lease premises are to be sublet to the sub-tenant, how will the parties apportion the outgoings payments due under the head lease?
 - (iv) Are there audit, objection, review and adjustment processes under the head lease which need to be mirrored or adjusted in the sublease?

18.5 Services and utilities

- (a) Similarly to the outgoing issue, where only part of the head lease premises are sublet, the Commonwealth tenant entity needs to consider how the costs of utilities and other services to the head lease premises will be apportioned between the parties. Relevant considerations include the following.
 - (i) Are the utilities separately metered, or does the Commonwealth tenant entity reimburse the head landlord for the cost of the utilities consumed at the head lease premises?
 - (ii) Are part or all of the utilities costs recoverable as outgoing in the head lease?
 - (iii) Does the head landlord have responsibility for paying for utilities consumed in the process of providing services to the head lease premises (such as electricity consumed in providing air conditioning)?
 - (iv) If the Commonwealth tenant entity procures cleaning and/or security services from a third party, is it appropriate or desirable to continue to procure these services for the sublet premises?
- (b) Consideration will need to be given to the form of these security and cleaning contracts to determine whether their scope can be reduced without adverse financial impact on the Commonwealth tenant entity. If so, then the Commonwealth tenant entity should avoid undertaking responsibility for providing those services to the sublet premises.
- (c) If the Commonwealth tenant entity procures cleaning and/or security services from the head landlord, consideration needs to be given to how the costs of these services will be apportioned between the parties.
- (d) The Commonwealth tenant entity should avoid inadvertently taking responsibility for providing utilities or services such as air conditioning to the sublease premises where those responsibilities are allocated to the head landlord under the head lease.

18.6 Fit-out and make-good

- (a) Whether the whole head lease premises are to be sublet, or only part, the Commonwealth tenant entity should consider the position in the head lease with regard to ownership of fit-out and its reinstatement obligations at the end of the tenancy.
- (b) If the existing fit-out is owned by the Commonwealth tenant entity, it may wish to retain a right to remove and retain that fit-out at the end of the sublease.
- (c) If the head lease requires the Commonwealth tenant entity to remove some or all of its fit-out, and/or to reinstate any part of the head lease premises, care should be taken to pass these obligations on (apportioned as appropriate to the size of the sublet premises) to the sub-tenant.
- (d) However, if the sublease expires or is terminated prior to the end of the head lease, it may not be desirable for the sub-tenant to remove the existing fit-out. Ultimately, decisions on these types of issues will be informed by the particular situation.

18.7 Head landlord consent costs

- (a) When assessing a subleasing proposal, the requirements under the head lease need to be taken into account, including the costs (if any) recoverable by the head landlord in considering a request for consent to a sublease.
- (b) If the head landlord is able to require the Commonwealth tenant entity to pay or contribute to its costs, it will need to consider whether it requires the sub-tenant to reimburse all or a portion of those costs.

18.8 Further consents

- (a) Depending upon individual circumstances, other consents such as Ministerial or mortgagee consents may be required.

18.9 Registration and other jurisdiction-specific issues

- (a) A reference table is attached summarising the registration requirements and stamp duty liability for subleases in each State and Territory. It should be borne in mind that the sublease will not be registrable if the head lease is unregistered.

19. Important note for users

- (a) The template Sublease provides a basic framework only. It does not cover every possible scenario and it should always be fully assessed and amended to suit the particular circumstances.
- (b) Leases vary widely in the terminology used and it is therefore imperative that comprehensive due diligence on the form and content of the head lease is undertaken and that the terminology used in the template Sublease is changed to reflect that in the head lease. Some examples include whether the lease refers to a lessor rather than landlord, to lessee rather than a tenant or how the premises are named.

20. Guidance on specific clauses

Capitalised terms in this part of the Divestment Guide have the same meaning given to them in the Commonwealth National Lease – Sublease.

20.1 Ending of Head Lease (clause 2.2)

- (a) As the consent of the Head Landlord is a condition precedent to the Sublease (where this is required by the Head Lease or applicable laws), the Sublease will not come into effect if that consent is not obtained.
- (b) These clauses impose an obligation on the Commonwealth tenant entity to use 'reasonable endeavours' to procure the consent and also preclude the Sub-Tenant from making a claim against, or seeking any costs or expenses from the Commonwealth tenant entity if the Head Landlord fails to consent to the Sublease or if that consent is provided on terms that are not acceptable to the Commonwealth tenant entity (acting reasonably).
- (c) If the Head Landlord's consent is required, also consider whether there are any costs associated with procuring this consent. If the parties have agreed that the Sub-Tenant will make a contribution to these costs, this should be set out at clause 9.
- (d) It is useful to note that, if the Sublease is to be registered, the consent of the Head Landlord will often be required by the relevant land titles office, notwithstanding that the Head Lease terms do not stipulate this.

20.2 Payment of Rent (clause 3)

- (a) The payment of Rent may need to align with the Head Lease.
- (b) The optional clause below should be included unless there is provision for the abatement of rent in the Head Lease or if the rights of the Sub-Tenant to abate under the Sublease are intended to be removed or operate differently to those to the Sub-Landlord (as Tenant under the Head Lease):

3.2. *Abatement of Rent*

The Sub-Tenant's obligation to pay Rent under this Sublease only abates if and to the same extent that the Sub-Landlord's obligation to pay rent abates under the Head Lease.

20.3 Application of Head Lease (clause 4)

- (a) It should be considered whether there are any obligations of the Head Landlord under the Head Lease which would not be practical or desirable to be taken on by the Commonwealth tenant entity as Sub-Landlord.

- (b) Examples include obligations to comply with State laws, to clean or maintain areas outside of the Head Lease Premises, to take out insurance or to repaint or recarpet. Any warranties (e.g. warranties of fitness), indemnities or releases granted by the Head Landlord under the Head Lease should be excluded.
- (c) If variations are required these will be listed in Schedule 1. It is essential that Schedule 1 is carefully drafted to list all variations to the terms of the Head Lease which are being incorporated as terms of the Sublease.
- (d) The Commonwealth tenant entity should avoid taking on as Sub-Landlord those Head Landlord obligations which it is not capable of satisfying either practically or legally.

20.4 Legal costs of Head Lease (clause 9)

- (a) The Sublease provides that each Party will pay its own legal costs in connection with the Sublease. Legal advice should be sought if amendments are requested to the costs clause.
- (b) If it is agreed that the Parties have agreed that the Sub-Tenant will make a contribution towards the Head Landlord's costs of consenting to the Sublease, this should be detailed.

20.5 Schedule 1 – Variations to Head Lease

- (a) Any required variations to the Head Lease here will be included here.
- (b) Without limitation, issues to think about include those mentioned below. These are not elaborated upon as what is needed will depend on the particular form of Head Lease on the particular circumstances.
 - (i) compliance with laws – Commonwealth immunity will not extend to the Sub-Tenant;
 - (ii) rent;
 - (iii) rent reviews;
 - (iv) outgoings;
 - (v) rates and taxes;
 - (vi) insurance;
 - (vii) inspections;
 - (viii) access for Head Landlord where required by Head Lease;
 - (ix) work health and safety;
 - (x) provision of services;
 - (xi) rights on damage and destruction;
 - (xii) remedies for malfunction of services;
 - (xiii) cleaning;
 - (xiv) abatement rights;
 - (xv) common areas;
 - (xvi) assignment and sub-subletting;
 - (xvii) alterations;
 - (xviii) repair, yielding up, make good, reinstatement;
 - (xix) ownership of fixtures and fittings;
 - (xx) consents;
 - (xxi) default and termination; and
 - (xxii) incentives.

Schedule 3 Subleases - State and Territory registration requirements

Note – This information is current as at 20 August 2019 and is in summary form only and not comprehensive. Changes in law and procedure occur from time to time and applicable requirements should be checked for each transaction

State	Should the sublease be registered?	Can either party lodge the sublease or does it need to be the party which is the tenant under the head lease?	Is stamp duty payable? If so, by which party?
ACT	Yes, if head lease is registered. Leases for a term of 3 years or less are not required to be registered.	Either party may lodge. Original Certificate of Title and consent of mortgagee required.	No.
NSW	Yes, if head lease is registered. Leases for a term of 3 years or less are not required to be registered.	Either party may lodge. Original Certificate of Title and consent of mortgagee required.	Stamp duty may be payable if a premium is paid on top of rent. The transferee (in the case of a sublease, the sub-tenant) is liable to pay the stamp duty
VIC	No.	N/A	Stamp duty may be payable where consideration other than rent is paid in relation to the sublease. The transferee (in the case of a sublease, the sub-tenant) is liable to pay any stamp duty.
TAS	Yes, if head lease is registered. Leases for a term of 3 years or less are not required to be registered.	Either party may lodge. Original Certificate of Title and consent of mortgagee required	Stamp duty may be payable if any premium is paid on top of rent. However, a sublease is exempt from duty if the premium is less than \$3,000. The transferee (in the case of a sublease, the sub-tenant) is liable to pay any stamp duty.
NT	Yes, if head lease is registered. Leases for a term of 3 years or less are not required to be registered.	Either party may lodge. Certificate of title required if paper title exists. Mortgagee consent needed if mortgage terms require it.	Generally, no. Stamp duty may be payable where a premium has been paid on top of rent. If stamp duty is payable, the lessee (in the case of a sublease, the sub-tenant) is liable to pay the duty.
QLD	Yes, if head lease is registered. Leases for a term of 3 years or less are not required to be registered.	Either party may lodge. Certificate of title required if paper title exists but will be destroyed on production. Mortgagee consent required.	No.
WA	Yes, if head lease is registered. Leases for a term of 5 years or less are not required to be registered.	Either party may lodge. Original Certificate of Title and consent of mortgagee required	Generally, no. Stamp duty may be payable where a premium has been paid on top of rent. If stamp duty is payable, the transferee (in the case of a

State	Should the sublease be registered?	Can either party lodge the sublease or does it need to be the party which is the tenant under the head lease?	Is stamp duty payable? If so, by which party?
			sublease, the sub-tenant) is liable to pay the duty.
SA	Yes, if head lease is registered. Leases for a term of 3 years or less are not required to be registered.	Either party may lodge. Consent of mortgagee required. CT production not required.	No.