

**FREMANTLE SAILING CLUB**  
**MEMBERS' QUESTIONS ON DOT LEASE**  
**GENERAL MEETING 30 MARCH 2023**  
**(ADJOURNED TO 13 JUNE 2023)**

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**QUESTION 1**

I was the person who opened the letter, my first thought was rubbish and it was egregious. Paul mentioned the word mediation several times, there was no attempt at that point to do mediation. How does this valuation of our acreage tie in with what Landgate would assess. We also pay rates at Fremantle Council. Why didn't we sit down at the beginning with DOT to work out how they came to the valuation. Why didn't we go to mediation at the get go.

Dear Member

We and our predecessors on the Lease Committee would have welcomed the opportunity to sit down with DOT at the beginning to work out how DOT came to its valuation, and/or the opportunity for a mediation early on.

We share your disappointment with how DOT chose to approach the rent re-appraisal. DOT did propose meetings to discuss a possible settlement, but the Lease Committee insisted upon being provided with a copy of DOT's valuation in advance of any discussion. Where DOT refused to provide it in advance of a settlement meeting or mediation, the Lease Committee considered that any settlement discussion, without having a copy of DOT's valuation, would not have been productive, and we therefore reached a stalemate.

DOT was asserting that FSC's rent had been re-appraised to \$760,000 per annum. FSC disputed this and started to progress with the preparation of its own valuation. However, it soon became apparent that due to the real ambiguity in the old leases, very different valuation methodologies could be used, and very different assumptions could be made, which led to very different values. It was not (and still is not) clear as to the proper construction of the rent review mechanism in the old leases, and a consequence, there was (and still is) also real uncertainty as to the appropriate valuation methodology to be applied.

A mediation (or other negotiation) only became a viable option for resolving the rent review dispute after we had received DOT's valuation and after the parties' respective legal positions were exchanged through the arbitration process, so that the scope of the dispute became clearer (ie as the parties could assess their best, worst, and most likely case scenarios).

There are many aspects of the DOT valuation (once we obtained it through the arbitration process) which we consider open to criticism. However, the valuation is not clearly inconsistent with the rent review clause. Nor is it clearly without foundation. There are arguments that can be made to challenge the valuation, but they involve varying degrees of certainty, both in terms of prospects of success and effect on value.

The board has taken these considerations into account in weighing up the benefits and risks of the New Lease compared to continuing with arbitration.

**QUESTION 2**

What is the significance to us what we have to deal with is that DOT will put conditions on the club not only on improvements and fixtures which they have no entitlement to at all. We have significant assets

but are required under the lease to replace or reinstatement so we will be back in arguments with DOT. Also reference in discussing issue of rent they will have to give us notice of rent we have 10 business days to reject. I would like to know where is this money going to come from and who is the club going to charge – are they going to charge members or pen owners, these are important issues that need to be addressed and haven't been addressed tonight.

The Make Good Provisions are similar in both leases. What worries me most is that the issues of default are not just monetary, it deals with if we don't have enough insurance, rusting environment report and what they deem appropriate. A lot more compliance as well as the increase in lease. DOT can terminate the lease in 14 days. I am concerned that DOT is working its way to \$760,000 as well as CPI.

Do you agree if we comply with the lease that we automatically get an extension to 2079. If we default do we lose our land rights.

Dear Member

We do not consider that DOT has the ability, or the desire, to impose onerous conditions on FSC generally.

In some respects, the terms of the New Lease are more favourable to DOT, compared with the terms of the current leases. However, you will appreciate that commercial lease terms often favour the landlord, because the landlord is in a stronger negotiating position. That is the case with the New Lease. Further, from the very first discussions between FSC and DOT about a potential settlement of the rent review dispute and arbitration, it has been DOT's position that it would be necessary for FSC to enter into a new lease on DOT's standard terms and conditions. DOT has not shown any willingness to negotiate in this regard. It is clear that, if we were to insist on some other lease terms (eg variations to the current leases), then DOT would refuse to settle, and we would be obliged to 'take our chances' in the arbitration.

In such a context, the negotiations focused on what we considered to be the most important terms of the New Lease, from the point of view of FSC. We accept that there are several other clauses in DOT's standard form lease which, in a 'perfect world', we would also seek to amend. However, we decided to focus on those important clauses where we considered that we could win the argument to justify an amendment. We sought concessions from DOT, and exhausted our ability to procure amendments, where the risk seemed to us to be excessive. In all other instances, we are content that the risk is manageable.

The repair and maintenance obligations under the New Lease are considered appropriate and comparable to the repair and maintenance obligations under the old leases. A landlord has an interest in the premises, including all assets on the premises, remaining in good order and repair (particularly here, where title in the assets on the premises passes to the DOT at the end of the term). FSC already repairs and maintains the assets, and it is in FSC's interests to do so. There does not appear to be any realistic scenario in which it would be appropriate for FSC to stop repairing or maintaining the assets without there being any consequences.

We have carefully considered the terms of the New Lease, within the limitations imposed by DOT's stronger negotiating position. Of course, as you say, it is possible that disagreements with DOT will occur in the future. While the relationship of landlord and tenant continues, that will always be a possibility, which can never be eliminated. It can only be managed, including by and through the careful drafting of the terms and conditions, but this is subject to the willingness of the other party to negotiate. During the negotiations between FSC and DOT, DOT advised that it was not willing to make any further changes or concessions to the offered terms and conditions. Accordingly, the version of the New Lease proposed to the meeting in March represented the most extensive amendments we thought we could achieve, and we considered that FSC's ability to further negotiate the terms and conditions had been largely exhausted. It is also important to bear in mind that the old leases were drafted in the 1980s, using language in keeping with that time, which also lends itself to disagreements.

With respect to the two-week period to challenge a rent review notice, which you have raised in your question, we sought changes on several occasions to address the issues you raised, but we ran into a

'dead end'. This is also the position with respect to the two-week period to remedy non-financial defaults, which you have also raised in your question. Despite our efforts, DOT was not willing to agree to a longer period.

While DOT's initial approach to the rent re-appraisal may have been heavy handed, its more recent approach to dealings with FSC has not been unreasonable. DOT's actions, in seeking to resolve the rent review dispute and arbitration, have demonstrated a reasonable level of goodwill. In our view, if FSC and DOT are to continue with a relationship of landlord and tenant, it must be on the basis that there is some level of mutual trust and confidence.

Turning to your question about sources of funds, the increased rent, and any other costs, may be funded from a range of sources, depending upon the club's financial position at the time. Some costs may be passed on to members and/or pen owners as considered necessary and appropriate by the Board from time to time. FSC is also investigating other possible sources of funding.

As you will appreciate, it is not as if there is a certain alternative. The re-appraisal and arbitration may also require FSC to fund increased rent (potentially in a greater amount, more rapidly), just as the New Lease requires FSC to do so. Either way, it will be necessary for FSC to identify other possible sources of funding, and this may include passing on some costs to members and/or pen owners.

That being said, the New Lease allows FSC to manage the financial impact of the increased rent, which may not be possible through arbitration. The New Lease does so by providing for an incremental increase in rent each year until 1 January 2030. This maximises FSC's ability to identify other possible sources of funding and minimises the extent to which it will be required to pass on costs to members and/or pen owners.

If we comply with the New Lease and with the requirements to exercise the option, then FSC will get an extension to 2079. As you suggest, if there is a default under the New Lease which is not remedied, there is a risk that New Lease may be forfeited. The risk of forfeiture is also present under the old leases. We agree that, unless the New Lease is terminated, FSC can unilaterally extend the New Lease by exercising the options granted to it under the New Lease.

### **QUESTION 3**

In the absence of Phil addressing the issues directly rather than peripherally, perhaps you could give me a clear response. The questions asked and mood of the meeting was a clear indication that I was not an orphan in seeking the advice. This is a formal request.

Will you also provide me with a mechanism for a pen-holder to contact all other pen-holders so that we may discuss the implications of the issues before us.

I found the mountain of data just too overwhelming to climb. A week was insufficient for me to conduct a deeper analysis. I could see no informing summary that would allow making sense of the detail I would likely miss if attempting the climb as a lay-person.

What I have heard of the need for negotiations over the past year or two, they were conducted under the threat of immediate demand for a 20+ times increase in annual rent backdated to 2019. From Phil's Report, the Treasurer's report of the past year, and the motion to forgo all rights to the 22 years remaining on the Club's lease (to 2045) it appears the negotiations resulted in the Club releasing all its tenancy rights to DoT – the landlord. The residual 22 years rights to 2040 appear deemed to have no value. The tenant's improvements to the leasehold also seem to have DoT recognising them and seeking to charge the tenant twice: once for creating them and a second time in rent for the increased value of their creation.

Worse, the Club is bound to ensure no degradation of those improvements, over and above the rent for them by the end of the lease term. This is a mutually beneficial term as the Club would wish to maintain the asset in expectation of continuing as tenant. On the other hand, the Landlord can terminate the lease, thereby just taking the improvements, seemingly for no recompense.

The numbers for the rent negotiations established are about 20 times the existing annual rent. I was unable to find from the Treasurer's report what impact that was likely to have on individual members. The only serious source of funds 2022 was the increase in pen maintenance, implying the pen-holder-members are to fund the DoT increase in annual rent.

Have I misunderstood the attachments? If I have, please advise how and where. An impact statement would have been most beneficial to members asked to vote.

Perhaps my question and understanding of the background to it could be presented at the General Meeting. Phil could then address them prior to putting the motion proposed.

Dear Member

Thank you for your questions.

We apologise to members for them not having had more time to consider the position. We trust that with the adjournment of the meeting, you and other members have now had sufficient time to do so.

As suggested, any queries of pen owners may be raised by contacting them directly (to the extent you are in touch with them), by attending meetings, or through the Board of Management.

As you will see from the materials circulated to members, the proposal to surrender the old leases in exchange for the New Lease represents the basis upon which DOT was willing to consider a settlement of the rent review dispute and arbitration.

The remainder of the term of the old leases is not being released or deemed of no value. It is being exchanged for the term of the New Lease (ie which is considerably longer, with options), together with the associated covenants, as part of the settlement of the rent review dispute and arbitration. This is considered to be fair value.

We do not agree that DOT has charged FSC twice for the improvements. This is not an analysis that assists FSC or its members to decide between entering into the New Lease or continuing with arbitration. As explained in answers to other questions, FSC has largely exhausted its ability to negotiate with DOT in relation to the terms and conditions of the New Lease, and the only alternative (except, perhaps for some 'tidy up' amendments) is to 'take our chances' in the arbitration.

Another perspective is that, in effect, FSC has been paid for the improvements, by way of a reduction in rent, which it has enjoyed from when it entered into the current leases in 1982, all the way through to 2019. We believe that it was probably the intention of the parties for FSC to receive some sort of credit for creating the improvements, by way of a reduction in rent, for the duration of the old leases. However, the drafting of the rent review clause failed to fully capture that idea. The rent review clause does not specify a formula for determining what credit FSC should receive. Based on FSC's investigations, what the parties probably intended was never recorded in any way that could be successfully relied upon as the basis for a legal argument.

We accept that the current rent paid by FSC in relation to the premises in some ways reflects FSC's contributions in terms of funding, materials, and labour. Whether FSC has been fully or adequately compensated for this is perhaps a matter about which reasonable minds might differ. However, a nominal or concessional rent, which would remain so over the life of the old leases, is apparently not the bargain that was struck. Or if it was, it is certainly not the one that was documented.

Members can be assured that all the arguments along these lines have been comprehensively investigated by FSC as part of the rent review dispute and arbitration.

As explained in the answer to Question 2, the extent to which increased rent and any other costs are passed on to members and/or pen owners will need to be determined by the Board from time to time, based on the prevailing circumstances.

Again, it is important to consider the alternatives. Proceeding with the arbitration, in the Board's view, is more likely than not to lead to a significant increase in rent. Similarly, this increase will need to be passed on to members and/or pen owners. The benefit of the New Lease, over arbitration, is that it allows FSC to manage the financial impact of the increased rent, by providing for an incremental

increase each year until 1 January 2030. This maximises FSC's ability to identify other possible sources of funding and minimises the extent to which it will be necessary to pass on costs to members and/or pen owners.

#### QUESTION 4

Capacity to ask questions last Thursday night was very limited so your decision to defer a vote on the motion was wise in the circumstance. Craig or the EA decided not to bring my queries below to your attention, it seems, as you did not respond or address them directly in your presentation. Interestingly, most of my queries (and new ones that arose from presentations) arose from the members; wholly independent of me.

Many of the members concerns were set aside by the negotiating team's responses that there was 'no intent' in the draft agreements to do unintended things that were conjectured from the changed terms of the proposed agreements. 'It is all a matter of what is in the agreement as to what can and will occur,' they said. Most disagreements in my experience find their way to court because one or other of the parties fails to adhere to the intent of the agreement at outset and pursues advantage at the expense of the other party through 're-interpretation' of the wording.

However, the rent intent of the existing agreements was evidenced by over 40 years of behaviour, with rent rising at close to CPI. Interestingly, CPI was all over the place but averaged out at 5% approximately since 1995. As far as I can see there was no intent in the original agreements to increase rent by more than 2000% over 10 years (that is, over 36% pa), but as advised Thursday night, hidden away in an obscure – 'unintended' – clause provided capacity for DoT to bankrupt the Club with a huge ambit claim under the clause. Can you tell members at what stage in the negotiations that reference was made to the intent of the existing agreements?

We are asked to terminate the agreements – to what end? What is asked in the draft Agreements is for the Club to relinquish its existing conditions to be replaced by all those member-perceived negative conjectures, so that DoT could determine the Lease if it considered any breach and thereby take over the site with its improvements. Virtually all the Club land is reclaimed and therefore is 'improvement', similarly to the seabed.

The use intended was "for the purpose of a Yacht Harbour". The environment in the late 1979s was that the existing yacht club would be cut off from the sea by the planned enhanced freight rail line to Fremantle Harbour. The agreements to move the Club were intended to resolve that issue. It is difficult to see what has changed to warrant the present rent change.

The DoT valuation for rent appears to be directly based on the improvement of the breakwater to the seabed, and the land recovery on which much of the Club is built (refer pix attached – Trevor Sutcliffe and GoogleEarth – and Clauses 2 (2) (a) (i) for seabed and 2 (2) (a) (iii) for land agreements). That valuation appears to be based on commercial tenancy that takes advantage of the improvements created and maintained by the Club. The Club is a non-profit entity. The argument of depreciation dissipating the value of the improvements is irrelevant as the premises have all continued to be maintained to a high functional standard, as per the leases (Clause 1 (4)) as intended.

The issues of fairness under the existing agreement, and of precedent of the past 27 years "TO HAVE AND TO HOLD the demised premises SUBJECT TO the powers reservations covenants and conditions herein" would seem to relevant to the existing agreement. There is no basis for the extreme change to rent under the existing agreements if accepted and consenting practice since inception is applied, in my opinion. There is no reason to relinquish the leases as the seabed agreement contains clauses for continuation (Clause 2 (6)) by extension to that of the land-based premises, viz 100 years.

Trevor Sutcliffe's Sailing to Success should be essential reading for new members to get a feel for what the Fremantle Sailing Club is all about. To grasp the intent of the Agreements, Trevor sets out their environment before the present DoT bureaucrats made their ambit claim on rent.

I look forward to more and better particulars from the Board, well before the follow-up meeting.

Dear Member

We trust your ability to submit questions during the adjournment of the meeting has gone some way towards addressing your concerns about the opportunity for members to consider the position.

The Lease Committee's comments were intended to convey that it may not be appropriate, when considering the terms of the New Lease, to begin from an assumption that DOT will strain or contort the language. It is appropriate to consider the terms of the New Lease according to their ordinary meaning, which would be applied by the courts in the event of a dispute. FSC has carefully considered the level of risk associated with that ordinary meaning. Where the risk appeared excessive, we sought concessions from DOT, and exhausted our ability to negotiate amendments. In some instances, FSC has been forced to accept drafting that may not represent FSC's preferred position, but which represents a level of risk that FSC considers manageable. As noted above, DOT indicated that it was not willing to make any further changes or concessions to the offered terms and conditions.

FSC has raised with DOT the argument that its historical rents have been nominal or concessional. FSC did so in 2019, not long after the rent re-appraisal. However, DOT categorically rejected the argument. FSC has fully investigated whether the nominal or concessional nature of historical rents, or considerations of fairness, can be successfully relied upon as the basis for a legal argument that the rent re-appraisal under the old leases should not be to 'market'. FSC also investigated the question of whether it could be argued that the rent should be somehow linked to CPI. Because of advice received, FSC considers that no such legal argument is open.

The rent re-appraisal does not pre-suppose a material change in circumstances. Under the rent review clause, the Minister is empowered to re-appraise the rent in accordance with a valuation, in effect, to current market rent from time to time.

As noted above, through the arbitration process, we obtained a copy of DOT's valuation. There are many aspects of it that we consider open to criticism, in line with your observations. However, the valuation is not clearly inconsistent with the rent review clause. Nor is it clearly without foundation. There are arguments that can be made to challenge the valuation, but they involve varying degrees of certainty, both in terms of prospects of success and effect on value. The board has taken these considerations into account in weighing up the benefits and risks of the New Lease compared to continuing with arbitration.

We hope that the above, together with the other materials circulated to members, addresses your questions.

## **QUESTION 5**

At the FSC meeting on Thursday last the commodore suggested members write to you with any points they wished considered in finalizing negotiations with DOT over the new lease.

I wish to raise the following.

1. As FSC will now be paying over \$300 000 to #750 000 per year to DOT, just what will the club get back in return? As DOT is the new landlord, the club should be able to expect some maintenance and improvements to the site. Possibly drainage issues, maintenance of the railroad crossing, repairs to the fencing, improvements to access to the club etc, etc. In a normal lease the landlord has some responsibility to maintain and improve the occupiers enjoyment of the property. Why has this aspect been ignored by the club's legal team?

Dear Member

Thank you for your questions.

It is important to consider the background to the New Lease. FSC is not offering to pay the increased rent voluntarily or as a gift. In April 2019, DOT purported to exercise its right under the old leases to re-appraise FSC's rent. It purported to re-appraise the rent to \$760,000 per annum, in accordance with a valuation prepared by McGees. The old leases do not require FSC to be provided with anything in return. The re-appraised rent is considered by DOT to represent current market rent for the premises, which DOT argues is the test under the old leases.

The proposal to enter into the New Lease, which contemplates the rent increasing gradually from \$325,000 to \$760,000 over the next nine years, arises in a context where DOT is otherwise asserting that rent of \$760,000 per annum is payable effective 1 January 2019, with the expectation of a further, higher review on 1 January 2022 and every three years thereafter. Accordingly, the staged increases in rent represent a compromise between FSC's and DOT's positions, taking into account the range of outcomes possible in arbitration.

In return for the payment of rent, DOT (who is not a new landlord – FSC's landlord has always been a manifestation of the State) will give FSC quiet enjoyment, namely the right to use land and seabed owned by the State. That is usual in commercial leases and is reflective of the lease terms of all other yacht clubs who have DOT/the State as their landlord (which is most of them).

2. The lawyers presented an outline of the use the club can make of the land areas. Amongst the service facilities was a vague reference to the club being able to carry out normal functions of a yacht club. What was not specified was the use of the hard stand in servicing and maintaining member's boats. This involves messy functions such as painting, sanding, welding, anti fouling waste, engine oil disposal and a mass of other industrial actions.

In the past years the club has been under siege from environmentalists from the council and others to curtail hard stand operations with the long aim of eliminating them altogether. There has been some talk of closing down the hard stand and moving it all to Henderson in the future? I raised this issue with the lawyers and got a most unsatisfactory response, such as there was no question of the hard stand being under threat from DOT. There may be no present threat but there is a move to eliminate the hard stand operations at FSC by the local environmentalists and with no written right to conduct hard stand operations in the new lease these can be withdrawn by a future government. I consider the lawyers must include a clause to guarantee the hard stand use in the future. Just trusting to the good intentions of DOT will ensure tears and expense in the future.

We consider that, in circumstances where FSC and DOT have agreed to surrender the old leases and replace them with the New Lease, and the New Lease provides that the permitted use of the premises is as a yacht club, DOT would not be able to successfully argue that the use of the hardstand areas for servicing and maintaining members' boats (ie which was continuing as at the time of entry into the New Lease) does not fall within the use of the premises as a yacht club.

3. When the council imposed rates on the pen owners at FSC, the club decided that only the pen owners be charged the costs. The rest of the membership were exempt. Blind Freddy can see who will be charged the new impost of the DOT lease payments— The Long Suffering Pen Owners!!!!

I feel it necessary to get in early and insist that the lease payment be shared among all members including life ones. Obviously lesser members, as crew for example, should pay a reduced rate as to full members. All members enjoy the land and water areas so they can expect to pay their share of the costs as well.

As explained in the answer to Question 2, the extent to which increased rent and any other costs are passed on to members and/or pen owners will need to be determined by the Board from time to time, based on the prevailing circumstances.

4. It is obvious that DOT plans to slug all other clubs the same charges as it has tried to impose on FSC. Has the club considered raising a fighting fund from sister clubs if we decide to go to arbitration? The sister clubs will face similar outrageous lease fees if DOT bully FSC into submission, so it is in their interests to help fund our campaign. The clubs must present a united front to DOT or go down individually.

I shall be attending the next meeting and be seeking the outcome of my suggestions.

Thank you for your suggestion, which will be considered if a majority of members decide to vote against the Board's recommendation and reject the New Lease, notwithstanding its benefits, compared with continuing with the arbitration. We note that we understand that other yacht clubs' leases do not contain the same rent review clause. Therefore, the rent review dispute in relation to FSC is unlikely to assist with a rent review dispute in relation to a sister club, and vice versa.



## QUESTION 6

If FSC's current lease does not expire until 2045 is there possibility for the club to just pay the increase and NOT agree to any of the changed conditions in the new lease?

\$700,000 divided between 2000 members = \$350 per member. The club has been getting a bargain on 7 hectares for the past 20+ years. Members seemed more concerned with the changed conditions of the lease rather than the increase in fees?

If food and beverage can return to its pre 2019 profitability the increase to each member may not even be as much?

It was great to see so many passionate members put forward ideas.

Dear Member

The short answer to your question is 'yes': it would be open to FSC to accept the rent re-appraisal (ie to \$760,000 per annum effective 1 January 2019) and continue with the old leases. The Board has not recommended this option to members because:

- (a) FSC would have to "back pay" rent at the increased amount from 1 January 2019, either to 1 January 2022 (subject to DOT issuing a further re-appraisal effective on this date), or to present, either of which would require FSC to make an immediate "lump sum" payment of at least \$3 million;
- (b) FSC would have to pay rent at the increased amount immediately, instead of having progressive increases over the next nine years, which limits FSC's ability to manage the impact of the increased rent (including on pen owners and members), and to investigate other sources of funds;
- (c) the New Lease provides FSC with a more conventional, and more certain, market rent review mechanism, while the old leases expose FSC to the rent review mechanism which has given rise to the present dispute, and may do so every three years, for the remainder of the term of the current leases; and
- (d) the New Lease provides FSC with a significantly extended lease term (inclusive of options).

## QUESTION 7

Up front my apologies as I missed the General Meeting as I was called interstate for work at short notice. I saw the notice to members and the item relating to the Lease. I reviewed the related documents in the members login area New Lease Summary, Existing Leases, Surrender Lease and New Lease.

As a member who has a sub-leased Pen (B11) that I purchased recently in October 2018, is there a document that summarises the impact that the New Lease will have on current pen lease arrangements? I appreciate this was probably covered in the General Meeting and again apologise for asking what has probably already been answered.

Dear Member

In the course of FSC negotiating the New Lease with DOT, FSC obtained DOT's consent to the pen leases. Accordingly, FSC does not anticipate any direct impact on the legal relationship between FSC and pen owners.

Some members who are pen owners have raised questions about arrangements for living on board and keeping pets on vessels. Our understanding is that DOT does not intend the New Lease to require FSC to significantly change its existing operations/activities. Accordingly, FSC is clarifying these matters with DOT, and anticipates being able to update members as to these matters prior to the Town Hall and/or the reconvened general meeting. FSC expects to be able to confirm to members that the existing policies and rules governing these matters will continue to apply following the entry into the New Lease.

However, please be aware that increased rent and other costs may, from time to time, be passed on to pen owners and/or members as considered necessary and appropriate by the Board, as explained in Question 2. FSC is seeking to minimise the impact on pen owners and/or members, including by investigating alternate sources of funds.

#### **QUESTION 8**

As instructed at the meeting you were going to publicise the Fors and Against the Lease and arbitration. When is this going to happen?

Dear Member

Thank you for your question.

You may wish to refer to the separate document on FSC's website titled "*Comparison of new lease and arbitration*" (which will be posted on the website in the coming days).

#### **QUESTION 9**

There were a number of concerns at the meeting regarding the contents of the lease and concerns about specific wording and a view that we may potentially be disadvantaged vis a vis normal lease situation. The response was that the lease is essentially a "standard" lease. Could the Board advise what inclusions which might be deemed non standard are in the lease, if any, and what they might be. That is, how "standard" is the proposed lease?

Given the concerns about the negotiated value with respect to the starting point for the lease and subsequent escalations and the advice given that legal opinion considered this position to be broadly in accordance with an anticipated arbitration then further information about the reality of what an arbitration might deliver is important despite the uncertainty of the process. Could the Board advise on the following please:

the arbitration will presumably follow an assessment of our legal obligations and of the reasonableness of the lease value taking into account the powers of the State Government to enforce such a lease and the legal basis for assessing the value of the land/sea areas.

The negotiated dollar value was outlined on the overheads from a starting point as \$/square metre and then a demonstration of deductions from this point due to the value of land reclamation etc which we reasonably need to leave to our legal team to assess how an arbitration might view that deduction position.

however the point of clarification being sought in this query is what the legal position is for the Dept of Transport's starting point which wasn't clear to me. Presumably there is a basis for reasonable dollar value comparison which has been tabled by DOT for an arbitrator to draw upon to agree, or otherwise, the starting point of \$sq/m.

The above two points might be the crux of the matter for members to be informed to decide as there seemed to be opinions that giving arbitration a go would produce a better outcome but opinions perhaps without the above background?

Dear Member

The New Lease is "standard" in two senses.

First, it is "standard" in the sense that it reflects DOT's standard terms and conditions, which also apply to DOT's leases with other yacht clubs, subject to any agreed exceptions.

Second, it is "standard" in the sense that the terms and conditions reflect those that landlords and tenants often agree upon, where (as here) the landlord is in a stronger negotiating position. We have carefully considered the extent to which the terms of the New Lease create scope for potential disputes. We sought concessions from DOT, and exhausted our ability to do so, where the risk seemed to us to be excessive. In all other instances, we are content that the risk is manageable. As noted above, DOT

indicated that it was not willing to make any further changes or concessions to the offered terms and conditions.

You are correct that the Board's recommendation of the New Lease takes into account its assessment of the strength (or otherwise) of the parties' positions. You may wish to refer to the separate document on FSC's website titled "*Comparison of new lease and arbitration*" (which will be posted on the website in the coming days) for more information.

As noted earlier, by reason of the ambiguous rent review clause under the old leases, a variety of different valuation methodologies might be found to be appropriate, and in that context, very different assumptions can be made, which lead to very different values. It is not clear that any of those methodologies or assumptions will be found to be correct. Accordingly, at best, there are degrees of certainty as to the result of arbitration.

The staged rent increases under the New Lease (which take the total rent gradually from \$325,000 and \$760,000 per annum over the nine-year period to 2030) take into account what FSC considers to be the likely result in arbitration, and the associated risks.

#### **QUESTION 10**

I am a little discombobulated as my questions prior to meetings that I attend, as you suggest, seem to vanish into the great unknown, and information that would allow greater interaction is received so close to said meetings that interaction and constructive input is thereby impossible.

I would therefore like the names and contacts of representative Members of the Board of Management (pen holders) who can address some of the issues well before closure motions are put to General Meetings of members. If Privacy is an issue, the Club could contact members with the matters raised by pen holders. There appears no mechanism to hold and express views more broadly, provide a forum for consideration and debate. The obligation in the Constitution to poll members is lost.

It would seem to me that getting the pen holders together to speak as one voice would be constructive rather than the disparate struggle to be heard as last Thursday.

The single issue of exiting agreement intent I put to the Commodore in response to his request for members to offer up questions is but one of a complex bunch of interdependent matters that cannot be resolved by adopting DoT's rent increase ambit as is. The clauses of 'oversight' are so loose as to allow the DoT to determine the Club's lease on matters that are beyond the Club's control, eg:

- water quality arising from ground-water seeping into the seabed area
- stormwater run-off from the South Ward of Fremantle LGA.
- The issue of rising sea levels in the life of the existing lease, let alone a new one, does not get a mention. Does DoT propose recladding the existing wall as the landlord? If not, how is its cost to be borne by members (at maybe \$60 M)?
- Protection of the Fishing Boat Harbour wall by the Club's is ignored in the draft leases.
- The value avoiding replacement sea wall blocks alongside the rail line with the development of the Club site did not get a mention
- Social value of the junior sailing to Olympic sport went the same way in negotiations.
- I could find no valuation of the seabed to the west of South Beach (south of the Club site) that would guide valuation of the seabed within the Breakwater.
- The sale of what marina sites similar to FSC was used guide the DoT valuations?
- The ambit (2000% increase within 10 years) claim by DoT meant 'negotiations' were conducted under duress.

I am sure there are many more issues that have not yet arisen or have been discussed among members as there has been little opportunity to do so.

Dear Member

Beginning with your last point first, the negotiations with DOT were conducted against the background of DOT asserting that FSC's rent had increased by 2000%, with immediate effect from 1 January 2019. The gradual increases in rent under the New Lease, over a timeframe of nine years to 2030, is one of the benefits that FSC has obtained through the negotiation of the New Lease. However, none of this means that the negotiations have been conducted under duress. It is simply a commercial negotiation, which has followed DOT purporting to exercise its rights under the current leases.

As noted earlier, DOT advised that it was not willing to make any further changes or concessions to the offered terms and conditions. Accordingly, it seems to us that FSC's ability to further negotiate the terms and conditions has been exhausted. Some of your points (eg the social value of junior sailing), which make good arguments, simply will not persuade DOT to move its position.

There are the usual protections available to FSC in the New Lease that are available in commercial leases, including:

- a right to remedy upon notice;
- a right to quiet enjoyment;
- the duty of good faith owed to contractual counterparties; and
- a right to relief from forfeiture.

As to your questions regarding value, FSC obtained valuation input from a variety of sources, but as you have anticipated, there are limited comparable sites/examples, and that lack of comparable properties resulted in a potential range of valuation outcomes, and therefore risks which may crystallise if FSC 'takes its chances' in arbitration.

#### **QUESTION 11**

As Phil has commented, there are a lot of unanswered questions about the Board proposal to accept the negotiated position presented at the meeting on 30 March 2023.

While many of these have been raised in the correspondence submitted by Bill Henson and raised by other members, I would like specific answers to the following:

- 1) Are all other Sailing/Boating/Yacht Clubs subject to leases now under DOT?
- 2) What are their lease rates and terms?
- 3) Have any of the DOT Lessee Clubs recently renewed/renegotiated their leases?
- 4) Are any of the DOT Lessee Clubs subject to short or medium term lease reviews?
- 5) Has FSC attempted to enlist the support of these Clubs to present a stronger and united negotiating position to DOT?
- 6) What specific political lobbying has been undertaken and with which Members of Parliament and/or Local Government to attempt to mitigate the outrageous increment suggested by the DOT?
- 7) Is the Minister of Sport aware of the potential impact on FSC with the State's premier youth development and Olympic development programs in place?
- 8) What is the projected financial impact from the proposed negotiated settlement on Full Members and Pen Owners? (I understand the exact figures have yet to be determined but Members deserve a ball park indication in order to make a considered vote)

Dear Member

Thank you for your questions. Adopting your numbering:

1. We understand that most, if not all, other sailing/boating/yacht club leases are now under DOT control, on terms and conditions similar to those in the New Lease, although with a variety of rental mechanisms.
2. The extent to which other clubs are comparable to FSC, and therefore the extent to which the rents payable by them are comparable to the rents payable by FSC, involves difficult questions of fact and degree, about which reasonable minds might differ. The Board has taken into account valuation input on these matters, in the course of negotiating the new rents and rent increases under the New Lease.
3. We understand that some DOT sailing/boating/yacht club leases were entered into relatively recently. However, for the reasons given in answer to Question 2 above, this is unlikely to advance the negotiations with DOT.
4. As we understand it, other sailing/boating/yacht clubs' leases, on DOT's standard terms and conditions, are subject to market rent reviews every three years.
5. In circumstances where the other clubs are subject to DOT control, under DOT's terms and conditions (which are different to those of FSC's old leases), it is unlikely that support from other clubs would significantly assist FSC to present a stronger negotiating position.
6. We agree that FSC should consider undertaking a 'lobbying' process into the future (ie particularly coming into the next rent review cycle), but we do not consider that it is a viable option to address the current circumstances facing FSC.
7. As mentioned in answer to Question 6 above, it does not seem that lobbying is presently a viable option to address the current circumstances facing FSC.
8. As explained in the answer to Question 2, it will be a matter for FSC's Board to consider from time to time whether and to what extent the increased rent payment and any other costs are to be passed on to members and/or pen owners. This will depend upon FSC's financial position and sources of funds at the time.

## QUESTION 12

Some questions for the board to consider

- 1) I noticed the land and the seabed was a different \$ rate and my question is, has the area that was reclaimed seabed been assessed as seabed or land (in my opinion it's a capital improvement and should be charged as seabed)
- 2) Obviously a membership increase will be required, will the junior club be contributing an amount equal to the land area they are occupying, or possibly the junior club can negotiate a lease direct with DOT?
- 3) In the event the lease payments become too expensive has the board considered reducing the land area FSC currently occupies, EG the car park at South Beach.
- 4) What in percentage terms will be the increase to membership per annum for all members, assuming the increase will be equally distributed across all membership levels.

Thank you for your consideration.

Dear Member

Thank you for your questions. Adopting your numbering:

1. As you correctly identify, a different \$ rate has been allocated to the land (created by reclamation) and seabed. The drafting of the rent review clause under the old leases makes it difficult to argue that the same \$ rate for seabed should be applied to the land, in circumstances where the clause separately requires the valuer to have regard to the costs and expenses of reclamation. If the land were valued as seabed, having regard to the costs and expenses of reclamation would involve a

“double discount”, and it is not sufficiently clear that such a discount was intended. Indeed, these are exactly the kinds of issues that make the result in the arbitration so uncertain.

2. As explained in the answer to Question 2, it will be a matter from FSC’s Board to consider from time to time whether and to what extent the increased rent payment and any other costs are to be passed on to the junior club. This will depend upon FSC’s financial position and sources of funds at the time.
3. Thank you for your suggestion, which has been noted for consideration.
4. See the answer to Question 2 above.

#### QUESTION 13

Further to this letter from the Commodore today 6 April, would you please provide the details of the proposed lease and the position of the board including their perspective of the pros and cons for executing the lease or going to arbitration/litigation— I believe this was requested at the last meeting. It is clearly not possible to raise meaningful queries in writing without this information. I would appreciate if you could request the board to action this and circulate within 7 days to all members to allow for proper governance and due process.

Dear Member

Thank you for your question.

We apologise for members not having had more time to consider the position. We trust that with the adjournment of the meeting, you and other members have now had sufficient time to do so.

You may wish to refer to the separate document on FSC’s website titled *“Comparison of new lease and arbitration”* (which will be posted on the website in the coming days).

#### QUESTION 14

##### Why is FSC leasing the improvements from DoT, who don’t own them?

1. Members were advised at the General Meeting on 28/03 that ownership (and title?) of the improvements to the land and seabed would not be transferred to the Minister / DoT.
2. However, under the proposed lease FSC is leasing the ‘Premises’ which are defined as the land, seabed and ‘all structures and improvements’ on the land and the seabed. Thus the breakwater, marina, clubhouse and all buildings are being leased by FSC from DoT, even though DoT don’t own these assets.
3. The proposed new leases states:

RECITALS:

A. The Land and Seabed is by proclamation under Section 9 of the Marine and Harbours Act 1981 vested in the Lessor for harbour purposes.

B. Under Section 12(2) of the Marine and Harbours Act 1981 **the Lessor has the power to grant a lease of the Premises.**

C. The Lessee has requested and the Lessor has agreed to grant the Lessee a lease of the Premises on the terms and conditions of this Document.

1. Recital B clearly states that DoT has the right under the Marine and Harbours act to lease all of the structures and improvements to FSC.
2. The relevant section of the act is copied below:

**Marine and Harbours Act 1981** (current version updated 1 Aug. 2021)

## 12. Leases of vested land

(1) The vesting of any property in the Minister under section 9 shall not in any way affect or derogate from any lease, tenancy, licence or other like agreement to which that property was subject immediately before the property was vested in the Minister and the property shall be vested subject to any such lease, tenancy, licence or other like agreement.

(2) The Minister may grant a lease of land **or other property vested in the Minister** under this Act [Emphasis added]

(a) for purposes falling within the purposes of this Act or relating to the functions of the Department; or

(b) for such other purposes including —

(i) the use of the land or property for community activities; and

(ii) the commercial development of the land or property by any person, as the Minister thinks fit.

(2a) A lease may be granted for such term and on such terms and conditions, including a right of renewal, as the Minister thinks fit.

3. It is clear from the act that the Minister can only lease property that is vested in the Minister.

4. However, members have been assured that the assets will not be transferred to the Minister / DoT

### Questions

- A. Please explain how DoT has the authority to lease to FSC assets that are owned by FSC.
- B. Why is this arrangement necessary, given that FSC only leases the land and seabed at present?
- C. What are the benefits for FSC that arise from leasing back its own assets?
- D. What are the disadvantages for FSC that arise from leasing back its own assets?

### Answers

Dear Member

The surrender of the old leases, conditional upon the grant of the New Lease, occurs pursuant to a Deed of Surrender. To avoid any doubt about the issue you have raised above, DOT has agreed to the insertion of a clause in the Deed of Surrender, which will provide that:

For the avoidance of doubt and notwithstanding any other provision of [the Deed of Surrender] or the [existing leases], the surrender of the [existing leases] contemplated by this clause 4 and the entry into the New Lease will not effect a change in ownership of any improvements on the Premises.

In those circumstances, there is no change in ownership of the assets upon the entry into the New Lease. While the definition of Premises in the version of the New Lease previously circulated to members is broad enough to include any assets which DOT leases to FSC, there are no such assets. You will appreciate that a party (DOT) cannot lease to another party (FSC) an asset that it does not own.

Although we are confident that the clause would be interpreted in this way, given the focus on this issue by the members, and with a view to removing all doubt, we have sought DOT's agreement to remove the reference to 'improvements' in the definition of 'Premises' under the New Lease. We are hopeful that we will be in a position to update members as to this issue prior to the Town Hall and/or reconvened general meeting.

**The rent cap is 15% per annum, not 15% over 3 years.**

1. The rent is to be calculated on an annual basis:
  - a. "On each Rent Review Date the Rent, payable on a **calendar year basis** ...."
  - b. ""Current Market Rent" means the current market rent on an **annual basis** ..."
  - c. "the **annual Rent** payable for immediately preceding 12 months"
2. The 15% cap applies on an annual basis:
  - a. "Subject to clause 7.3(c), if the effect of a rent review under clause 7.3(a) would, but for this clause, cause the Rent **payable on a calendar year basis** to increase by greater than 15%, the Rent payable on a **calendar year basis** will instead be reviewed so that it is the Rent payable for the immediately preceding 12 months multiplied by 115% (that is, capped at an increase in the Rent **payable on a calendar year basis** of 15%)
3. If the rent was required to be set at the same rate for each of the 3 years following a rent review, then the wording might have the effect of capping the increase to be 15% every 3 years.
4. The agenda booklet states that the rent is 'capped at a maximum increment of 15% over any 3 year period'
5. However, no such wording exists in the lease agreement.
6. The effect of a 15% pa cap compared to a 5% pa cap is significant. If the cap is 15% pa the rent in 2044 could be \$5.4m pa compared to \$1.5m pa under a 5% pa cap.

#### Questions

- A. Does the Board agree that the cap is 15% pa, not 5% pa?
- B. If the Board believes it is 5% pa, what is the wording in the new lease agreement that has the effect of reducing a 15% pa cap to a 5%pa cap?

#### **The rent review clauses in the new leases are materially worse for FSC than the current leases.**

#### Answers

The cap applies on a per rent review basis ("if the effect of a rent review under clause 7.3(a) ..."). Rent reviews under clause 7.3(a) occur every three years.

The New Lease contemplates the payment of rent annually, that is, from 1 January to 31 December each year. Upon the rent being reviewed (generally with effect on 1 January, once every three years), the effect of the clause referred to above is to cap the reviewed rent at 115% (an increase of 15%) of the annual rent that was in force as a consequence of the immediately preceding the rent review (ie from 1 January to 31 December of the year preceding the rent review).

Consistent with your point 3 above, we do not consider that the rent during the 3-year period after the rent review can be graduated. The rent is set as an annual amount for each of the 3 years until the next rent review and therefore the cap of 15% is a cap on the increase from the last rent review (ie 3 years beforehand).

#### Current lease

1. The rent under the current land lease is to be determined on:
  - a. The valuation of the land, but
  - b. Excluding the value of all improvements including buildings, structure, erections, fixtures or plant and equipment
  - c. Having regard to FSC's costs and expenses for land reclamation
  - d. Having regard to the rents paid by other Perth yacht clubs
2. The rent under the current land lease is to be determined on:
  - a. The valuation of the seabed, but
  - b. Excluding the value of all improvements including buildings, structure, erections, fixtures or plant and equipment



- c. Having regard to FSC's costs and expenses for land reclamation
3. Note that an improvement is anything that adds value to the leased area. For example, the dredging of the harbour entrance by FSC has added value to the marina and yard.
4. Note the **value** of the improvements must be deducted from the valuation, not the cost. This deduction is mandatory.
5. 'Having regard' to a matter requires that it must be carefully considered, however it does not require it to affect the outcome.
6. Rent disputes are to be settled by arbitration, hence it is likely that DoT will be required to provide FSC with a copy of their valuations of the land and the seabed, and other relevant information.

#### Proposed lease

1. The rent under the proposed lease is to be based on highest of 3 factors:
  - a. Increases in the 'current market rent'
  - b. Increases in CPI
  - c. The rent from the previous year
2. Decreases in the current market rent or CPI are ignored, only increases are applied
3. Current market rent is to be determined by considering commercial rents and yacht club rents and the permitted use, however the value of the improvements that have been made by FSC must be ignored.
4. The commercial rents are based on the 'headline rent' while ignoring any discounts, rent free periods, financial inducements, or other similar incentives. Put another way, they are to be calculated based on the rent that DoT would like to charge rather than on the rent they actually charge.
5. The consideration of incentives that are provided to other yacht clubs is very unclear.
6. The drafting has a list of factors that must be considered and a list of factors that must be ignored.
7. Incentives that are provided to commercial tenants must be ignored – as noted in 4 above.
8. Incentives that are provided to other yacht clubs are removed from the list of factors that must be ignored. However, these incentives are not in the list of factors that must be considered. This means it is optional for expert to take the incentives into account when determining the rent from FSC.
9. The rent increases in the period 2031-2044 are capped at 15% pa. They are uncapped from 2045 onwards.
10. Rent disputes are to be settled by an expert. There is no obligation on DoT to provide FSC with any information to explain how the rent was determined. FSC has no right to make representations to the expert.
11. FSC must not do anything that might directly or indirectly the rent (see clause 8)

#### Discussion

1. It is highly likely – almost inevitable – that the proposed lease will have higher rents than the existing lease.
2. Under the existing lease, the value of the improvements made by FSC **must be deducted** from the valuation when calculating the rent. Under the proposed lease, the value of the improvements made by FSC **must be ignored** when calculating the current market rent.
3. The improvements are valued in the FSC accounts at \$20m. With a yield of 6% (typical commercial rental yield) this equates to an additional rent of \$1.2m pa.

4. The replacement cost of the improvements is significantly greater than the value in the FSC accounts. For example, the replacement cost of the breakwater is ~\$45m and the replacement cost of the marina is ~ \$30m. The capital cost of the 550 berth Ocean Reef marina is \$250m +
5. Thus, the estimate of \$1.2m pa of additional rent may be low by a factor of 2-4.
6. There are other mechanisms in the rent review clause that are designed to increase the rent above a fair and reasonable level:
  - a. The 'high of' 3 separate factors (CPI, current market rent or the previous rent – whichever is higher)
  - b. The ratchet wording where the rent is increased when CPI or the current market rent goes up, but doesn't decrease if CPI or the current market rent goes down.
  - c. The current market rent calculation must ignore any discounts, rent free periods, financial inducements, or other similar incentives. It is based on hypothetical rents, not actual rents.

#### Questions

1. Has the Board compared the rent review clauses the existing leases and the proposed lease?
2. If yes, please provide details of that comparison and the quantification of the differences.
3. Please identify and explain the drafting that supports the statement 'If other YC's have a prevailing discount rate of 50% - then a similar discount would be applied to the FSC rental assessment.'

#### Answers

FSC is aware of the differences between the rent review clauses under the old leases and the rent review clause under the New Lease. FSC is also aware that the rent review clause under the New Lease reflects, in essence, a market rent clause, which will eventually result in higher rents (ie after the graduated increase and after the 'capped' increases). The gradual move towards market rent forms part of the overall commercial compromise of the rent review dispute and arbitration, which is a move that DOT is implementing with the other yacht clubs in the metropolitan region.

FSC considers that the rent review clause under the New Lease will still incorporate the prevailing discount rates applicable to other yacht clubs from time to time, amongst other things, because the definition of "Current Market Rent":

- takes into consideration current rent values, rent reviews, and rent renewals in respect of comparable premises (paragraphs (d), (e) and (f)); and
- only ignores incentives, if no such incentives are included in any lease in force between DOT and any other yacht club in the metropolitan region (paragraph (n)).

#### Other questions

1. What is the estimate of the costs that FSC must pay DoT that are in addition to the rent? For example, we must pay DoT whatever McGees charge DoT for managing the FSC lease. This is in addition to the 4% kick-back. What is the estimated cost of an environmental audit which DoT can request every year?
2. What is the estimated additional annual cost for insurance that meets the requirements of the new lease compared to the existing leases?
3. Does the calculation of the levelized rent consider the COVID rent free period? Does it take into account the other costs FSC must pay DoT and any additional costs that will be incurred under the new lease (e.g., increased insurance, McGee's costs, audit costs, asbestos removal costs)
4. How does the discount rate of 6% compared to the actual returns earned by the FSC trust fund, which is a better measure of FSC's cost of capital? Please provide a sensitivity of the levelized rent using a 4% discount rate.

## Other Answers

FSC does not consider that the New Lease imposes significant additional compliance costs. As noted elsewhere in these responses, FSC considers that the obligations under the New Lease, while more specific, are consistent with general obligations under the old leases.

As regards the requirements relating to the removal of asbestos, our understanding is that DOT does not intend the New Lease to require FSC to significantly change its existing operations/activities. Accordingly, continuing on from work that FSC has previously done to prepare an asbestos register, FSC is in the process of preparing a hazardous materials plan, which reflects the relevant rules and regulations governing asbestos. In such a context, FSC has sought clarification from DOT that FSC will not be required to remove asbestos except as provided for under that plan (ie which plan will be agreed with DOT prior to entering into the New Lease). FSC is hopeful of being in a position to update members in relation to this issue prior to the Town Hall and/or reconvened general meeting.

### **QUESTION 15**

Hi, my question is in regard to pen leases. My understanding is that the proposal is to grant lease extensions to pen lease owners beyond the current expiry of 2045, I think meaning pen leases would then expire at the same time the FSC overall lease comes to renewal in 2100. This seems to be a substantial gift of value for zero consideration. My understanding of standard lease arrangements is that at the expiration of a lease either the lease ends and the asset reverts to the owner, or a renewal could be negotiated that would usually include an ingoing amount. By granting an automatic extension the FSC is forgoing considerable income, and I find this particularly irksome as at the last Town Hall meeting we were told one of the challenges facing FSC financially was we received no income from a substantial proportion of our wet pens.

Additionally, it is also pretty standard in lease arrangements that the asset is handed back at the end of a lease period in reasonable condition. Increasing maintenance fees on pen leases does not therefore justify gifting lease extensions for free. It is standard and reasonable that pen leaseholders pay for maintenance.

By gifting these lease extensions the FSC perpetuates a financial difficulty.

So my question is Why are the pen leases being extended for zero financial consideration. Or secondarily, Why are not the pen leases allowed to expire as planned in 2045?

Dear Member

Thank you for your question.

FSC is well aware of the financial difficulty caused to FSC which is perpetuated by the renewal of the Pen Leases. However, the terms of the Pen Leases provide that they will be renewed for the term of any further renewal/s or further extension/s of the Lease, and they do not provide for the payment of consideration for the renewal or extension.

FSC considers that the New Lease represents a renewal or extension of the old leases, and therefore, the Pen Leases will be renewed or extended accordingly according to their terms.

### **QUESTION 16**

**What possible compelling reason is there for FSC to relinquish the existing leases that are known to work well and replace with a new lease that may not work well?**

The only reason I see is for the extension from 2079 to the year 2100, and that does not make sense to risk our current situation. We still have 50 years or so of lease to go, circumstances can change drastically in that time before renegotiation is necessary.

And I believe the proposition put by Matt Duff and accepted by the Commodore is that the Board prepare both **For and Against** arguments to put to the members, we all look forward to that.

Dear Member

From the very first discussions between FSC and DOT about a potential settlement of the rent review dispute and arbitration, it has been DOT's position that it would be necessary for FSC to enter into a new lease on DOT's standard terms and conditions. DOT has not shown any willingness to negotiate this.

The Lease Committee is satisfied that there is no prospect of a settlement being achieved if FSC were to insist upon the old lease terms continuing to operate.

In such a context, you may wish to refer to the separate document on FSC's website titled "*Comparison of new lease and arbitration*" (which will be posted on the website in the coming days).

#### **QUESTION 17**

As you are aware many members are not very positive about the new rent and conditions DOT is trying to force on the **Not for profit sailing club**.(not a commercial business property Lease)

Dear Member

Thank you for your questions.

We do not disagree with your point that FSC is a not-for-profit sailing club. However, DOT's standard terms and conditions are included in leases between DOT and other not-for-profit yacht/boating/sailing clubs.

**History Note:** I remember when the club nearly went bankrupt about 25 years ago and had to sell pens and life memberships to survive.

The outcome of this new action by DOT will have members leaving the club which will cancel any future club financial estimates.

I went into the meeting the other week with being very negative about the increase in rent but then half way through the meeting was in a position where I was not happy to vote, due to the convincing hour of what had been done so far and the increase in rent was manageable. But then started to learn from the members that there was a lot more to this than the money. The conditions of the lease were more like a building lease than a land and water lease.

I guess one of the biggest issues is when the club need to supply McGee's Property with the clubs insurance that covers everything as per the lease contract and is does not even come close and McGee's ask for insurance that covers everything and we find that will cost in the area of \$2 million dollars. In 5 to 10 years the club will have no money and have to close..

Answer

From the very first discussions between FSC and DOT about a potential settlement of the rent review dispute and arbitration, it has been DOT's position that it would be necessary for FSC to enter into a new lease on DOT's standard terms and conditions. DOT has not shown any willingness to negotiate this. It is clear that, if we were to insist on some other lease terms (eg variations to the current leases), then DOT would refuse to settle, and we would be obliged to 'take our chances' in the arbitration.

While there is something to the suggestion that the conditions of the lease are more like a building lease than a land and water lease, we consider that DOT's terms and conditions (which are in use with other yacht/sailing/boating clubs) are not unacceptable. We sought concessions from DOT, and exhausted our ability to procure amendments, where DOT's terms and conditions seemed to create an excessive risk. In all other instances, we are content that the risk is manageable.

As to your question regarding insurance, under the old leases (cl 5(t)), FSC is required to maintain insurance. FSC already has an insurance policy and is in the process of confirming with its broker that the existing policy meets the requirements of the New Lease, and should this not be the case, the extent of any applicable higher premiums. FSC hopes to be in a position to update members on this issue prior to the Town Hall and/or reconvened general meeting.

**Question:** Has the club been in contact with all other clubs in Western Australia and Australia to find out what they pay in Rent to know what a fair rent is?????

I know Royal Fresh Water Bay Yacht Club and Royal Perth Yacht Club have had DOT come to them wanting a huge rent increase, and was able to avoid it due to them being on A class reserves.

**Answer**

FSC's position is not necessarily the same as other clubs. FSC has a significantly larger parcel of land, in a significantly better location.

FSC obtained valuation input from a variety of sources, but as you have anticipated, there are limited comparable sites/examples, and that lack of comparable properties resulted in a potential range of valuation outcomes, and therefore risks which may crystallise if FSC 'takes its chances' in arbitration.

The Lease Committee has considered this input and taken it into account in negotiating the rent payable, and the rent review mechanism, under the New Lease.

**Question:** Can FSC become a A Class reserve??? is it appears like it qualifies????

Can I suggest what might work with the members, is that the conditions of the old lease stay the same but we pay the money that they want as the conditions seem to be the big issue with the members??

If the increase happens there will be No new jetties, No new boat stackers, No new buildings, No money for a CEO, a lot less volunteers to maintain marks and moorings and jetties(about \$1.5million/year)

**Answer**

You may wish to refer to the answers to Question 6 above, in relation to the ability to continue with the existing leases.

As you will appreciate from the answers to other questions, a rent increase is probable under either scenario (ie the New Lease or the arbitration). The New Lease make FSC better able to manage the financial impact on the club (and on members/pen owners).

**Question:** Do you know what DOT is going to do with the Marina when they take it over???

I also think an email should be sent out to all members of FSC and to all other Sailing clubs in Western Australia so they can advise there members to take into consideration the option of other property management companies other than McGees Property for management and sales of property. (due to they are trying to destroy boating in Western Australia)

**Answer**

We have seen nothing to indicate that DOT has any intention or desire to "take over" the marina. DOT is seeking to resolve the rent review dispute and arbitration on the basis of:

- the grant of the New Lease, on DOT's standard terms and conditions (which have been adopted for use with other yacht/sailing/boating clubs); and
- granting FSC significantly extended tenure (inclusive of options),

which, in our view, is not consistent with any such intention or desire.

Thank you for your suggestion regarding seeking out support. FSC is in regular contact with other sailing clubs, including in relation to the rent review dispute, and will consider your proposed course of action.

#### QUESTION 18

We are to be slugged an average of about \$310-\$325,000 for the next twenty years to lease Club land from the government. This averages about \$100 per member.

The Club members involved have done a great job negotiating with the bastards to achieve a reasonable outcome over a number of years. It has to proceed as negotiated or we could lose the concessions agreed to.

Dear Member

We appreciate your support.

You may wish to refer to the separate document on FSC's website titled "*Comparison of new lease and arbitration*" (which will be posted on the website in the coming days). As set out in that document, a principal benefit of the New Lease is the certain and gradual increases in rent over the nine-year period to 2023, which enables FSC to plan for the future. As you have identified, under those gradual increases, the impact on a per member basis is tolerable, which may not be the case if FSC 'takes its chances' in arbitration.

It is on this basis (amongst others) that the Board has recommended that members vote **in favour of the New Lease**.

#### QUESTION 19

These were specific issues raised by the cruising committee on 6<sup>th</sup> April.

1. New lease states that staying overnight will only be allowed as per provisions of the liveaboard policy. People are reading that as implying no overnight staying on boats will be allowed unless they are officially "liveaboards" and paying the appropriate fees. However, I note the following in the liveaboard policy:

"6. Short Term Accommodation is only permitted for the Vessel Owner(s) and their family or crew and at least one member, either an FSC Senior or FSC CEO must accept responsibility for the safety and conduct of the others on board. Short term accommodation is also available to local visiting vessels with the condition that the owner or master accept responsibility for the safety and conduct of the crew."

This appears to mean that it is ok to stay aboard for short periods and the cross-over from liveaboard to short term stay is 5 consecutive days in a month as per following definition:

Liveaboard: Regular, repetitive living aboard a boat covering more than 5 consecutive days per month, or continuous living aboard a boat, is deemed to be "living aboard" or the crew of a visiting vessel.

Please confirm that staying overnight on boats in wet pens will continue to be allowed under the new lease.

Dear Member

Thank you for your questions.

Our understanding is that DOT does not intend the New Lease to require FSC to significantly change its existing operations/activities, including arrangements for living on board. Accordingly, FSC is clarifying these matters with DOT, and anticipates being able to update members as to these matters prior to the Town Hall and/or the reconvened general meeting. FSC expects to be in a position to confirm to members that the FSC's existing policies and rules governing these matters will continue to apply following the entry into the New Lease.

2. There is considerable concern over the impact of the higher lease cost on future membership and pen lease costs. At the general meeting a projection for next year showed no need for increases but as the lease costs will continue to rise considerably we would like to know what the anticipated impact will be over the next 8 years when the lease cost rises to 750,000 per year or how the club plans to cover it.

The increased rent, and any other costs, may be funded from a range of sources, depending upon the club's financial position at the time. Some costs may be passed on to members and/or pen owners as considered necessary and appropriate by the Board from time to time. FSC is also investigating other possible sources of funding.

As you will appreciate, it is not as if there is an acceptable alternative. The re-appraisal and arbitration may also require FSC to fund increased rent, just as the New Lease requires FSC to do so. Either way, it will be necessary for FSC to identify other possible sources of funding, and this may include passing on some costs to members and/or pen owners. It is the only way for FSC to continue in existence.

That being said, the New Lease allows FSC to manage the financial impact of the increased rent, which may not be possible through arbitration. The New Lease does so by providing for an incremental increase in rent each year until 1 January 2030. This maximises FSC's ability to identify other possible sources of funding and minimises the extent to which it will be required to pass on costs to members and/or pen owners.

3. Various questions have arisen on the basis for the valuation behind the new lease rate. At the meeting it was stated that the arbitrating judge had thrown out the DOT valuation. If that is the case then why is the lease rate still rising to 750,000 plus CPI increases over 8 years and why would we not expect arbitration to arrive at a different more reasonable valuation? How can it be considered justifiable to try to increase our lease rate by over 2000% overnight?- surely any court would throw this out as unreasonable? As the club contains a certain element of business which could be considered retail, is it not reasonable to tie our lease rate to retail leases which may be expected to rise and fall over time? Why are we being charged a commercial lease rate when we are a sports club operating on an overall not for profit basis? Is there not a case to be made that the club is an important part of the community supporting a diverse range of activities, not just pens for "rich people with yachts". An explanation of why arbitration would not consider the increase completely unreasonable would be appreciated.

The arbitrator did not throw out the DOT valuation. Through the arbitration process, we obtained a copy of DOT's valuation. There are many aspects of it that we consider open to criticism. However, the valuation is not clearly inconsistent with the rent review clause. Nor is it clearly without foundation. There are arguments that can be made to challenge the valuation, but they involve varying degrees of certainty, both in terms of prospects of success and effect on value. The board has taken these considerations into account in weighing up the benefits and risks of the New Lease compared to continuing with arbitration.

4. There seem to be many elements of the "standard lease" which may or may not be applicable to the club and this needs to be clarified in the lease agreement especially with respect to exactly what we are leasing and what we own. I note that Schedule B does address some of this but it would be a lot cleaner if this was made clear in the main contract rather than tagged on the end by which time most people have stopped reading and gone off in a huff!

DOT requires amendments to its standard terms and conditions to be made in the schedule. We agree that it makes the New Lease difficult to read and understand, but this formatting issue did not seem worth a fight (which FSC was, in any event, unlikely to win), in circumstances where there were more important issues to negotiate.

5. Clauses of particular concern: Clause 18.3 states that we cannot have amplified music that can be heard on the premises (and premises includes improvements which implies buildings?)– this is absurd and rules out all club social activities and functions. 18.2 bans us from putting up adverts, presumably including the LED sign on the road outside we sometimes use to advertise events – without prior consent which given government efficiency is probably unworkable, although schedule B addresses it to some extent but it still seems an onerous requirement. Clause 30.4 states that we must remove all jetties, piles and buildings and make good if required to do so by the lessor within ONE month which is clearly impossible so why have it in there? Clause 18.4 states that no major repairs can be made to vessels moored in or adjacent to the premises and that we cannot drape towels or clothing on vessels. Needs clarifying whether this affects the normal repairs being carried out on the hardstand and what constitutes “major”.

Answer

Dealing with each of your queries in turn:

- clause 18.3 prevents the use of sound producing equipment so as to be audible on or from outside the Premises, without the prior written consent of the Lessor. Our understanding is that DOT does not intend the New Lease to require FSC to significantly change its existing operations/activities, including by introducing significantly different restrictions on sound producing equipment. Accordingly, FSC is clarifying these matters with DOT, and anticipates being able to update members as to these matters prior to the Town Hall and/or the reconvened general meeting. FSC expects to be in a position to confirm to members that FSC’s existing position (or something similar to it) will continue to apply following the entry into the New Lease.
- as you acknowledge, the issues with clause 18.2 have already been addressed in Schedule B. While this may be an onerous requirement, this is a position that has been negotiated with DOT.
- clause 30.4 reflects DOT’s standard terms and conditions. Of course, this issue has already been addressed in Schedule B, which excuses FSC from the requirement to remove the assets.
- as to clause 18.4:
  - FSC considers that the restrictions on repairs apply to ‘floating’ rather than ‘dry’ repairs, which is consistent with FSC’s existing rules, which rules prohibit maintenance work in harbour pens likely to cause damage; and
  - FSC’s view is that it is in fact not appropriate for members to hang towels and apparel from boats, which could give the club an unpleasant and/or shabby appearance. Members are encouraged to make use of appropriate drying apparatus or otherwise hang towels and apparels on board in suitable internal locations, to maintain the club’s tidy external appearance.

6. Schedule A item 5 says the purpose is for “The operation of a sailing club including the provision of jetty facilities, service facilities and the mooring of private vessels”. This seems a long way short of describing all the activities that the club undertakes and we think it is important to list them all to avoid future issues e.g. Operation of a bar and restaurant, operation of other boating sections including powerboating and diving, operation of a functions business, hard standing for trailerable boats, operation of a lift out, maintenance and repair facility with associated sheds, hardstanding and



plant, pipes section, car parking, a dinghy section and separate club house, club social events including amplified music (at a level which doesn't interfere with surrounding residential areas) etc.

We believe the intent of the lease is probably to let us carry on as we are but that isn't how it reads and we think it is very important that this is clarified.

We are satisfied that where all of the activities you have described:

- are the sorts of activities which are carried on at a sailing club; and
- to the knowledge of the DOT, were being carried on at the Premises at the time of the entry into the New Lease (ie assuming that that occurs),

there is no real risk that the DOT could properly complain about such activities being conducted into the future.

7. One other comment from the meeting was whether the club has considered a publicity campaign with the community, MPs etc against the DOT's outrageous treatment of a sports club as a means of getting the whole issue reconsidered?

We agree that FSC should consider undertaking a 'lobbying' process into the future (ie particularly coming into the next rent review cycle), but we do not consider that it is a viable option to address the current circumstances facing FSC.

I'd just like to say that the efforts of everyone in addressing this difficult issue over the last few years have been highly appreciated by all but I think communication of the meaning of the lease agreement and the basis and implications for excepting the new rate needs much better communication to members and there seem to be potentially important issues within the text of the lease that need addressing before members can vote on it with confidence.

We appreciate your support. We trust that the adjournment of the meeting, and the opportunity to submit questions, has assisted you in understanding these important issues.

## QUESTION 20

May I add further questions of process to those already sent, questions that arose from your letter to members. Members have 8 days – diminished by Easter when many will already have gone away – to submit written questions as per your invitation. Many members are parents who may find attending a 7:30 PM meeting onerous. Members are asked to go looking on the website (Members Area) to find questions posed and responses. The Exmouth Trip affects a few members, the majority of member are not so affected by the Trip.

The questions that arise are:

1. Does the Board of Management consider the (8-5=) 3 days for members to note BoM's request for questions fair and reasonable?
2. Does the BoM consider all members are being treated the same under the polling clauses in the Constitution? I have received 4 MB emails from the Club that appear to have gone to all members and the Q&A documentation with 90 bpi .pdf files should be well below that size, and all members could be notified of the issues confronting the club in the next 50 years.
3. Will all the questions raised be put to the members, together with their answers, in sufficient time to absorb before a motion of the nature of that of 30 Mar, is put in May? The less formal Town Hall meeting is likely to trigger thoughts not yet able to be considered. My questions prior to the 30 Mar meeting were not addressed before or during the presentation. Many of them were raised from the floor although I had no contact with those members and clearly those members felt they were important, indicating some loss of communication somewhere along the line.

Dear Member

As we have said, we apologise for members not having had more time to consider the position. We trust that with the adjournment of the meeting, you and other members have now had sufficient time to do so.

#### **QUESTION 21**

1. Has the Club breached any of the terms of the existing agreements that would justify termination? If yes, what notification has the Lessor given the Lessee?
2. When were the Agreements last modified and who participated in the modifications for the Lessor and Lessee? What were the modifications?
3. What documentation does the Club or the Department hold describing the modifications?
4. I incidentally found that the Club had lodged an objection under 2 (2) (c) within the necessary time so the bureaucrats cannot lock us out of arbitration. The members would be better informed to understand a 2000% increase in rent if they had information DoT must have provided to change from 40+ years of undisputed Agreement – and leasehold maintenance to that Agreement. Will the Board provide members the written advice of the unprecedented increase, and the date?

Dear Member

As to your question 21.1, FSC is aware of one alleged breach of the old leases, concerning buildings that sit past the least boundary on the northern side, encroaching by approximately 800m<sup>2</sup>. FSC received notification on 22 June 2021. The encroachment issue is resolved under the New Lease by extending the relevant lease boundary.

As to your questions 21.2 and 21.3, FSC is not aware of any amendments to the old leases.

We refer you to our answers to Question 4 in relation to the rent re-appraisal. Further details are provided in the answer to Question 1.

#### **QUESTION 22**

1. Where are the benefits to members of the proposed scheme of relinquishing all the harbour assets to the Department of Transport and then leasing them back?
2. Will the proposed changes result in amendments to the current pen leases?

Dear Member

For the reasons set out in our response to Question 14, we do not consider that the effect of the New Lease is that the harbour assets of FSC are relinquished to DOT. They continue to be owned by FSC.

In relation to the impact of the New Lease on the current pen leases, we refer you to our response to Question 15.

#### **QUESTION 23**

I have read the proposed lease as forwarded to Members in March 2023 and also the proposed Deed with the Minister for Transport.

I am also familiar with the existing lease under the Land Administration Act, and aware that a Reserve was created over the whole of the existing leases (and more) in 2017 (Reserve 52842), and the management of the Reserve was granted to the Minister for Transport. I therefore see no reason for the existing leases to be forfeited as they are now managed by D.O.T.

Having read through the whole proposed Lease and Deed, I have similar concerns to most of those of Mr. Bill Henson in his documents of 25.3.23 and his questions of 20.3.2023.

It seems to me that every item negotiated in your discussion with D.O.T. are all in favour of D.O.T.

If you look at proposed Schedule A, Item 6, Rent, the figures quoted bring us back to the original figure in dispute (\$760,000) by year 2030, with adjustments by CPI (ambiguous), so this is not gaining much.

At the meeting of 30th March, Mr. John Law indicated that D.O.T. have agreed to various items of importance e.g. FSC to retain the assets on surrender of existing leases; pen sub Lessees to retain their leases in their present form. These items were not spelled out in the wording and only seem to be verbal agreements.

As a pen sub Lessee myself (Part 1 Lease – original) I am feeling insecure as to the tenure, and as a Member of nearly 50 years standing, before too long will be looking at selling my lease. I feel with the uncertainty of this whole issue, the value of pens will diminish considerably.

Given my comments above, I have to say I would prefer to go back to the Arbitration process, even though there is a substantial up front cost involved. I believe the security of the Club into the future would be better safeguarded by retaining the existing leases and would have thought that the Arbitrator, being a fair minded person would arrive at a fair conclusion for the Fremantle Sailing Club.

However, if it is decided by the Members to proceed with the negotiation process, it would be imperative that a full draft of the lease, with all those items of concern inserted as clauses in writing and be presented to the Members at a Special Meeting and not proceeded with until approved by the Membership.

Questions :

1. What happened to the Indenture signed in 1982 (21 years from 1979) by FSC and Minister Gavin Troy for a License under the Marine Act and Jetties Act 1926? Was that renewed? Is it still required?
  - a. If so, what are the implications?
2. There is no mention or reference on the (Annexure A) Lease area Survey – Land (P58 of the proposed new Lease) of the excision for the carpark and entry road at the South boundary.

This was approved by FSC, and FCC, and Landgate in 2000, Surveyed and Plans drawn, but the dealings weren't finalized. There could be Insurance and Maintenance issues if the property remains within the FSC Lease. Has this been discussed with Transport?

Answers:

Dear Member

To be clear, the old leases are not being forfeited. As explained in the answer to Question 3, the proposal to surrender the old leases in exchange for the New Lease represents the basis upon which DOT was willing to consider a settlement of the rent review dispute and arbitration.

For further information regarding queries raised by Bill Henson, you may wish to refer to the answers to Question 14.

We do not agree that the gradual increase in rent, so that it reaches the disputed amount of \$760,000 in 2030, some 11 years later, is "not gaining much". FSC is to receive a significant rent discount over the intervening period, which mitigates the uncertainty associated with the possible outcomes in arbitration and allows FSC time to mitigate the financial impact and plan for the future.

As explained in the answers to various questions above, including Question 1, there is a risk, albeit a small one, that the arbitration could result in FSC paying rent greater than \$760,000 per annum on and

from 1 January 2019, or from another point during the 11-year period, for the remaining term of the old leases. Moreover, there is a real risk that the arbitration could result in FSC paying rent greater than the amounts agreed under the New Lease, from a point during the 11-year period, for the remaining term of the old leases.

We confirm that the other matters you have raised in relation to the comments by John Low at the meeting (FSC retaining the assets and the continuation of the pen leases) are not verbal agreements as you suggest. These matters are addressed in writing within the New Lease documents (specifically, the Deed of Surrender and the Deed of Consent/Consent Letter), as noted in our response to Question 14.

You may wish to refer to the separate document on FSC's website titled "*Comparison of new lease and arbitration*" (which will be posted on the website in the coming days), in relation to the decision whether to proceed with arbitration. The Board resolved to put this matter to members to enable them to decide the club's future. If you consider that arbitration, not the New Lease, is the appropriate solution, then you should vote accordingly.

In relation to your specific questions:

1. we assume that your reference to the 'Indenture signed in 1982 (21 years from 1979)' is a reference to the original seabed lease. That lease was replaced in 1996 by a new seabed lease with substantially the same provisions, but which had a term of 49 years (which was the maximum period permitted under the legislation). It is this second seabed lease which currently operates and which it is proposed will be replaced (together with the lease over of the land) by the New Lease;
2. thank you for raising the issue at 2, which we are investigating and in relation to which, we hope to be able to provide a response at the Town Hall.

#### **QUESTION 24**

My objective here is primarily to understand the background of how we got to this position, with the new lease. There is no evidence that I know of that DoT has our best interests in mind as a Club. I hope my comments and questions elicit more details of the context of the negotiated 'settlement'. Thanks for your work on all this.

Dear Member

Thank you for your questions and support.

1. Commercial lease and the Clubs sector (not-for-profit)
  - a. We are not a commercial organisation and, therefore morally, should not come under a commercial lease arrangement. We do not disagree. However, from the very first discussions between FSC and DOT about a potential settlement of the rent review dispute and arbitration, it has been DOT's position that it would be necessary for FSC to enter into a new lease on DOT's standard terms and conditions. DOT has not shown any willingness to negotiate this.
    - i. Are there are other not-for-profit organisations in WA that have commercial leases? Yes, other sailing clubs have entered into leases with DOT on DOT's standard terms and conditions.
    - ii. Are there other sporting clubs under commercial leases? As above.
    - iii. What subsidies are provided to other clubs to foster their financial viability? Local government subsidies (in-kind or direct financial, etc) may come into play here. The Lease Committee has taken valuation input on the lease terms and incentives in place with other yacht clubs. The Lease Committee has considered this input and taken it into account in negotiating the rent payable, and the rent review mechanism, under the New Lease. However, as you will appreciate, raising in negotiations incentives or subsidies which may be offered

to other yacht clubs (on a case-by-case basis) does not provide an immediate solution or remedy to the dispute with DOT.

2. Ownership of the seabed; commercial leases
  - a. My understanding of the Australian Constitution is that certain powers are vested in the State governments, including managing certain seabed areas.
  - b. In the case of 2(a), our lease(s) should be with the State government and on a similar basis as all other sporting clubs. In effect, FSC's lease is with the State, acting through the Minister for Transport/Department of Transport, with McGees acting as their commercial agent and property manager. That is true for both the old leases (though the names of the relevant Ministerial portfolios and departments have changed from time to time) and the New Lease.
    - i. While river sailing/boating clubs may deal directly with a different government agency, aren't most or all their leases of a non-commercial nature? We understand that the terms and conditions of the other yacht club leases are substantially the same as those in the New Lease (ie as most are also on DOT's standard terms). The rent payable by the other yacht clubs is not currently on commercial rates, but we have been advised that, like FSC, all of the other yacht club rental rates are also moving to commercial rates over time. Unfortunately, the non-commercial nature of the leases is no answer to the need to agree terms and conditions with DOT (ie where DOT is not willing to agree to terms and conditions of a different nature).
    - ii. If FSC could negotiate a lease under non-commercial conditions, would we be able to argue that we lease the water area but have been/are permitted to construct our assets in a portion of that water area? As noted in answers to previous questions, there does not appear to be any scope for FSC to negotiate a lease under non-commercial conditions.
    - iii. In the case of 2(a), can we retain ownership of our assets, rather than have them transferring to DoT with no financial recompense? As noted in the answer to Question 14, FSC will retain ownership of its assets. Under the old leases, the ownership of FSC's assets vests in the Minister for Transport upon determination of the old leases. This has been carried forward to the end of the New Lease.
3. In-good-faith relationships
  - a. Members have heard the term in-good-faith in referring to our original lease.
    - i. Is/will DoT dealing with our original lease in-good-faith? We consider that DOT's conduct, in purporting to re-appraise FSC's rent under the rent review clauses in the old leases, does not amount to 'bad faith'. DOT is simply arguing that under the old leases, they are entitled to re-appraise the rent in the amount proposed. Although we do not agree, their position is arguable and therefore we do not consider that it constitutes 'bad faith' to adopt such a position.
    - ii. Can we trust DoT to deal with the negotiated new lease in-good-faith? While DOT's initial approach to the rent re-appraisal was arguably heavy handed, its more recent approach to dealings with FSC has not been unreasonable. Its actions, in seeking to resolve the rent review dispute and arbitration, have demonstrated a reasonable level of goodwill. In our view, if FSC and DOT are to continue with a relationship of landlord and tenant, it must be on the basis that there is some level of mutual trust and confidence.
4. As this whole fiasco is fraught with social and political dimensions;
  - i. Which MPs or Ministers of the WA government have been consulted? FSC's previous exploration of the issues with government stakeholders was met with

the response that they did not wish to intervene in DOT's handling of the dispute. Accordingly, it seems that for present purposes, it is not possible to progress this matter by way of campaigning or government lobbying.

- ii. Have there been meetings with the other sailing clubs? FSC has engaged with other sailing clubs as appropriate from time to time. However, FSC's unique situation arises out of the rent review clauses in its old leases (which do not apply to other clubs).
- iii. What sort of leases are used in NSW and Victoria, for example? This issue has not been investigated.
- iv. If this new lease is rejected, what other processes should we use, even if Arbitration becomes the only alternative? If members decide to reject the New Lease and proceed with arbitration, FSC will be required to continue with the arbitration process. In such a scenario, we do not see any alternative but to pursue the arbitration to a conclusion, as FSC's previous attempts to consult government stakeholders, resulted in feedback to the effect that the stakeholders do not wish to interfere with the legal process.

We hope that the above assists with your questions.

#### QUESTION 25

1. It is unclear why the FSC should surrender its existing leases that run to 2045 and 2079. The Draft DoT leases indicate that rent is to be retained at \$34k pa, as does the existing lease. The DoT acting for Lands is obliged to adopt the existing leases with their terms for increasing rent on a 3 year basis that has stood the test of time. Why must the FSC surrender the existing leases except to allay the duress-threat of DoT increasing rent to \$760k pa?
2. DoT has been unable to establish the grounds for rent increase, acting for Lands, which is well outside the precedent of the last 40 years +, and the agreements. DoT and the negotiators seemingly have not established the value of unimproved sea-bed at other locations within 50 km of Fremantle, but must be rather low, given Development WA's construction of a marina at Ocean Reef.

The FSC has objected as per the Leases, but DoT is now seeking to avoid arbitration. Arbitration is a quite normal process where parties to an agreement dispute application of its terms. Why must FSC abandon agreed terms of the existing agreements, except to allay the duress-threat?

I see from Ocean Reef Master Plan that **The project is state government funded and is being delivered by Development WA in partnership with the City of Joondalup and Department of Transport.**

As part of the business case for this development, the unimproved seabed valuation must be available to provide the necessary evidence that would be a useful guide to members.

Dear Member

As to your point 1:

- as we have previously indicated in the answer to Question 10, there is no relevant "duress" or "threat" in relation to the ordinary commercial negotiations between DOT and FSC.
- as explained in the answer to Question 3, the proposal to surrender the old leases in exchange for the New Lease represents the basis upon which DOT was willing to consider a settlement of the rent review dispute and arbitration.
- neither the old leases nor the New Lease indicate that the rent is to be retained at \$34,700 per annum. The rental rate of \$34,700 per annum is only relevant to the interim period between 1 January 2019 and the resolution of the rent review dispute, which is to FSC's benefit. FSC negotiated, and agreed with DOT, that the rent would be retained at \$34,700 per annum for

that interim period, to avoid FSC becoming liable to “back pay” rent. This is one of the various benefits of the New Lease to FSC.

- we do not agree that it is correct to describe the terms for increasing rent under the old leases as having “stood the test of time”. It is beyond doubt that DOT had the right, under the terms of the old leases, to re-appraise the rent payable by FSC. Save for a few historical occasions, DOT did not purport to exercise that right. That did not prevent it doing so in 2019. Further, it is the indeterminate and uncertain nature of the “terms for increasing rent under the old leases” which prompted the rent review dispute.
- the surrender and replacement of the old leases with the New Lease puts FSC on more contemporary lease terms, which forms part of the overall package of benefits that FSC receives under the New Lease and the settlement of the rent review and arbitration. You may wish to refer to the separate document on FSC’s website titled “*Comparison of new lease and arbitration*” (which will be posted on the website in the coming days).

As to your point 2:

- we do not agree that it is correct to say that DoT has been unable to establish the grounds for the rent increase. As explained in the answer to Question 1, there are many aspects of the DOT valuation (once we obtained it through the arbitration process) which we consider open to criticism. However, the valuation is not clearly inconsistent with the rent review clause. Nor is it clearly without foundation. There are arguments that can be made to challenge the valuation, but they involve varying degrees of certainty, both in terms of prospects of success and effect on value.
- we do not agree that DoT is “seeking to avoid arbitration”. DoT appears more than willing to proceed with the arbitration process, should that become necessary. However, DoT has also been willing to engage in discussions with FSC with a view to reaching a mutually beneficial resolution of the rent review dispute. The Board has weighed the benefits of the New Lease against the risks of continuing with arbitration, formed the view that the New Lease represent the best way forward for FSC, and has recommended that members accordingly vote **in favour of** the New Lease. For further information, you may wish to refer to the separate document on FSC’s website titled “*Comparison of new lease and arbitration*” (which will be posted on the website in the coming days).

It does not seem to us that the business case for the Ocean Reef Master Plan is likely to throw significant light on the appropriate valuation of FSC’s land and seabed for the purposes of a rent re-appraisal pursuant to the rent review clause in the old leases.

## QUESTION 26

### ITEM 1

It appears to me that the lease document has been adapted from a standard building lease, not just a land and seabed lease. It does not seem to acknowledge that the Club owns the jetties and buildings as it imposes numerous obligations on the tenant over its own improvements even though the lessor has no ownership in these items. Some of the relevant clauses are:

12 and 13. These clauses require the lessee to maintain the jetties, buildings, plant and equipment, and even air conditioning, in a manner approved by the lessor.

Dear Member

Thank you for your questions.

Regarding clauses 12 and 13 of the New Lease, we would draw to your attention clause 5(b) of the old leases, which require FSC to “*from time to time and at all times during the term [of the old leases] at its own cost operate and maintain the Yacht Harbour in a proper and efficient manner and comply with*

*accepted modern practices in regard thereto ... and keep and maintain the demised premises and [the seabed] and all development reclamation buildings structures erections fixtures plant equipment and all improvements whatsoever now or hereafter deposited or erected thereon or affixed thereto or connected therewith in good repair and in proper working order and condition fair wear and tear excepted to the satisfaction of the Minister for Lands”.*

That is, FSC’s repair and maintenance obligations are broadly consistent under the old leases and the New Lease.

16. The lessor has a say over how we can load the floors.

Clause 16 requires FSC not to overload floors, causing excessive stress. It does not give DOT “a say” in how the floors are loaded. It is not clear that there is any scenario under which FSC would want to overload floors.

18.2 We are not allowed to fix advertisements to our buildings.

FSC has negotiated a modification to DOT’s standard terms and conditions regarding advertising, which is recorded in Schedule B. In short, DOT’s consent to advertising cannot be unreasonably withheld.

18.3 We can’t build aerials.

Clause 18.3 only prohibits aerials to the extent that DOT’s consent is not sought and obtained. Further, DOT’s consent for aerials less than 4 meters in length cannot be unreasonably withheld.

Our understanding is that DOT does not intend the New Lease to require FSC to significantly change its existing operations/activities, including FSC’s existing aerials (which are all longer than 4 meters in length). Accordingly, FSC has sought a standing consent from DOT as to the existing aerials, and to future aerials, which FSC considers necessary for the purposes of the sailing club. FSC expects to be in a position to provide confirmation in this regard to members on this issue prior to the Town Hall and/or reconvened general meeting.

20.2 The lessor determines how we insure our own structures and they want to be nominated on our policies.

Under the old leases (cl 5(t)), FSC is required to maintain insurance. FSC already has an insurance policy and is in the process of confirming with its broker that the existing policy meets the requirements of the New Lease, and should this not be the case, the extent of any higher premiums. FSC hopes to be in a position to update members as to this issue prior to the Town Hall and/or reconvened general meeting.

24. We are required to inform the lessor of any damage to the structures that we own.

Clause 24 only requires FSC to report *material* damage, and circumstances involving danger. We consider this to reflect a reasonable position having regard to the landlord’s interests as the owner of the premises.

30. On termination we have to restore all our buildings and structures to their satisfaction and then hand over to them all our keys.

FSC has negotiated a modification to DOT’s standard terms and conditions regarding restoration on termination, which is recorded in Schedule B. This is similar to the terms and conditions of the old leases, which vest the assets in the Minister on termination.

To me, it appears from the above clauses that the lessor effectively owns the structures and improvements and determines how we maintain and use them, even though we paid for them. Is that what the Club wants?



In our view, it is an overstatement to say that, under the New Lease, DOT effectively owns the structures and improvements and determines how FSC maintains and uses them. Under the New Lease, FSC assumes repair and maintenance obligations similar to those under the old leases, which contemplate the involvement of the “Minister for Lands”. While the obligations under the New Lease may not represent FSC’s preferred position, we consider them to be appropriate, and to represent a better result than taking the risks associated with arbitration.

## ITEM 2

If we are in the process of completely negotiating a new lease, now is the time to make sure everything is included that we want. There has recently been much discussion around trying to find new revenue streams to assist the Club’s finances. Should the Club negotiate for pre-approvals in the lease for things such as:

1. Boat stackers
2. Short-stay accommodation apartments

DOT has indicated that it was not willing to make any further changes or concessions to the offered terms and conditions. There does not appear to be any scope to raise, at this stage, pre-approvals for boat stackers or short-stay accommodation apartments.

However, we agree that such alternative income streams are worth being investigated and FSC intends to investigate those options (ie amongst others).

## QUESTION 27

How much is the negotiated DOT lease fee increase and how to it apply to PEN Owners etc etc and the Club generally ?

What does the Club Management and steering committee recommend?

The Board recommends that members vote **in favour of** the New Lease.

The rent payable under the New Lease is as follows:

Period	Rent
From 1 January 2022 until 31 December 2022	\$325,000.00 plus GST per annum.
From 1 January 2023 until 31 December 2023	\$350,000.00 plus GST per annum.
From 1 January 2024 until 31 December 2024	\$375,000.00 plus GST per annum.
From 1 January 2025 until 31 December 2025	\$400,000.00 plus GST per annum.
From 1 January 2026 until 31 December 2026	\$425,000.00 plus GST per annum
From 1 January 2027 until 31 December 2027	\$450,000.00 plus GST per annum
From 1 January 2028 until 31 December 2028	\$500,000.00 plus GST per annum
From 1 January 2029 until 31 December 2029	\$600,000.00 plus GST per annum

Period	Rent
From 1 January 2030 until the first rent review (on or after 1 January 2031)	\$760,000.00 plus GST per annum
Rent review (on or after 1 January 2031 and every third anniversary thereafter, up to but not including 1 January 2043)	The greater of: <ul style="list-style-type: none"> <li>• 'Current Market Rent' (as defined in the New Lease);</li> <li>• the previous rent, adjusted by CPI; and</li> <li>• the previous rent,</li> </ul> capped at 115% of the previous rent (ie the increase capped at 15%).
Rent review (on or after 1 January 2043)	As above, but without the cap.

As explained in the answer to Question 2, the extent to which increased rent and any other costs are passed on to members and/or pen owners will need to be determined by the Board from time to time, based on the prevailing circumstances.

### QUESTION 28

1. What are the pros and cons of the lease as deemed by the Board.

Dear Member

You may wish to refer to the separate document on FSC's website titled "*Comparison of new lease and arbitration*" (which will be posted on the website in the coming days).

2. What is the benefit of renegotiating the land lease at this stage given this runs for a significantly longer period than the sea bed lease.

The proposal to surrender the old leases in exchange for the New Lease represents the basis upon which DOT was willing to consider a settlement of the rent review dispute and arbitration.

The New Lease, of both the land and the seabed, is being negotiated as a "combined package" given that the same terms apply to both.

3. What provisions have been included in the lease to ensure that maintenance of the fixtures, fittings buildings and other infrastructure is at the discretion of the club and not a requirement that DOT can impose costs on the club with free abandon.

The maintenance is *not* at the discretion of the club under the New Lease. It is *not* at the discretion of the club under the old leases.

The repair and maintenance obligations are considered to be similar under both.

Please refer to Question 26 above.

4. What financial modelling has been prepared to demonstrate ongoing viability of the club under the proposed lease and what cost is this expected to have on members.

The increased rent, and any other costs, may be funded from a range of sources, depending upon the club's financial position at the time. Some costs may be passed on to members and/or pen owners as considered necessary and appropriate by the Board from time to time. FSC is also investigating other possible sources of funding.

As you will appreciate, it is not as if there is a certain alternative. The re-appraisal and arbitration may also require FSC to fund increased rent (potentially in a greater amount, more rapidly), just as the New Lease requires FSC to do so. Either way, it will be necessary for FSC to identify other possible sources of funding, and this may include passing on some costs to members and/or pen owners.

That being said, the New Lease allows FSC to manage the financial impact of the increased rent, which may not be possible through arbitration. The New Lease does so by providing for an incremental increase in rent each year until 1 January 2030. This maximises FSC's ability to identify other possible sources of funding and minimises the extent to which it will be required to pass on costs to members and/or pen owners.

5. Please provide financial modelling.

See our answer to question 4 above.

6. What research has been conducted to determine market value of lease payments of land and seabed leases and what comparable information has been obtained to benchmark this against.

FSC obtained valuation input from a variety of sources, but a lack of comparable properties has resulted in a potential range of valuation outcomes, and therefore risks which may crystallise if FSC 'takes its chances' in arbitration.

7. What if any legal advice has been sought regarding an unconscionable increase in rate and what would be the estimated costs with arbitration.

FSC has been advised by international law firm Herbert Smith Freehills and represented by S K Dharmananda SC and J Solliss of counsel in relation to the arbitration proceedings.

As explained in the answer to Question 1, there are many aspects of the DOT valuation (once we obtained it through the arbitration process), relied upon to support DOT's purported 2019 rent re-appraisal, which we consider open to criticism. However, the valuation is not clearly inconsistent with the rent review clause. Nor is it clearly without foundation. There are arguments that can be made to challenge the valuation, but they involve varying degrees of certainty, both in terms of prospects of success and effect on value.

In these circumstances, as a consequence of the advice received, FSC does not consider that it would succeed in an argument that the actions of the DOT were unconscionable.

You may wish to refer to the separate document on FSC's website titled "*Comparison of new lease and arbitration*" (which will be posted on the website in the coming days), as to the anticipated outcomes of arbitration (and likely costs).

8. Has the cost of arbitration / litigation been financial modelled and compared to the viability modelling in my previous query.

As set out in the "*Comparison of new lease and arbitration*" document, continuing with the arbitration will require significant legal fees (at least \$400,000) as well as significant management time.

## QUESTION 29

Whilst I appreciate that the date for the Special General Meeting is being slated for late May, can you please let me know how I can name a proxy for my vote as I will be in the UK from 20 May to 10 June. This trip has been planned for a long time and cannot be changed.

**Subject:** Powers / authority of the Arbitrator to make determinations

**Question** Can the Board please confirm that should the matter be referred back to arbitration, does the Arbitrator have any power or authority to make determinations beyond the (amount of) rent that is the only matter for review under the current lease?

I.e. Can the Arbitrator make **ANY OTHER** determination that impacts or changes the current lease in **ANY** way?

Dear Member

Thank you for your questions.

As to your first question, FSC is considering the position with respect to proxy votes and will respond to members separately regarding this issue.

The answer to your second question (as to the powers and authority of the arbitrator), the answer is 'no'. That is, the arbitrator is not empowered to make any other determination that impacts or changes the current lease, other than to determine the re-appraised rent (which will be payable with retrospective effect on and from 1 January 2019).

### **QUESTION 30**

What do other sporting clubs pay for their leases? Royal Perth Sailing Club annex both seabed and land lease? Hillaries Yacht club also. As well as the river clubs?

Is it also fair to compare other clubs such as golf clubs? Royal Fremantle Golf club lease fee and their rates.

We also need to directly express our concerns to the Mayor of Fremantle the Premier and the Minister for Sport. It seems that no approach to them has been made.

Our path seems inevitably towards arbitration.

Dear Member

The extent to which other clubs are comparable to FSC, and therefore the extent to which the rents payable by them are comparable to FSC's, involves difficult questions of fact and degree. The Board has taken into account valuation and legal input on these matters, in the course of negotiating the new rents and rent increases under the New Lease.

Over the life of the rent review dispute, FSC has approached various government stakeholders. However, they have declined to engage with FSC, citing the need to not interfere with a legal dispute for which the Minister for Transport and DOT is responsible.

The Board resolved to put this matter to members to enable them to decide the club's future. If you consider that arbitration, not the New Lease, is the appropriate solution, then you should vote accordingly.

However, the Board recommends that members vote **in favour of** the New Lease.

### **QUESTION 31**

I would like to know from whom we have taken legal advice and what prospects for success does that adviser give if we challenge the lease?

Dear Member

FSC has been advised by international law firm Herbert Smith Freehills and represented by S K Dharmananda SC and J Sollis of counsel in relation to the arbitration proceedings.

As explained in the answer to Question 1, there are many aspects of the DOT valuation (once we obtained it through the arbitration process), relied upon to support DOT's purported 2019 rent re-appraisal, which we consider open to criticism. However, the valuation is not clearly inconsistent with the rent review clause. Nor is it clearly without foundation. There are arguments that can be made to challenge the valuation, but they involve varying degrees of certainty, both in terms of prospects of success and effect on value.

You may wish to refer to the separate document on FSC's website titled "*Comparison of new lease and arbitration*" (which will be posted on the website in the coming days), as to the anticipated outcomes of arbitration.

### QUESTION 32

My question relative to the DoT lease is simply around costs to members.

What impact will these increases to the club have on,

Member fees,

Pen fees,

Pen 'owner' fees,

Jetty and boat lift, and services fees

What are the expected year on year costs/increases?

Also, does the DoT have the legal attribute to make such exorbitant increases and have we 'The Club' investigated these legalities.

Given the time frames involved I imagine the answer is yes to the legalities, and the club has done all it can to mitigate exorbitant costs.

Have the investigations and outcomes been notified to members?

Dear Member

Yes, you are correct. FSC has investigated the legality of DOT's purported 2019 rent re-appraisal and done all it can to mitigate exorbitant costs.

The New Lease provides FSC with the greatest flexibility to manage the cost increases. It is for that reason (amongst others) that the Board recommends that members vote **in favour of** the New Lease.

As explained in the answer to Question 2, the extent to which increased rent and any other costs are passed on to members and/or pen owners will need to be determined by the Board from time to time, based on the prevailing circumstances.

For further background, you may wish to refer to:

- our response to Question 1; and
- the separate document on FSC's website titled "*Comparison of new lease and arbitration*" (which will be posted on the website in the coming days).

We trust that the above will be of assistance.

### QUESTION 33

It was stated at the recent meeting, that the FSC lease situation would be repeated at a number of other clubs.

1) Has FSC made formal approaches to other clubs about the lease situation?

2) if yes, has any common position been sought to ensure a level playing field of T&Cs and perhaps try to use a collective of clubs to improve the negotiating position?

Thank you all for your work in this area, it's appreciated and you're doing a great job.

Dear Member

Thank you for your support.

FSC has discussed the rent review dispute with representatives of other clubs. However, other clubs do not have leases in the form of the old leases, and in fact, most other clubs have already entered into leases with DOT on DOT's standard terms and conditions. Accordingly, FSC's rent review dispute is unlikely to be of broader application.

#### QUESTION 34

I reject the concept of a new lease and request that the club finalise the Arbitration.

Dear Member

The Board resolved to put this matter to members to enable them to decide the club's future. If you consider that arbitration, not the New Lease, is the appropriate solution, then you should vote accordingly.

However, the Board considers that the New Lease is the best solution and recommends that members vote **in favour of the New Lease**.

1. In summary most of the terms and conditions are unacceptable as they remove huge areas of responsibility from the club to control how the club can provide amenity and services to the members. They also severely limit how the members can have a say in the running of the club.
2. The club may as well dissolve and we just become clients of the DOT via the egregious McGees Real Estate company and sell the club assets to DOT.

Selling what the club has paid for by turning a section of unusable coastline into a place that not only provides a service to members but also adds considerably to the economy of the City of Fremantle. A valuation on what the club has brought to Fremantle would be vastly in excess of what the club members have paid putting the improvements in place and maintaining them, and maybe part of the calculation that produced the ridiculous claim for the rent increase by McGees.

Having some buildings, a boat yard and a marina may seem to be a juicy attraction for the real estate moguls, but the reality would be that the value of the asset to the City of Fremantle would plummet.

How much business does the Annexe or the DOT marina add to Fremantle?

Training juniors to sail and developing young sailors, what is the value there?

Hosting events of all sorts to bring people, life and money into the area. Have a look at the 'vibrant' marina at Port Coogee... what does it do for the City of Cockburn?

The bottom line is that we are being squeezed by some very greedy people and they have their sights on all the sailing clubs, angling clubs, rowing & canoeing.

United we bargain, divided we beg.

Questions on the lease in detail

1 Clause 9.1

(b) what is this? And what is the liability to the club?

(e) what are these levies and how much will they cost?

(g) how much will this cost and what will we be getting for the money, and who decides the scope?

(j) What is the scope of this process and who decides what is required?

(k) what does this mean?

2 Clause 9.2

What is the definition of supplies? Fuel, Food, Beer, catering services, boat repair services?

What is the intent of this to remove our rights and ability to negotiate with suppliers?

3 Clause 12

12.1 (a) Definition of excessive marine growth?

12.1 (d) Decoration of the seabed ????????????

12.1(e) Replacing signage what are the conditions of this requirement?

4 Clause 13

13.2 what are the approved colours and what are the terms of reasonable satisfaction?

13.3 what does this mean, and what are the implications?

13.4 who decides who is reputable what are the conditions on defining reputable?

5 Clause 14

14.1 (b) Does this mean that we have to get the permission to replace or sell or buy club owned boats, marks, furniture?

14.1 (c) what does this mean and what are the implications to the running of the club?

14.1 (e) what are these conditions?

14.4 (b) How can this be carried out given that some of the asbestos is in the form of piping and other asbestos products have been treated to prevent exposure and to prolong the life of the structure thus saving the club members needless cost on unnecessary work.

6 15.1 What is the defined purpose of use as a sailing club and how might this purpose be infringed?

7 18.3 (a) So antenna can't be longer than 4 m but can be any height?

And written consent is required to use a power tool that could be heard on Capo D'Orlando drive??? Or a lawnmower or flushing out a boat engine at the launching ramp...

What about the Pipes & Drums and the May gathering?

8 18.4 (c) what are the conditions here, and who decides what constitutes a breach and how is that notice of breach served?

18.4 (d) seriously???? Please explain this one....

18.5 (e) Simple just change the rules to allow all boat owners the ability to live aboard their vessels

18.7 How does this work with the fact that Fremantle council allows untreated water to flow from the streets of South Fremantle into the harbour and REFUSES to undertake any action to prevent this from happening.

9 24.1 How does is the lessee ought to be aware?

10 27.10 How does this work?

- 11 30.3 How are the members affected by this action?
- 12 31 So the DOT can sell our boats if they are not removed within 1 month.
- 13 51 How can this requirement be enforced with respect to Fremantle Councils refusal to redirect and/or treat polluted street run off from entering the clubs Marina...
- 14 52 Development of common areas, how will the lessor provide security otherwise offered by the fencing provided by club to members property.
- 15 Schedule A – reject outright and we need to complete the arbitration process.
- 16 How many other clubs in the metro area are using a similar lease agreement with DOT?

Where in the new lease does it define who is responsible for the supply of water at an adequate pressure and volume to the property?

My feeling is that the developer or lessor should be solely responsible at their cost for the provision of an adequate water supply to the property to ensure compliance with fire regulations.

The options presently available to FSC are entering into the New Lease or reverting to arbitration. You may wish to refer to the separate document on FSC's website titled "*Comparison of new lease and arbitration*" (which will be posted on the website in the coming days) in deciding between these options.

We disagree that most of the terms and conditions of the New Lease are unacceptable. We accept that some of the terms and conditions proposed are less than ideal, but the Lease Committee is satisfied that we have exhausted the negotiation with DOT and that on balance, the New Lease as a whole is in the best interests of FSC. We would not be putting the New Lease to members unless we believe that to be the case. FSC has carefully considered the level of risk associated with the ordinary meaning of the terms and conditions. Where the risk appeared excessive, we sought concessions from DOT, and exhausted our ability to negotiate amendments. In some instances, FSC has been forced to accept drafting that may not represent FSC's preferred position, but which represents a level of risk that FSC considers manageable. As noted above, DOT indicated that it was not willing to make any further changes or concessions to the offered terms and conditions.

A number of the points which you have raised involve a misunderstanding of the terms of the New Lease. As to your relevant queries regarding the specific clauses:

- clause 9.1 of the New Lease requires FSC to pay all outgoings. You will note that clause 5(a) of the old leases also requires FSC to "*duly and punctually pay and discharge all present and future rates taxes charges assessments impositions and out-goings whatsoever*". Accordingly, we consider clause 9.1 to be consistent with the old leases and appropriate.
- contrary to your suggestion, the intent of clause 9.2 is not to remove FSC's rights and ability to negotiate with suppliers. As you will have seen, the clause refers to the bulk supply of a 'Service', which is defined as "*electricity, gas, oil, fuel, water, telecommunications or other like commodity, facility or service*". The clause provides a mechanism for DOT to acquire these things in bulk and supply them to lessees, at a certain cost. FSC is not obliged to accept the bulk supply.
- clauses 12 and 13 of the New Lease contains repair and maintenance obligations consistent with clause 5(d) of the old leases, which require FSC to "*from time to time and at all times during the term [of the old leases] at its own cost operate and maintain the Yacht Harbour in a proper and efficient manner and comply with accepted modern practices in regard thereto ... and keep and maintain the demised premises and [the seabed] and all development reclamation buildings structures erections fixtures plant equipment and all improvements whatsoever now*



*or hereafter deposited or erected thereon or affixed thereto or connected therewith in good repair and in proper working order and condition fair wear and tear excepted to the satisfaction of the Minister for Lands". Accordingly, although clause 12 of the New Lease is more specific and detailed in certain respects, we consider it appropriate.*

- the restrictions under clause 14 are similar to those under clause 5(h) of the old leases, under which FSC must *"not without the previous consent in writing of the Minister for Lands the Minister for Works and the Minister for Transport first had and obtained ... build on affix to or install on or permit or suffer to be built on affixed to or installed on the demised premises or the Section 116 land any building structure erection fixture plant equipment or improvement whatsoever (either above or below the surface of the demised premises or the Section 116 land)".* Accordingly, we consider clause 14 of the New Lease to be appropriate. As regards the requirements relating to the removal of asbestos, our understanding is that DOT does not intend the New Lease to require FSC to significantly change its existing operations/activities. Accordingly, continuing on from work that FSC has previously done to prepare an asbestos register, FSC is in the process of preparing a hazardous materials plan, which reflects the relevant rules and regulations governing asbestos. In such a context, FSC has sought clarification from DOT that FSC will not be required to remove asbestos except as provided for under that plan (ie which plan will be agreed with DOT prior to entering into the New Lease). FSC is hopeful of being in a position to update members in relation to this issue prior to the Town Hall and/or reconvened general meeting.
- as to clause 15.1, this is similar in effect to clause 5(d) of the old leases, which required FSC to only use the premises *"for the purposes of the Yacht Harbour"*.
- as to clause 18.3, please see our response to Question 19.
- as to clauses 18.4 and 18.5:
  - As noted, our understanding is that DOT does not intend the New Lease to require FSC to significantly change its existing operations/activities, including arrangements for living on board and keeping pets on vessels. Accordingly, FSC is clarifying these matters with DOT, and anticipates being able to update members as to these matters prior to the Town Hall and/or the reconvened general meeting. FSC expects to be able to confirm to members that the existing policies and rules governing these matters will continue to apply following the entry into the New Lease.
  - FSC's view is that it is in fact not appropriate for members to hang towels and apparel from boats, which could give the club an unpleasant and/or shabby appearance. Members are encouraged to make use of appropriate drying apparatus or otherwise hang towels and apparels on board from suitable internal locations, to maintain the club's tidy external appearance.
- as to clause 18.7, to the extent that you are correct that the City allows untreated water to flow from the streets of South Fremantle into the harbour, we do not consider that there is any real risk that this 'pollution' by the City could constitute a breach by FSC of its obligations under clause 18.7 of the New Lease.
- as to clause 24.1, this only requires FSC to report *material* damage, and circumstances involving danger. We consider this to reflect a reasonable position having regard to the landlord's interests as the owner of the premises.

We trust that the above is of assistance.

### **QUESTION 35**

Good afternoon. I read there is a problem with DOT, but I don't understand what is the actual situation?

What the situation with DOT?

DOT lease?

How does it affect the club, member and lease holder?

What the actual situation?

What might change and how the club or myself would be affected?

And lease holder?

I'm renting my berth to another club member who bought the lease/berth to the club.

What was the price and for how long? Is it for life or for 20 years?

I quickly look to buy a berth for my 52', but it's almost double of the price that the price of my boat....

Why is it so expensive?

Was it so expensive when member bought their berth to the club?

If I'm selling a berth I bought to the club, is it normal I can sell it twice the price I bought it? And make a profit on another club member?

Why assets of the club has been sold in the past? And not rent to all member to give all member the same advantage?

Why I'm paying the same price for my full membership when I'm renting a berth... and the same price if I own and rent my berth to another member and make plenty of profit doing so...

So if DOT take back the lease, are they taking back all Berth sold to member and will make it available to everyone for a fair renting price?

I have all these questions and i want answer. I don't remember receiving anything explaining the whole situation.

Dear Member

Thank you for your questions.

We apologise that you have not received anything explaining the whole situation.

FSC conducts its activities on land and seabed leased on a long-term basis from the State of Western Australia, through the Minister for Transport/Department of Transport (DOT). McGees is DOT's commercial agent and property manager.

In April 2019, FSC received a notice from McGees (on behalf of DOT) purporting to exercise a rent review clause in FSC's leases. The notice asserted that FSC's rent, effective 1 January 2019, would be a total of \$760,000 per annum. Before that time, the rent payable by FSC was a total of \$34,700 per annum (ie DOT purported to increase FSC's rent by 2000%).

Since then, FSC and DOT have been locked in a dispute as to the rent payable. In May 2019, FSC referred the dispute to arbitration. Various efforts were made to resolve the dispute (and the referral to arbitration was suspended to allow this to progress). These efforts were unsuccessful. In June 2021, the arbitration commenced. The parties progressed with the arbitration through a number of preliminary steps, which resulted in the parties respective positions being clarified. As a consequence, and with better understanding of the risks and arguments, in October 2021, FSC and DOT met to discuss options for a potential settlement of the rent review dispute and arbitration.

That led to the proposal now being put to members, to surrender the old leases in exchange for the New Lease (as part of the settlement of the rent review dispute and arbitration). You may wish to refer to the

separate document on FSC's website titled "*Comparison of new lease and arbitration*" (which will be posted on the website in the coming days), to understand the benefits and risks of the respective options.

Because this is a significant decision for the future of the club, the Board is giving members the opportunity to decide whether the club should proceed to settle the rent review dispute and arbitration and enter into the New Lease, or revert to arbitration.

The Board recommends that members vote **in favour of** entering into the New Lease.

In the course of FSC negotiating the New Lease with DOT, FSC obtained DOT's consent to the pen leases. Accordingly, FSC does not anticipate any direct impact on the legal relationship between FSC and pen owners. DOT will *not* be taking back all pens sold to members.

Our understanding is that DOT does not intend the New Lease to require FSC to significantly change its existing operations/activities, including arrangements for living on board and keeping pets on vessels. Accordingly, FSC is clarifying these matters with DOT, and anticipates being able to update members as to these matters prior to the Town Hall and/or the reconvened general meeting. FSC expects to be able to confirm to members that the existing policies and rules governing these matters will continue to apply following the entry into the New Lease.

However, please be aware that increased rent and other costs may, from time to time, be passed on to pen owners and/or members as considered necessary and appropriate by the Board.

We understand that you have some other questions regarding the transfer of pen leases, which are not directly related to the issue currently before the general meeting. Please contact [reception@fsc.com.au](mailto:reception@fsc.com.au) and we will be happy to assist you separately.

### **QUESTION 36**

A common rationale for granting clubs and community groups a non-commercial rental or lease agreement is that community groups pay a social dividend to the community that in an indirect way saves government money by providing services or preventing expenditure on remediation.

An example of this is the pepper corn rental that Apace enjoys at North Fremantle.  
<https://www.apacewa.org.au/>

The plant nursery contributes a significant social dividend by growing out native vegetation appropriate to the Swan Coastal Plain at affordable prices so the Perth residents can use native vegetation to maintain landscape ecology and amenity while minimizing water use. It also trains and upskills young people that wish to work in the field and provides expert advice for Swan Coastal Plain residents.

Yacht Clubs similarly pay a valuable social dividend.

The Fremantle Sailing Club, for example:

- has at its own expense built a breakwater structure that protects the State Government owned railway in South Fremantle that previously required constant expensive remedial works to stop coastal erosion.
- runs a sailing academy (at a cost of several hundred thousand dollars per year) that trains many of Australia's elite Olympic athletes, several of whom have won gold medals.
- runs a junior sailing club that provides programs for youth that are skill and character building, and help maintain a healthy lifestyle balance and offset forces in society that erode mental health.
- runs for senior community members, events that provide exercise, the stimulation of sporting events and social camaraderie.

- runs national and international events that attract large numbers of participants, their families and support teams that all spend money in Fremantle.
- runs clinics for youth and disabled persons that enable them to access ocean pursuits that might be otherwise beyond their reach.
- provides employment for professional, technical and administrative staff.
- runs marine education events where members and their guests can learn from each other, international distance voyagers and highly skilled and experienced marine technical experts and scientists.
- runs guest speaker events where club members and guests can gain insights across a wide range of topics of general importance and interest to the community.
- runs a library for the benefit of members, visitors and guests.

These are just a few things that I can think of that the State and community benefit from- courtesy of the Fremantle Sailing Club. Not only does the club expend considerable funds providing all this, there have been hundreds of thousands of hours of volunteer contributions from club members that have supported the payment of a massive social benefit. In this age where mental health is in crisis, these are exactly the sort of events and programs that support positive mental health outcomes.

There is no evidence that the Fremantle Fishing Boat Harbour or other commercial marinas support community benefiting programs.

So, why has the club not to date argued these benefits and will it now commit to doing so by reverting to arbitration where it could effectively do so?

Dear Member

We do not disagree with anything you have said about the social benefit generated by FSC and its activities. We embrace that.

However, social benefit is not a consideration that the arbitrator would be entitled to take into account as part of the arbitration, within the framework established by the rent review clause under the old leases.

The arbitrator is only empowered to determine the re-appraised rent in accordance with the terms of the rent re-appraisal provisions of the old lease and the "Minister's valuation". There is nothing in the old leases to indicate that the valuation may be conducted on the basis of social benefit, instead of by reference the actual rental value of the premises, determined by the usual process of valuation.

Further, DOT is well aware of the social benefit generated by FSC and its activities. Yet, despite this awareness, DOT still purported to re-appraise FSC's rent to \$760,000 per annum.

Unfortunately, contrary to your suggestion, considerations as to "social benefit" do not allow FSC to take matters any further, either by reverting to arbitration or in negotiations with DOT. Such considerations may be relevant in any process to 'lobby' the State Government to take a different approach to the rent re-appraisal process, but so far, FSC has been unsuccessful in such 'lobbying' efforts.

### QUESTION 37

1. Has the Board considered that DOT's Valuers (Real Estate Property Managers) have a conflict of interest?

Firstly in trying to achieve the highest possible Lease for DOT, plus if DOT takes over the Lease then McGee's would manage same and receive a 4%-6% Management Fee per Annum ad infinitum.

Dear Member

Thank you for your questions.

Yes, FSC is aware that it can be argued that McGees have a conflict of interest in preparing the valuation relied upon for the rent re-appraisal. Although from a 'best practice' point of view, we consider DOT ought to have had regard to McGee's potential conflict, it is not, strictly, a requirement for DOT to address that issue to exercise its rights under the rent review clause in the old leases.

In the context of the arbitration in relation to the rent review dispute, DOT foreshadowed obtaining an valuation from an independent third party, which had produced a similar (and in fact, slightly higher) valuation.

2. Was the board unanimous in approving the negotiated Lease with DOT?

Noting that board deliberations are confidential, FSC confirms that the New Lease has been approved by a resolution of FSC's board.

3. Speaking as a former Real Estate Licensee with 40 years Leasing experience, I believe that McGee's Leasing Market Valuation has not been 'Apples with Apples', but instead it is 'Apples with Oranges'. In my opinion there is no correlated comparable market analysis for the unproved current Leasing Market amount, claimed by DOT. To have an Arms Length Appraisal, the BOARD would have no other alternative but to go to ARBITRATION as soon as possible.

The cost would be negligible PARA PASU to the gargantuan amount claimed!

We do not disagree. As explained in the answer to Question 1, there are many aspects of the DOT valuation (once we obtained it through the arbitration process) which we consider open to criticism. However, the valuation is not clearly inconsistent with the rent review clause. Nor is it clearly without foundation. There are arguments that can be made to challenge the valuation, but they involve varying degrees of certainty, both in terms of prospects of success and effect on value.

We agree that the cost of arbitration is not in itself decisive in assessing the merits of reverting to arbitration compared to settling the rent review dispute and arbitration, and enter into the New Lease. However, it is clearly relevant, particularly where, if FSC is unsuccessful, it may also be liable for DOT's costs (although we consider that this is an unlikely outcome, given the drafting of the relevant clauses of the old leases).

Further, as noted in the separate document on FSC's website titled "*Comparison of new lease and arbitration*" (which will be posted on the website in the coming days), settling the rent review and arbitration, and entering into the New Lease, provides several benefits.

It is on this basis that the Board recommends that members vote **in favour of** entering into the New Lease.

### QUESTION 38

This is a bit beyond our general knowledge but from our point of owning a pen at FSC until supposedly 2045? Does this then mean if this lease of the seabed is extended to 2079 we automatically get a renewal until that year?

Dear Member

The answer to your question is 'yes'. The terms of the Pen Leases provide that they will be renewed for the term of any further renewal/s or further extension/s of the Lease. The option to extend the New Lease to 2079 would constitute such an extension.

### QUESTION 39

1. Should we publish an information article informing of our lease, rates, social, sporting and recreational status in the local paper (The Herald) to gain some local support.

Dear Member

Thank you for your suggestion to publicise FSC's rent review dispute with DOT. However, as you will appreciate, FSC's previous exploration of the issues with government stakeholders was met with the response that they did not wish to intervene in DOT's handling of the dispute. Accordingly, it seems that for present purposes, it is not possible to progress the current dispute by way of campaigning or government lobbying. However, such lobbying efforts are likely to be worthwhile at the time of the next rent review.

2. I propose the vote to accept or reject the change in our lease, be able to be a postal or online format for those unable to attend the General Meeting.

FSC is considering the position with respect to proxy votes and will respond to members separately regarding this issue.

### QUESTION 40

The Board of Management have conducted a series of townhall meetings as well as providing updates at several of the General Meeting held as FSC on progress of the lease negotiation.

The information has been very detailed and focused on the 'process' and the likely 'financial impact'. That the club would be required to surrender the existing leases and enter into new leases, came as a surprise to many members including myself. Indeed, one member felt he had been 'blindsided' by this aspect of the lease negotiation. Members including myself understood the Lease Review Committee were negotiating a rent review not a lease review.

The new proposed lease appears more suitable for parties entering into a lease agreement for a government owned facility such as stadium or high rise office building, but quite unsuitable for a multi-dimensional sailing club.

The Commodore and Mr Paul Arns advised that the intent of the new lease Vs. the apparent clauses were quite different on several points. This is despite the 'new lease' document appearing very 'prescriptive' in its format.

As I pointed out at the General Meeting the word 'MUST', used in the positive or negative i.e. 'MUST NOT' appears in 123 clauses.

Mr Paul Arns asked the question as to how many times the word MUST appeared in the existing lease document/s, which I was unable to answer on the evening. However a subsequent review of both the existing FSC Land Lease and the existing FSC Sea Bed Lease reveals the word MUST does not appear, other than in one header (top of page 2 of the existing FSC Sea Bed Lease i.e. "NOTE:- All dealings with this lease must be in the forms prescribed under the Transfer of Land Act, 1893")

The word 'MAY' however appears 29 times and 28 times in the respective documents.

In July 2022 the Department of Transport released FREMANTLE HARBOURS MASTER PLAN (FISHING, CHALLENGER & SUCCESS BOAT HARBOURS).

Included in that document is the provision of a 100-berth boat stacker, 60 tonne and 200 tonne boat lifters with spray and blast sheds, hardstand servicing areas and berths for vessels of up to 35m in length, trade services workshops, and local commercial retail opportunities to the north of Capo

D'Orlando Drive opposite FSC existing work's area. It is likely these facilities will be subcontracted out and will act in direct competition of the FSC works area.

My question at the General Meeting focused on the prescriptive nature of the new lease. Based on the premise that by entering a 'new lease' agreement both parties will have legal obligations that will be required to be fulfilled or the lease suitable endorsed as a variation I seek clarification on the following points.

Spreadsheet below, continuation from Terry & Louise Baker...

Dear Members

Thank you both for your comments.

We regret that members did not have more time to consider the position. We trust that with the adjournment of the meeting, and the opportunity to submit questions, you and other members now feel prepared to engage with the issues of whether to settle the rent review dispute and arbitration and enter into the New Lease, or instead revert to arbitration.

The proposal to surrender the old leases in exchange for the New Lease represents the basis upon which DOT was willing to consider a settlement of the rent review dispute and arbitration. Accordingly, this structure arose naturally out of the Lease Committee's effort to achieve a negotiated resolution of the rent review issue.

We understand that the proposed New Lease option reflected a desire, mainly on the part of DOT, to modernise FSC's lease terms (where the old leases were drafted in the 1980s using language appropriate for that time), and to have all yacht clubs, as far as possible, on the same terms and conditions to minimise administration costs. This does not seem to us to be unreasonable as an objective.

In a number of respects, the terms of the New Lease are more favourable to DOT, compared with the terms of the old leases. However, you will appreciate that commercial lease terms often favour the landlord, because the landlord is in a stronger negotiating position. That is the case with the New Lease, as it is with the other leases between DOT and yacht clubs, which are also on DOT's standard terms and conditions.

For these reasons, the New Lease is (of course) more prescriptive. However, the 'must' vs 'may' comparison is not illustrative. As documents using older language, the old leases also use the word 'shall' to express mandatory language (around 25 times), which is broadly comparable in proportion to the length of the document.

Moreover, DOT has indicated that it was not willing to make any further changes or concessions to the offered terms and conditions. It is clear that, if we were to insist on some other lease terms (eg variations to more closely reflect the old lease terms), then DOT would refuse to settle, and we would be obliged to 'take our chances' in the arbitration.

We have set out below your queries, and our responses, in relation to specific clauses of the New Lease. We trust that this will assist you in your consideration of your options.

Query regarding New Lease	Answer
Requirement for a rust and corrosion prevention program (cl 12.1(b))	<p>The old leases require FSC to <i>“from time to time and at all times during the term [of the old leases] at its own cost operate and maintain the Yacht Harbour in a proper and efficient manner and comply with accepted modern practices in regard thereto ... and keep and maintain the demised premises and [the seabed] and all development reclamation buildings structures erections fixtures plant equipment and all improvements whatsoever now or hereafter deposited or erected thereon or affixed thereto or connected therewith in good repair and in proper working order and condition fair wear and tear excepted to the satisfaction of the Minister for Lands”</i> (cl 5(b)).</p> <p>It is arguable that the requirement to operate and maintain the Yacht Harbour in accordance with accepted modern practices requires FSC to have a rust and corrosion prevention program, which is such an accepted modern practice.</p> <p>It is clear that the requirement to, at FSC’s own cost, keep the premises and the various structures and improvements in good repair and proper working order to the satisfaction of the Minister for Lands (now the Minister for Transport) requires FSC to monitor and rectify rust and corrosion issues.</p> <p>Accordingly, the New Lease is consistent with FSC’s existing obligations (though perhaps more specific and detailed). Therefore, this clause is considered appropriate.</p>
Requirement to replace broken or damaged glass (cl 12.1(c))	<p>The requirement to replace broken or damaged glass is an incident of the existing obligation to keep the premises and the various structures and improvements in good repair and proper working order, under cl 5(b) of the old leases.</p> <p>It is not clear that there is any realistic scenario under which it would be appropriate for FSC to leave glass in a broken or damaged state.</p> <p>Accordingly, the New Lease is consistent with FSC’s existing obligations (though perhaps more specific and detailed). Therefore, this clause is considered appropriate.</p>
Requirement to repair damage (cl 12.2)	<p>This is an incident of the obligation to keep the premises and the various structures and improvements in good repair and proper working order, under cl 5(b) of the old leases.</p> <p>This clause is considered appropriate on the basis that it is consistent with FSC’s existing obligations.</p>
Requirement to service air-conditioning (cl 13.4)	<p>This can be seen as an incident of the obligation to keep the premises and the various structures and improvements in good repair and proper working order. Amongst other things, faulty or malfunctioning air-conditioning units can be a health and safety risk and a fire hazard.</p> <p>It is not clear why responsibility for maintaining air-conditioning units would rest with any party other than FSC. Nor is it clear that there is any realistic scenario under which it would be appropriate for FSC to cease maintaining and servicing air-conditioning units.</p> <p>This clause is considered appropriate on the basis that it is consistent with FSC’s existing obligations.</p>



Query regarding New Lease	Answer
Restrictions on alterations without prior consent (cl 14.1)	<p>Under cl 5(h) of the old leases, FSC must <i>“not without the previous consent in writing of the Minister for Lands the Minister for Works and the Minister for Transport first had and obtained ... build on affix to or install on or permit or suffer to be built on affixed to or installed on the demised premises or the Section 116 land any building structure erection fixture plant equipment or improvement whatsoever (either above or below the surface of the demised premises or the Section 116 land)”</i>.</p> <p>The clause also requires FSC to submit plans and specifications with any application for consent and <i>“to make complete and carry out”</i> the works strictly in accordance with the plans and specifications.</p> <p>Accordingly, the clause of the New Lease is considered appropriate, including on the basis that it is consistent with FSC’s existing obligations.</p>
Requirement to remove asbestos (cl 14.4)	<p>Our understanding is that DOT does not intend the New Lease to require FSC to significantly change its existing operations/activities, including by way of removing all asbestos from the premises. Accordingly, continuing on from work that FSC has previously done to prepare an asbestos register, FSC is in the process of preparing a hazardous materials plan, which reflects the relevant rules and regulations governing asbestos. In such a context, FSC has sought clarification from DOT that FSC will not be required to remove asbestos except as provided for under that plan (ie which plan will be agreed with DOT prior to entering into the New Lease). FSC is hopeful of being in a position to update members in relation to this issue prior to the Town Hall and/or reconvened general meeting.</p> <p>.</p>
Restrictions on advertisements, signs and notices (cl 18.2)	<p>FSC has already addressed the issues with this clause in Sch B, para 9, which amends cl 18.2 to provide that DOT’s consent to advertisements, signs and notices must not be unreasonably withheld.</p>
Restrictions on aerials and amplified noise (cl 18.3)	<p>As to amplified noise, as noted, our understanding is that DOT does not intend the New Lease to require FSC to significantly change its existing operations/activities, including by introducing significantly different restrictions on sound producing equipment. Accordingly, FSC is clarifying these matters with DOT, and anticipates being able to update members as to these matters prior to the Town Hall and/or the reconvened general meeting. FSC expects to be able to confirm to members that the existing position (or something similar to it) will continue to apply following the entry into the New Lease.</p> <p>As to aerials, under the clause, DOT may not unreasonably withhold its consent to <i>“an aerial or antenna less than FOUR (4) metres in length which is required by the Lessee for carrying on the business it is permitted under this Document to carry on from the Premises”</i>.</p> <p>Further, where our understanding is that DOT does not intend the New Lease to require FSC to significantly change its existing operations/activities, including FSC’s existing aerials (which are all longer than 4 meters in length). Accordingly, FSC has sought a standing consent from DOT as to the existing aerials, and future aerials that FSC considers necessary for the purposes of the sailing club. FSC expects to be able to confirm this position to members prior to the Town Hall and/or reconvened general meeting.</p>

Query regarding New Lease	Answer
Restrictions on animals or birds (cl 18.8)	<p>The restrictions apply to animals or birds “kept” on the premises. Accordingly, temporary visits are not captured by this clause.</p> <p>As noted, our understanding is that DOT does not intend the New Lease to require FSC to significantly change its existing operations/activities, including arrangements for keeping pets on vessels. Accordingly, FSC is clarifying these matters with DOT, and anticipates being able to update members as to these matters prior to the Town Hall and/or the reconvened general meeting. FSC expects to be able to confirm to members that the existing policies and rules governing these matters will continue to apply following the entry into the New Lease.</p>
Compliance with DOT’s “Live Onboard” policy (cl 18.5)	<p>As noted above, our understanding is that DOT does not intend the New Lease to require FSC to significantly change its existing operations/activities, including arrangements for living on board. Accordingly, FSC is clarifying these matters with DOT, and anticipates being able to update members as to these matters prior to the Town Hall and/or the reconvened general meeting. FSC expects to be able to confirm to members that the existing policies and rules governing these matters will continue to apply following the entry into the New Lease.</p>

It is not clear that the DOT works area described in the Fremantle Harbours Master Plan (Fishing, Challenger & Success Boat Harbours), and the potential future competitor facilities, are relevant to the terms of the New Lease. The requirement for DOT’s consent to the replacement of major equipment will arise both under the old leases and under the New Lease. Notwithstanding, the impact of that plan on future operations of the FSC is obviously an important issue (including as to potential future revenue streams to assist meeting the rent obligations to DOT), which the FSC will be investigating into the future.

