

FREMANTLE SAILING CLUB
DOT LEASE
COMPARISON OF NEW LEASE & ARBITRATION

Issue	Arbitration	New Lease
<p>Determination of rent</p>	<p>If FSC continues with arbitration, FSC considers it more likely than not that the arbitrator will determine the re-appraised rent in an amount <i>less than</i> \$760,000 per annum.</p> <p>However, the arbitrator declined to provide an interim award answering questions as to the appropriate valuation methodology. Accordingly, the parties' respective expert valuers will have significant discretion as to how they approach the issue.</p> <p>In such a context, there is significant uncertainty as to the result in arbitration. It is difficult to anticipate <i>how much</i> less than \$760,000 per annum the arbitrator will determine the re-appraised rent.</p> <p>Further, there is a risk that the re-appraised rent will be determined in an amount <i>more than</i> \$760,000 per annum, though this seems unlikely.</p> <p>As was noted in the presentation to members, FSC considers that the most likely outcome is a re-appraisal in the range of \$350,000 to \$500,000.</p>	<p>If FSC enters into the New Lease, it secures a series of staged rent increases, which equate to a starting rent of \$325,000 per annum, which gradually increases to \$760,000 per annum over nine years (to 2030).</p> <p>This gives FSC certainty and the ability to manage the financial impact, and investigate other potential sources of funds over that period.</p>
<p>Immediate payments to DOT</p>	<p>The re-appraised rent, as determined in arbitration, will be payable from 1 January 2019 to 1 January 2022 (when DOT would be entitled to issue a further re-appraisal), or to the present date.</p> <p>In other words, once a determination is made in arbitration, FSC will be required to "back pay" the difference in rent, between \$34,700 per annum and the amount determined by the arbitrator, as a "lump sum" payment to DOT.</p> <p>Assuming that DOT does not issue a further re-appraisal effective from 1 January 2022 (although that is likely and would likely result in a further increase the amount payable to DOT):</p> <ul style="list-style-type: none"> • the period over which FSC would be required to "back pay" rent is at least 	<p>If FSC enters into the New Lease in mid-2023 (ie prior to 1 July 2023), the amount due and payable to DOT would be around \$470,000, which consists of:</p> <ul style="list-style-type: none"> • \$325,000 plus GST, being the rent payable in the agreed amount, from the commencement date of the New Lease (1 January 2022) to 31 December 2022; • \$175,000 plus GST, being the rent payable in the agreed amount, for Q1 and Q2, 2023; • \$20,000, being the management fee of 4% per annum (\$13,000 for 2022 and \$3,500 for each of Q1 and Q2, 2023); • less \$52,050, being the \$34,700 per annum rent already paid for 2022 and Q1 and Q2, 2023.

Issue	Arbitration	New Lease
	<p>4.5 years (being 1 January 2019 to mid-2023);</p> <ul style="list-style-type: none"> • if the arbitrator re-appraises the rent in the amount sought by DOT, being \$760,000 per annum (although such an outcome is considered unlikely), the amount that FSC would be required to “back pay” for the 4.5 years would be around \$3.5 million, minus any allowance for rent remission during the COVID period; • if the arbitrator re-appraises the rent in a lesser amount (say \$425,000 per annum), the amount that FSC would be required to “back pay” for the 4.5 years would be around \$2 million, minus any allowance for rent remission during the COVID period. <p>These amounts would have a significant adverse effect on the club’s cash flow.</p>	<p>As noted above, for the future, FSC will be obliged to pay staged rent increases over nine years (to 2030) and will not be required to back pay rent from 1 January 2019 to 1 January 2022 (when DOT would be entitled to issue a further re-appraisal) or to present.</p>
<p>Effect on pen owners</p>	<p>The rent review dispute and arbitration does not directly affect the legal relationship between FSC and pen owners.</p>	<p>The New Lease includes option periods of 34 years (to 31 December 2079) and 21 years (to 31 December 2100).</p> <p>Pen leases will be automatically extended to 2079 and 2100, if the options under the New Lease are exercised.</p>
<p>Staged rent increases</p>	<p>If FSC continues with arbitration, staged rent increases are not possible as an outcome.</p> <p>The arbitrator is only empowered to determine the re-appraised rent as at the review date (1 January 2019).</p> <p>The arbitrator must determine the re-appraised rent as a matter of the proper interpretation of the old lease and then the application of appropriate valuation methodologies, rather than exercising a general discretion.</p>	<p>As noted above, FSC will obtain staged rent increases over nine years (to 2030), allowing it to budget and plan accordingly.</p>

Issue	Arbitration	New Lease
Security of tenure	<p>If FSC continues with arbitration, the current leases will expire in 2078 (land lease) and 2045 (seabed lease). An extension to the term of the old leases is not possible through arbitration.</p> <p>Although previous governments expressed an intention to extend the old leases, this could require political/legal enforcement, the results of which cannot be guaranteed.</p>	<p>The term of the New Lease is 24 years (to 31 December 2045) with further option periods of 34 years (to 31 December 2079) and 21 years (to 31 December 2100).</p>
Future rent reviews	<p>Continuing with the arbitration is likely to provide FSC with guidance as to future rent reviews, which can occur every three years, under the current leases.</p> <p>However, it is uncertain as to whether that guidance will be favourable to FSC.</p>	<p>The New Lease contains a comparatively standard market rent review mechanism, which will apply on and from 1 January 2031.</p> <p>Further, the rent reviews are capped at 15%, up to (but not including) 1 January 2043.</p>
Legal costs	<p>Continuing with the arbitration will require significant legal fees and expert fees (currently estimated to be at least a further \$400,000).</p>	<p>If the New Lease is adopted, no further significant legal (or other) fees will be incurred.</p>
Management time	<p>Continuing with the arbitration will require significant time and attention from FSC.</p> <p>The next steps in the arbitration will include:</p> <ul style="list-style-type: none"> • DOT serving a statement of contentions in reply; • FSC serving a statement of contentions in rejoinder; • DOT and FSC providing a statement of agreed facts and list of documents tendered by consent; • DOT and FSC providing lists of disputed facts, and witness statements/documents to establish those facts; • DOT and FSC providing lists of agreed and disputed questions for the expert valuers; • the arbitrator settling the list of questions for the expert valuers; • DOT and FSC obtaining their respective expert reports and serving those expert valuer's reports on the other parties; 	<p>The New Lease brings the rent review dispute and arbitration to an end. This will enable FSC's management to focus on the development of the club, including investigating other sources of funding and planning for the future, rather than instructing lawyers and preparing for the next steps in the arbitration.</p>

Issue	Arbitration	New Lease
	<ul style="list-style-type: none">• a further procedural conference before the arbitrator to arrange for any other steps before a final hearing and for the final hearing itself; and• the final hearing before the arbitrator (which will include the expert valuers giving evidence and being cross-examined) and legal argument.	