

**CITY OF MARION
GENERAL COUNCIL MEETING
24 March 2015**

CONFIDENTIAL REPORT

Corporate Manager: Abby Dickson, Manager Libraries & Cultural Development

Director: Kathy Jarrett

Subject: Marion Leisure & Fitness Centre
Lease to CASA Leisure Pty Ltd

Reference No: GC280415F01

If the Council so determines, this matter may be considered in confidence under Section 90(3)(b), (i) and (k) of the Local Government Act 1999 on the grounds that the report contains information relating to commercial information of a commercial nature the disclosure of which (i) could reasonably confer a commercial advantage on a third party or prejudice the position of the Council; could relate to potential litigation between Council and a third party, and could impact on a proposed tender for the supply of goods or services and, (ii) would, on balance, be contrary to the public interest.

Kathy Jarrett
Acting Chief Executive Officer

RECOMMENDATION:

1. That pursuant to Section 90 (2) and (3)(d) of the Local Government Act 1999, the Council orders that all persons present, with the exception of the following persons: Kathy Jarrett, Abby Dickson, Mark Gibson, Heather Michell, David Barrett, Ray Barnwell, Colin Heath, Kate McKenzie and Craig Clarke be excluded from the meeting as the Council receives and considers information relating to the Marion Leisure Fitness Centre Lease to CASA Leisure Pty Ltd, upon the basis that the Council is satisfied that the requirement for the meeting to be conducted in a place open to the public has been outweighed by the need to keep consideration of the matter confidential given the information relates to commercial information of a commercial nature the disclosure of which (i) could reasonably confer a commercial advantage on a third party or prejudice the position of the Council; could relate to potential litigation between Council and a third party; and could impact on a proposed tender for the supply of goods or services and, (ii) would, on balance, be contrary to the public interest..

DISCUSSION:

The purpose of this report is to provide an update to Council in relation to Marion Leisure and Fitness Centre (MLFC) following the termination of the lease on 22 January 2015.

The following is a summary of actions in response to Council's resolutions at the 9 December 2014 General Council meeting:

Resolution	1.	Council gives 14 days' notice of breach to CASA to remedy the current default provisions of the lease.
January Report		<p>The Notice of Breach for non-payment of rent and outgoings was posted to CASA on 24 December 2014. The notice was officially served on 2 January 2015, providing 14 days for the breach to be remedied.</p> <p>CASA failed to remedy the breach. No payments were received by 16 January 2015. Rather, CASA offered a payment plan of \$5,000 per month on a lesser debt total. This offer did not remedy the breach.</p>
Status		Completed
Resolution	2.	Should such default not be remedied, that Council moves to terminate the lease with CASA for breach and non-payment of rent and outgoings, subject to lease and legislative requirements.
January Report		<p>Given the breach was not remedied; a Notice of Termination was served on CASA on 22 January 2015. The termination took effect immediately upon service and provided that the facility be vacated by CASA and handed over to Council on or before 20 February 2015 or such other date as Council may stipulate by further notice.</p>
Status		Completed
Resolution	3.	That in terminating the lease, Council implements such strategies to ensure that appropriate arrangements for current patrons are made.
January Report		<p>Discussions have been held with CASA, and an agreement has been reached to work towards an orderly transition of business. Options to manage the facility whilst market testing and tendering is progressed are being developed by both CASA and Council. This will ensure that the adopted approach delivers the best outcome for the Centre's patrons and Council.</p> <p>A communication plan has been developed, and CASA have agreed to a joint approach</p>
February Report		<p>Since the last update, a number of options became evident as being available to Council to deliver the best outcome for the Centre's patrons and Council:</p> <ol style="list-style-type: none">1. Enter into a new centre management agreement with CASA for an interim period2. City of Marion manage stadium operations & CASA manage fitness component3. Source a new operator to manage facility

	<p>4. City of Marion manage full centre operations 5. City of Marion manage stadium operations only</p> <p>Short term management options were sought from CASA, YMCA, and Belgravia Leisure, and assessed against City of Marion management options.</p> <p>An assessment was undertaken, and concluded that the best option was to engage YMCA under an interim Management Agreement to operate the facility for up to 16 months.</p> <p>This decision was made on the basis of best value to the City of Marion from both a financial and patron perspective.</p> <p>As at the writing of this report, Council will assume control of the facility at 7pm Friday 20 February 2015. The YMCA will begin operating the facility on Saturday 21 February 2015. Council, YMCA and Casa staff have been working together to focus on a smooth transition.</p> <p>A Letter of Intent is being drafted detailing the terms of the proposed management agreement, and anticipated to be finalised in the week beginning 23 February 2015. The YMCA have agreed to begin management tasks in good faith while this is being finalised. A further update will be provided at the 24 February 2015 Council meeting.</p>
March Update	<p>A Letter of Intent (LOI) has been executed and is provided at Appendix 1 of this report. The LOI outlines the terms which will be included in the final Management Agreement.</p> <p>The key terms within the Agreement include:</p> <p>A minimum term to 28 February 2016 and thereafter ongoing (subject to termination by either party with 60 days' notice in writing to the other party from 30 December 2015 onwards). Termination prior to 28 February 2016 is subject to agreement by both parties.</p> <p>There is no implied representation by Council that this LOI or final Management Agreement will be renewed or extended following expiry of the Initial Term.</p> <p>Council pays a 10% management fee on agreed turnover.</p> <p>Council assumes full responsibility for the net performance of the Centre benefiting 100% from any surplus and funding 100% of any net operating deficit.</p> <p>Monthly reporting of the operational and financial performance of the MLFC is to be provided by the operator to management. This will be assessed against the jointly prepared budget and agreed KPI's which will be developed by 30 April 2015. Financial statements associated with the MLFC operations produced by the YMCA SA will also be certified correct and true as part of the YMCA SA's annual independent audit opinion. Council reserves the right to inspect any records associated with the operations of the MLFC.</p> <p>The terms within the LOI will be translated into a formal management agreement following the development of a detailed budget and KPIs. This will be completed by 30 April 2015. The time taken to develop the detailed budget allows consideration of actual operating data.</p>
Adjourned meeting April	<p>The development of the management agreement is in progress and a copy will be provided to Council when available.</p>

Update		
April 28 update		The development of the management agreement is in progress. Input will be sought from the consultant engaged to ensure the agreement best supports business continuity and customer service for the period of the interim management agreement.
Status		In progress
Resolution	4.	Further, that in terminating the lease, Council takes appropriate legal action to recoup monies owing to Council.
January Report		Discussions are currently progressing with CASA further to their proposed repayment plan and disputed balance owing. Based on the outcome of these discussions, appropriate debt recovery approaches will be taken having regard to both CASA's ability to repay the debt, and Council's financial objectives.
February Update		Now that interim arrangements for the ongoing management of the Centre have been implemented, debt recovery will be progressed. The amount owing will be confirmed. Legal advice to ensure that all funds owing to Council are repaid in accordance with the lease agreement is being sought.
March Update		Work has progressed on this item including leveraging from the purchase value of the CASA equipment as a means of debt recovery. Taking this approach requires reaching a negotiated position on both the amount owing and the market value of the equipment based on independent valuation. The independent valuation has been received, and is currently being reviewed in detail on the basis of Council's and the YMCA's understanding of the equipment's useful life.
Adjourned meeting April Update		<p>Council's legal adviser has indicated that a Deed of Settlement is the appropriate mechanism in lieu of litigation at this stage.</p> <p>The lease will be resolved by means of a Deed of Settlement to be entered into between CASA and Council under which:</p> <ul style="list-style-type: none"> • CASA would transfer to Council ownership of the requested plant and equipment free of all encumbrances and interests; • Council would release CASA from all further liability howsoever arising from or in respect of the former Lease; • CASA would release Council from all further liability howsoever arising from or in respect of the former Lease; <p>Council's legal adviser had indicated that a deed of settlement approach is the appropriate mechanism at this stage in lieu of litigation.</p> <p>A lump sum for settlement will be explored, to be calculated through consideration of:</p> <ul style="list-style-type: none"> • The purchase of Plant and Equipment from CASA to operate the Centre. • The amount City of Marion owes CASA for written down capital costs for works undertaken to Spa and Air-conditioning plant under the provisions of the lease. • Amount owed by CASA under the provisions of the lease which includes: outstanding rent and insurance, rates and legal fees associated with the settlement of the lease.

28 April Update		<p>A consultant with commercial acumen and sports industry experience has been engaged to review the matter in full and develop a settlement approach which provides the best financial return to Council. This review is estimated to be completed by 8 May 2015.</p> <p>The review includes consideration of purchase of equipment based on valuations received. A second valuation has now been received which provides greater clarity to inform Council's negotiation position.</p>
Status		In progress
Resolution	5.	Conducts a market review of the facility which includes identifying potential users and management options and models for the medium and long term.
January Report		Two prospective contractors have been identified to assist with this work, and a briefing will be held accordingly following the 27 January 2015 Council meeting. In order to facilitate this, Council's resolution to authorise the CEO to release relevant information is necessary.
February Update		<p>The interim management model will take the form of an agreement which can be terminated prior to July 2016. This will provide Council with sufficient time to stabilise centre operations and determine a future management model for the Centre which maximises public value.</p> <p>A proposal has been received from an external contractor to undertake a review of the centre and recommend future options and models.</p>
March Update		This review will be commenced when Centre operations have stabilised and Council has a better understanding of the operations through transparent budget reporting and the KPIs outlined in the management agreement.
28 April Update		As above.
Status		In progress
Resolution	6.	Receive a report detailing the findings of this review which will include future options for the facility and management models.
January Report		A report will be prepared for Council consideration upon completion of the market review.
February Report		This report will be presented for Council's consideration by July 2015 which will be followed by the Expression of Interest process.
March Update		As above.
28 April Update		As above.
Status		In progress

Resolution	7.	That in the interim, monthly updates be provided to Council on progress associated with this matter.
January Report		Monthly reports will continue to be provided.
Status		Ongoing

At the 27 January 2015 General Council meeting Council passed the following resolutions.

Resolution	4.	Requires all former sub-tenants of CASA to pay their current rent obligations directly to the City of Marion
February Update		<p>Notices have been issued to Gymnastics SA and Koorana advising that all payments from 22 January 2015 are to be paid directly to Council on a monthly basis.</p> <p>Discussions with the YMCA are occurring regarding the manner of financial accounting for such payments. Under the proposed Management Agreement, the revenue from the Centre will be considered City of Marion revenue.</p>
March Update		A license for use will be developed with Gymnastics SA and Koorana for the period of the interim management agreement with the YMCA. This provides Council with flexibility while it undertakes a review of the future directions of the Centre.
Adjourned meeting April Update		<p>It is confirmed that the rent from sub tenants is being paid directly to Council and therefore does not fall within the 10% management fee calculations.</p> <p>This arrangement is currently being reviewed in the context of managing the whole site in an integrated manner, including the expenses being incurred associated with Gym SA and Koorana's use of the site. The review is being undertaken as part of the budget development process, including analysis of income and outgoings as they relate to Gym SA and Koorana, and the various arrangements that could be adopted.</p>
28 April Update		Consultancy advice on the most appropriate business arrangement for treating income and expenditure associated with Koorana and Gym SA is being sought and will form part of the final management agreement for the Centre.
Status		Ongoing
Resolution	5.	CASA be requested to:
		<p>a) provide their membership list including the status of memberships to the City of Marion</p> <p>b) refrain from taking any new memberships for the Marion Leisure & Fitness Centre</p>
February Update		A letter was handed to Phil Gray, Director of CASA on 30 January 2015 which included the above requests. CASA have provided this list to the YMCA in good faith.

March Update		The membership was transferred by CASA to the YMCA. Under the new agreement with the YMCA Council retains ownership of the membership database.
Status		Completed

Financial information to date that will be factored into the settlement with CASA.

In settling the lease there are multiple financial factors which will inform Council's negotiation position to achieve a commercially sound agreement. The consultant engaged to develop options for the settlement of the lease will analyse the financial information to develop a recommended approach to settlement.

Amount owed by CASA to Council

The original amount identified by Council, and included in the Notice of Breach was \$82,395 which included Council rates owed. CASA at the time claimed that the amount owing was \$34,593. These amounts were included in the January 2015 Council report. It should be noted that the amount in the Notice of Breach was calculated for the full 2014-15 financial year.

Since exiting the premises on 20 February, CASA have made 2 payments, one of \$5,272 and a second of \$5,046. The amount owed has also been adjusted to reflect CASA vacating the premises on 20 February 2015. This takes Council's starting position to an amount owed of \$59,683 which includes Council rates.

The Lease requires CASA to pay all legal fees associated with settling the lease and the exact amount owing to date is currently being verified.

Council should note that the above amounts will alter if further debt is repaid and additional legal costs are incurred.

Amounts owed by the City of Marion to CASA

In order to maintain services at the MLFC for the interim period Council will need to purchase plant and equipment to operate the Centre. The equipment is owned by CASA.

Two independent valuations have been undertaken to inform a purchase price which will be factored into the final settlement sum.

The first valuation considered all centre equipment required for the interim period and came to \$183,120 (with approximately \$123,000 of this amount being for gym and fitness equipment).

The valuation of the gym and fitness equipment was questioned due to age and condition and consequently a second valuation was undertaken for the gym and fitness equipment only which was valued at \$67,885.

The second valuation for the gym and fitness equipment is significantly lower than the first valuation. Analysis is currently being undertaken to determine a fair and reasonable purchase price.

Council should note that the upfront amount paid to purchase plant and equipment will be recouped at a written down value at the end of the interim management agreement in 2016.

The lease requires Council to pay for the written costs down associated with capital works undertaken to Spa and Air-conditioning plant and this is calculated at \$12,579.

Membership Liability

CASA has a current membership liability which is to be paid to the YMCA. This is valued at approximately \$62,000 and will form part of the negotiations to settle the lease.

The negotiations are complex and the consultant who has been engaged will evaluate the current situation from an industry perspective. The consultant's brief is to consider the matter in full and advise Council on what form of debt recovery or settlement will deliver the best return to Council financially. This advice will be finalised by mid-May.

Question taken on notice regarding capital works undertaken to the Spa and Air-conditioning Plant

At the 14 April 2015 General Council meeting a question was asked regarding the provision in the lease for Council to pay for the written down costs of capital works undertaken to Spa and Air-conditioning Plant. Clause 14 of the lease states that Council is to pay the written down cost of this work at the expiry of the lease. The question was asked whether it was standard practice in leases that the costs associated with capital works be the responsibility of the lessee; and if so why the lease with CASA deviated from standard practice.

Generally leases contain provisions or incentives depending on the type of facility to be leased or whether there is strong demand in the market. Other factors include the current condition of the facility, the remaining useful life of the plant and equipment and whether these would need to be replaced during the life of the lease agreement. Provisions can range between providing rent free periods or the landlord financing capital upgrade works. From an overall perspective, differences do exist between individual leases to reflect the specific circumstances under which Council enters into the lease.

Clause 14 in the former lease held between CASA and Council for the management of the MLFC may have been developed due to the age and condition of the spa and air-conditioning plant in 2004 and/or was an incentive for the Lessee to undertake capital investment into the Centre to support business growth.

RECOMMENDATIONS: (2)

DUE DATES

That Council:

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| 1. Council note this report | 28 April 15 |
| 2. That Council in accordance with Section 91(7) and (9) of the Local Government Act 1999 the Council orders that the report, 'Marion Leisure and Fitness Centre, Lease to CASA Leisure Pty Ltd' (Report Reference GC240215F02), its appendices and the Minutes arising from this report having been considered in confidence be kept confidential under Sections 90(2), (3)(b), (3)(i) and (3)(k) of the Act and not be available for public inspection for a period of 12 months from the date of this meeting or until such time as the tender process regarding the provision of future services and works in respect of the Centre is complete. This confidentiality order will be reviewed at the General Council Meeting in December 2015. | 28 April 15 |