

Tips and traps when leasing

Presented to
Community Legal Centres Qld

18 August 2021

Matthew Glenn
Partner
matthew.glenn@minterellison.com

Lynne Kozak
Special Counsel
Lynne.kozak@minterellison.com

Tanya Sciasci
Senior Associate
tanya.sciasci@minterellison.com

Overview

- Benefits of Leasing vs Freehold ownership for NFP entities
- Overview of the Leasing Lifecycle
- Heads of Agreement
- Hidden costs of leasing – including possible mitigation strategies
- Bespoke special conditions for NFP entities
- Guide to proactively managing situations over the term

Benefit of Leasing vs Freehold Ownership

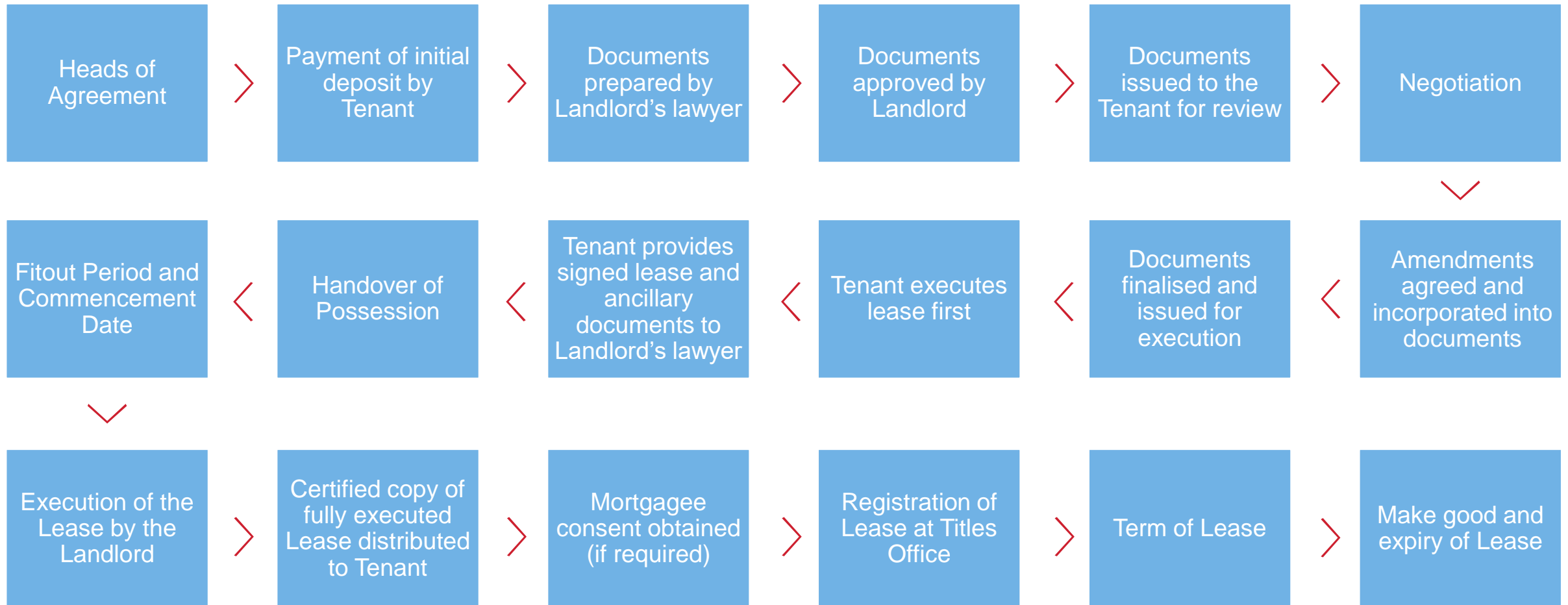
Significant capital investment
v
freeing up capital

Taxation

Insurance

Flexibility if needs change

Leasing lifecycle



Heads of Agreement

- Show of good faith (a 'documented handshake')
- Sets out the material commercial terms to facilitate the preparation of the formal documents
- Must be clear and complete as to any special conditions, unusual provisions or representations
- Otherwise known as 'lease proposals' or 'letters of intent'

Heads of Agreement – When are parties bound?



Commercial terms

- What is the date?
- Who are the parties?
- What is being leased?
- Are there any conditions precedent?
- What is the handover process and obligations?
- When will the lease commence?
- How will the rent be restructured?
- Incentives?
- Is a deposit appropriate? Is it refundable?
- What is the permitted use?
- What security is necessary?
- Who is responsible for legal fees and disbursements?
- Is the offer confidential?
- How long will the offer be open and can it be withdrawn early?
- Are there any other special conditions requiring consideration?

Hidden costs of leasing

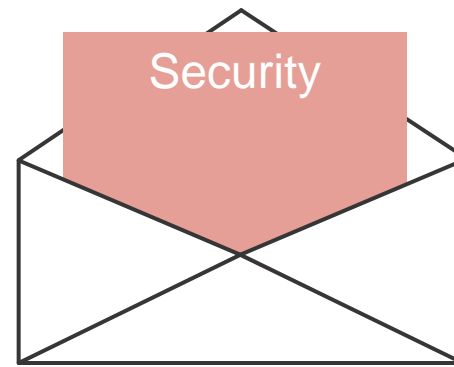


Hidden costs of leasing

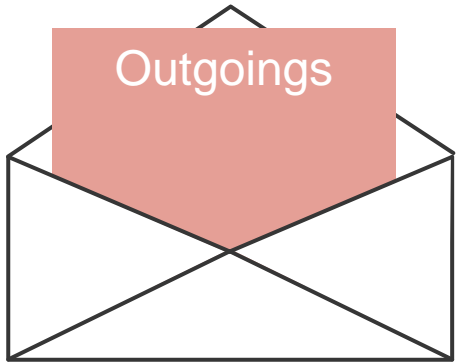


Due diligence

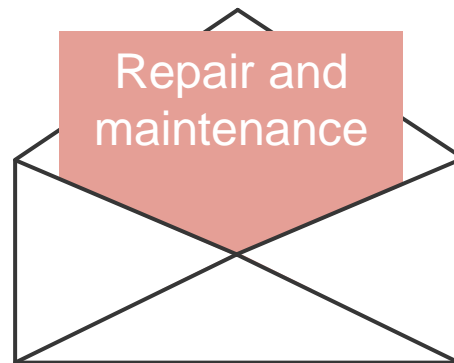
- Retail versus commercial
 - Commercial terms
 - Disclosure statements
- Contaminated land and asbestos
- Sustainability requirements
- Town planning
- Credit checks



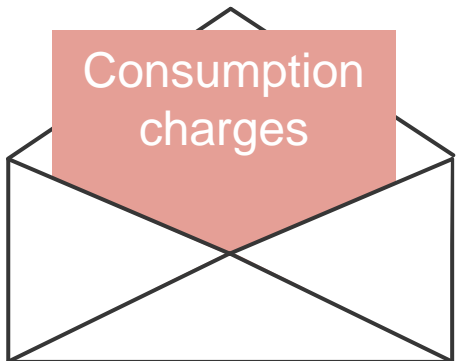
- Term deposit fees
- Annual bank guarantee upgrades



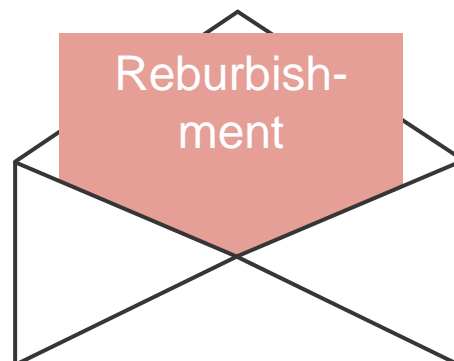
- Proportions
 - Licensed Area
- Land tax
- Management fees
- Capital / Structural Works
- Exclusions



- Air-conditioning
- Capital works
- Positive obligation on Landlord

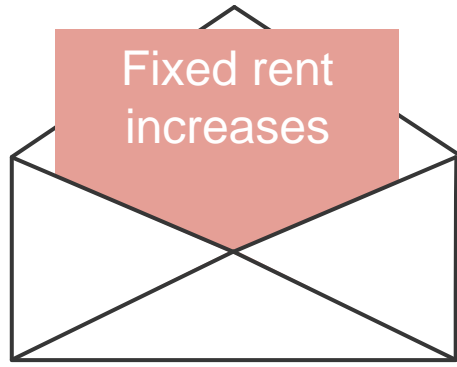


- Separate metering
- Administration fees
- Embedded networks



- Limit to front of house
- Minimise obligation at HOA stage

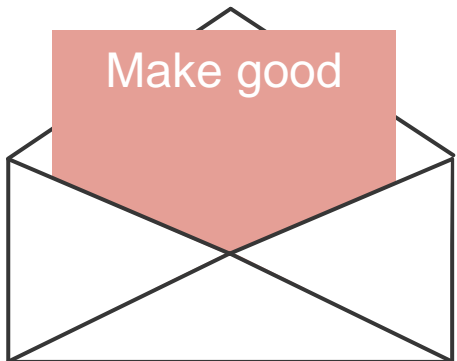
Hidden costs of leasing



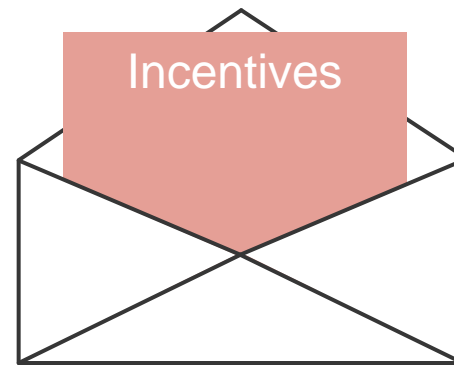
- Escalation without a market reset during the term
- Ratchet clauses
- Cap and collar arrangements



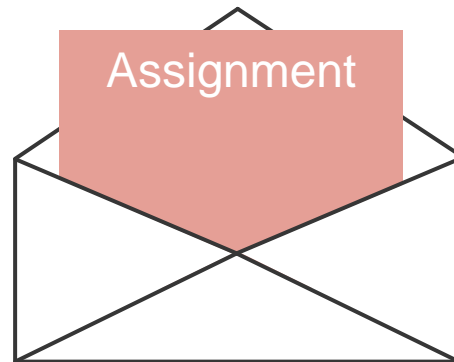
- Early determination before option exercise



- Minimise obligation at HOA stage
- Option to pay a cash sum in lieu of obligations
- Timing implications
- Condition report



- Types
- Tax advice
- Clawbacks



- Permitted Use
- Equal or better standard
- Subletting

Special conditions for NFP

- Break clauses linked to funding
- Charitable purpose (subletting)
- Neighbours
- Modifications for use
- Value adds
- Unreasonably withholding consent to alterations

Managing issues during and at the end of the lease term

Common areas of dispute between landlords and tenants

During term of lease

- Rent arrears / defaults under lease
- Usage and disturbance issues
- Repair and maintenance obligations
- Rent reviews
- Misrepresentation claims

Towards or at end of lease

- Renewals
- Options
- Make good issues
- Misrepresentation claims (historical)

Quiet enjoyment, disturbance and demolition

- Common law right to quiet enjoyment – does not necessarily mean ‘quiet’, but means freedom from interference from disturbance by the landlord or other tenants of the landlord
- Will be ‘read down’ or modified by the specific lease terms
- *Retail Shop Leases Act 1994* (Qld) (**RSLA**) – section 43 compensation for disturbance in certain circumstances
- Lease terms govern if there is a right to early termination for demolition or a right to relocate
- The RSLA imposes minimum timeframes for notices to vacate (demolition or relocation) and mandatory compensation terms (but also check your lease)

Make good

- Identify what the lease requires
 - Scope
 - Can the landlord nominate any items to be left and/or require the tenant to remove additional items?
- Identify current state of premises
 - Do you have or want to get a condition report?
- Determine what the parties want
 - Payment in lieu or agreement to leave certain items in situ

Note: These are practical questions that require practical answers. The lawyers can assist you about what the lease requires but otherwise need the parties' input

Options

- Check lease for timing for exercise of option and manner in which notice of the exercise of option must be given (if any)
 - What systems do you have in place for managing option timeframes?
- Strict application of timeframes – ‘It’s a cold cruel world in the land of options.’
- Retail leases
 - Landlord must give you notice if there is an option (but no penalty if they don’t – it is up to you to make sure you exercise within time)
 - Landlord must give you notice if there is no option of their intention (to offer a new lease or that you must vacate) at least 6 months before the lease is to end



For more information



Matthew Glenn

Partner

T +61 7 3119 6632

M +61 438 191 942



Lynne Kozak

Special Counsel

T +61 7 3119 6262

M +61 478 878 974



Tanya Sciasci

Senior Associate

T +61 7 3119 6224

M +61 419 754 913

EMAIL firstname.lastname@minterellison.com

MinterEllison

minterellison.com