



**Meeting:** Council

**Title:** Walkerville Sports Club Financials

**Responsible Manager:** Chief Executive Officer, Kiki Magro

**Author:** Group Manager Corporate Services, Katy Bone

**Key Focus Area 2:** Sustainable and resilient future, based on a sensitive and sensible approach to planning, heritage, economic development and the public realm

**Type of Report:** Decision Report

Item No: 16.2

File No: 16.51.1.3

Date: 17 September 2018

Attachment: A

Pursuant to Section 83(5) of the *Local Government Act 1999*, the Chief Executive Officer indicates that the matter contained in this report may, if the Council so determines, be considered in confidence pursuant to Section 90(2) of the *Local Government Act 1999* on the basis that the information contained in the attached report is information of the nature specified in subsections 90(3)(b) of the Act being commercial information of a confidential nature the disclosure of which could reasonably be expected to prejudice the commercial position of the person who supplied the information or that would confer a commercial advantage on a third party and that would, on balance, be contrary to the public interest.

### Recommendation (Public)

#### Pursuant to s90(3)(b)

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public, except Council's Chief Executive Officer Kiki Magro, Group Manager Corporate Services Katy Bone, Property and Contracts Officer Kate Arthur and Council Secretariat Jayde Hanna, are excluded from attendance at the meeting for Agenda Item Walkerville Sports Club Financials.

The Council is satisfied that, pursuant to section 90(3)(d) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is commercial information of a confidential nature (not being a trade secret) the disclosure of which could reasonably be expected to prejudice the commercial position of the person who supplied the information and on balance, be contrary to the public interest.

### Recommendation (Confidential)

That Council authorises Administration to:

1. serve notice on the Club to terminate the period tenancy, giving at least 6 months' notice; and
2. set a deadline for the new lease terms and new loan agreement to be agreed, failing which the matter will be brought back to Council for a decision on a "Plan B".

## Recommendation (Public)

### Pursuant to s.91(7)

That having considered Agenda Item Walkerville Sports Club Financials in confidence under section 90(2) and (3)(b) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that the report and attachments relevant to this Agenda Item be retained in confidence for a period of 12 months or the matter has been finalised, excepting that Council authorises the release of the minutes to substantive party/parties to enable enactment of the resolution and that pursuant to Section 91(9)(c) of the *Local Government Act 1999* the Council delegates to the Chief Executive Officer the review and power to revoke this Order

and

That Council resolves to end its confidential deliberations pursuant to Section 90(2) of the *Local Government Act 1999* and re-admit the public.

---

## Summary

The purpose of this report is to present Council with an update on the status to seek a resolution to the monies owed by the Walkerville Sports Club.

Mr Peter Psaltis, Principal, Norman Waterhouse will be in attendance to respond to any questions or queries that Council may have, with respect to his professional advice and matrix of options presented (Attachment A).

## Background

Council at its meeting held on 18 December 2017, noted that the Walkerville Sports Club has accumulated a debt that totals approximately \$31,000. The figure accounts for missed loan repayments, unpaid maintenance, insurance costs and lease fees.

At its ordinary meeting on 18 December 2017, Council resolved:

### **CNC192/17-18**

*That Council:*

1. *Receive and note the financial report provided by the Walkerville Sports Club for the years 2015/16 and 2016/17;*
2. *Having noted the information provided by the Walkerville Sports Club, delegate responsibility to the Mayor, Chief Executive Officer and the Property and Contracts Officer to schedule a meeting with the Walkerville Sports Club in the early 2018 to develop strategy to address the outstanding debt: and*
3. *That a report be presented back to Council outlining the proposed strategy to a future meeting.*

In line with Council's decision on 18 December 2017, a meeting was held on 23 January 2018 and included, the Mayor, Deputy Mayor, CEO, Property and Contracts Officer and the President of the Walkerville Sports Club.

At its meeting held on 19 February 2018, Council received a further update outlining the outcome of the meeting held on 23 January 2018. At that meeting Council resolved the following:

### **CNC253/17-18**

1. *That Council authorise Administration to engage legal services to assist in the drafting of a revised Community Facility Leasing Agreement that will;*
  - *enable Council to terminate the leasing agreement and potentially evict the Walkerville Sports Club in the event that the lease and loan repayments as scheduled by Administration are defaulted upon; and*
  - *request the Club to provide Council with the sub-lease structure and associated financial statements; and*
2. *That the revised (redrafted) Community Facility Leasing Agreement, as specified in item 1 above, be presented to Council at a future meeting for consideration and endorsement; and*
3. *That Administration take no further action in relation to lease negotiations with the Walkerville Sports Club until Council has received the proposed repayment plan from the Club and considered the revised Community Facility Leasing Agreement.*

On 23 February 2018 (after the Council meeting) Administration received an email from the Club President outlining their proposal to repay the monies owed. Essentially the proposal provides the following (extract from the email received):

*The WSC Board has agreed to the following;*

1. *Make an immediate payment of one outstanding lease payment (\$6,298)*
2. *Make additional payment towards debt outstanding of \$2,500 per annum for 2018-19 and beyond, subject to items 3 to 5 below.*
3. *WSC will notify Council should WSC be unable to make payment referred to in item 2 (above), due to unforeseen circumstances (e.g. replacement of equipment).*
4. *WSC will make additional payments, of no more than \$2,500 at any one time, should financial circumstances permit, such as profitable trading period resulting in surplus revenue.*
5. *Payment outlined in item 2 may be split into two \$1,250 payments made at six-monthly intervals during WSC financial year (1 April – 31 March).*

At its meeting held on 19 March 2018, Council received a further update outlining the response received from the Club. At this meeting Council acknowledged the email received from the Club on 23 February 2018 and Administration has:

- engaged James McEwan, Mellor Olsson to assist in the drafting of a revised Community Facility Leasing Agreement, in line with Council's instructions;
- emailed the Walkerville Sports Club requesting that they provide Council with the sub-lease structure and associated financial statements. At the time of writing this report, that information has yet to be received;
- written to the Club advising that their 'proposed repayment plan' is unacceptable and provided them with three repayment plan options for their consideration, in line with the Council resolution.

Since 23 March 2018 WSC have made a loan payment of \$6,298 receipted on 4 April 2018.

On 9 May 2018 Administration met with a representative from WCS to collect background and further details regarding the financial statements provided.

At its meeting held on 21 May 2018, Council received a further update outlining WSC's proposed payment plan. At that meeting Council resolved the following:

#### **CNC375/17-18**

*That Council authorises Administration to negotiate with WSC on the following terms:*

1. *accepts WSC proposal for a one-off payment of \$25,000 to Council, no debt to be waived;*
2. *agree to the proposed payment plan over a three-year period as set out in Table 1 in the body of this report, with payments due monthly or quarterly;*
3. *That the payment of the outstanding loan balance due on the 15 March 2020 will be remitted; and*
4. *That an independent financial consultant is engaged to assist with determining WSC and its associated entities ability to pay.*

On 4 June 2018 WSC was advised of Council's decision. WSC provided two responses on 14 and 15 June regarding the Council's decision. WSC advised that the once-off payment of \$25,000 is no longer on the table given that Council has not accepted the Club's proposal in full form.

On 4 June 2018 WSC made a loan payment of \$6,298. WSC has yet to make any payments for the outstanding debt or insurance nor reimburse Council for 2017/2018 annual elevator maintenance.

Administration has found it difficult to find a workable resolution with WSC. Each time a positive resolution has been presented that meet WSC requirements, WSC advises that they have changed their initial position.

A number of times WSC has promised that they would pay a lump sum to reduce their outstanding debt and each time this payment has not been forthcoming. This has then resulted in negotiations stalling as WSC continue to ask questions on operational matters that are not related to the outstanding debt or lease agreement.

At its meeting held on 20 August 2018, Council received a further update outlining WSC's proposed payment plan. At that meeting Council resolved the following:

#### **CNC74/18-19**

#### ***Recommendation (Confidential)***

1. *That Council requires Administration develop a strategy, which includes a communication plan, to issue WSC with a self-executing payment plan attached to a notice of intention to terminate tenancy under periodic lease conditions allowing a minimum of 6 months' notice which will be presented to Council at its next meeting;*
2. *That Council requires the WSC to acknowledge the outstanding amount of their loan and requests it be listed in their audited financial statements, and;*
3. *That Council demands the WSC provide Council with a copy of their Auditor's Report for financial year 17/18 as per the conditions of their lease.*

To assist with recommending a communication plan and options to pursue the outstanding debt, administration engaged Peter Psaltis from Norman Waterhouse.

#### **Discussion/Issues for Consideration**

#### **Terminating the lease and enter into new short term lease**

The lease agreement under common law principles classifies as a periodic tenancy, as a result of the absence of a holding over clause in the existing agreement. As a result under such classification Council has the ability to issue WSC notice of their intention to terminate the tenancy giving a minimum of sufficient notice.

If the Council serves a notice on WSC to terminate the period tenancy, WSC would be required to vacate the premises at the end of the notice period (minimum 6 months), at which point management

of the facility will fall to the Council. In order to secure a smooth transition, ideally, the Council would have a pre-determined idea about its preferred alternative management model so that Council administration can be giving effect to this in the lead-up to WSC vacating the premises.

Together with the termination of the period tenancy, Council should provide WSC with a new lease and loan agreement. A timeframe should be provided, potentially two months, for WSC and Council to agree. If this deadline is not met, then the Council should use the rest of the time available (four months if six months' notice is given to the end periodic tenancy).

Council should also consider a Plan B, in case WSC is not co-operative or is not agreeable to entering into a short term lease or licence on terms acceptable to the Council. This will provide the next steps that sets the Club a reasonable deadline to negotiate a new lease but the Club is still unresponsive or uncooperative, or if WSC decides it is all too difficult and decides to walk away.

### **Communication Strategy**

Council has considered agenda items concerning the dispute with WSC as confidential and has retained documents in confidence under *section 90(3)(d) of the Local Government Act*. Norman Waterhouse has provided advice that these papers and discussions should continue to remain in confidence (Attachment A).

Norman Waterhouse has provided a communication strategy to assist with when Council should communicate to WSC regarding outstanding debt and the new lease agreement (Attachment A). As part of the communication strategy it is important that Council consider separating the outstanding debt with that of the new lease negotiations. The reasoning here is that this will allow Council to pursue these matters separately without interference from each other.

The Council should then subsequently;

1. serve the written notice of intention to terminate the periodic tenancy on the Club in accordance with notice requirements under the existing lease (not less than 6 months, but perhaps longer); and
2. provide to the Club a new lease and new loan agreement and an express deadline for execution (e.g. 2 months).

It is important that before Council communicates or meets with WSC, Council determines a strategy including developing a "Plan B" should the negotiations fail with WSC to recover the outstanding debt or lease agreement.

No direct communication should occur with member clubs until the deadline of the execution of the new lease and new loan agreement has passed.

### **Options for Consideration**

**Option 1: Terminate the lease and enter into a new short-term lease or licence on commercial terms and a new loan agreement with linked default mechanisms.**

That Council authorises Administration to:

1. serve notice on the Club to terminate the period tenancy, giving at least 6 months' notice; and
2. set a deadline for the new lease terms and new loan agreement to be agreed, failing which the matter will be brought back to Council for a decision on a "Plan B".

**Option 2: Council will proceed to negotiate the terms of the lease renewal and payment plan with WSC**

That Council authorises Administration to negotiate with WSC on the following terms:

1. agree to the proposed payment plan over a three-year period, with payments due monthly or quarterly;
2. exercising the ability to propose a new agreement with WSC;
3. that the payment of the outstanding loan balance due on the 15 March 2020 is remitted.

### Analysis of Options

Efforts thus far by Administration have proven to be unsuccessful and outcomes of attempts to date have installed no confidence of there being a conclusion arrived at with WSC that is fair and reasonable. The continuation of tedious and seemingly ineffective negotiations only contribute to the negative relationship between Council and WSC and with the proposed commencement of the Walkerville Sporting Oval Master Plan being on the horizon, time constraints exist for Council to establish necessary trust and confidence within a management capable of operating a new facility.

The adoption of Option 1 will ultimately contribute to Council's long term plans for the site, whereas Option 2 is a mere bandaid approach to an ongoing, ever increasing hindrance, prohibiting growth and development.

Ultimately, if Council are to allow and condone the negotiations to continue in its current model, the decline of the facility and the optional forfeiting of potential opportunities will only continue to support and develop upon, what can be considered to be one of Council's ongoing negative contentions .

Taking into consideration the invitation of potential damage through negative community feedback, Council will need to ensure all actions with respect to termination are carried out strategically and vigilantly. Concise community engagement plans will need to be developed and administered with due caution by Council Administration, such as the required efforts and expertise of staff from various administrative departments. Council's support will be imperative during this phase as the Administration's ability to collaborate and bind forces will be unquestionably tested.

Should the WSC be forthcoming with payments owed it is important that Council continue to negotiate the new lease agreement.

### Financial Implications

There are clear financial implications should the debt repayment not be forthcoming.

	Owing Total
Lease Fees	887.28
Outgoings ( <i>Insurance, servicing lift etc.</i> )	16,145.04
Loan Repayments	12,597.84
Balloon loan due 15 March 2020	57,489.58
<b>Total</b>	<b>87,119.74</b>

### Community Implications

There is no requirement to consult the broader community.

### Governance Implications

There are no known governance implications.

### Preferred Option & Reasoning

Option 1 is the preferred option. Administration is of the view that we have gone as far as we can in trying to reach resolution of the outstanding matters with the WSC. This matter has been going on for

a number of years and WSC have not provided Administration with any confidence that they intend to repay all monies outstanding.

**Attachment/s**

Attachment A	Norman Waterhouse paper
--------------	-------------------------

Released



By Email: KArthur@walkerville.sa.gov.au  
Ref: PSP\M00292856F05440067.DOCX

12 September 2018

Ms K Arthur  
Property & Contracts Officer  
The Corporation of the Town of Walkerville  
PO Box 55  
WALKERVILLE SA 5081

**PRIVATE AND CONFIDENTIAL  
SUBJECT TO LEGAL PROFESSIONAL PRIVILEGE**

Dear Ms Arthur

**Walkerville Oval – Walkerville Sports Club Inc – lease negotiations and dispute**

**1. INTRODUCTION**

- 1.1 There is a longstanding dispute concerning an inadequate lease arrangement in the form of a periodic tenancy of Walkerville Sports Club (**Club**) at Walkerville Oval complex (**Oval**) and the default of the Club in loan repayments to the Town of Walkerville (**Council**).
- 1.2 On 20 August 2018 Council resolved to end the Club's periodic tenancy and seek a new lease with self executing loan repayment plan with the Club and sought presentation by Council administration of a strategy and communications plan to achieve this outcome.
- 1.3 Council administration engaged Norman Waterhouse Lawyers to assist in developing the strategy and communications plan detailed in this report.

**2. BACKGROUND**

- 2.1 Our advice is based on the following background instructions.
- 2.2 The Club overarches four other clubs based at the Oval including the:
  - 2.2.1 Walkerville Senior Football Club;
  - 2.2.2 Walkerville Junior Football Club;
  - 2.2.3 Walkerville Cricket Club; and
  - 2.2.4 Walkerville Softball Club.



- 2.3 The Club is the lessee under a lease renewal dated 6 October 2000 (for which the term of extension expired on 31 December 2004), and now maintains a periodic tenancy in respect of the Oval.
- 2.4 Council obtained a loan from the Local Government Finance Authority (**LGFA**) on 8 March 2005 pursuant to Debenture 70 for the purposes of upgrading premises at the Oval.
- 2.5 An undated letter from the Club to the Council, presumably shortly after the Council secured the loan from the LGFA, shows agreement from the Club to contribute towards the Council loan and to repay Council (\$140,000) over a set repayment period and at an established interest rate (**Club Loan**).
- 2.6 The Club Loan repayment was offset against the rent otherwise payable by the Club under the lease. In effect, the Club was required to pay off the Club Loan in lieu of rent.
- 2.7 Since 2016, the Club has defaulted on the Club Loan repayments, and other repayments including outgoings, and has not rectified these defaults.
- 2.8 A benchmarking exercise undertaken by Council administration in 2010 revealed that the terms of the lease were already outdated, not commercially favourable to Council and did not represent the standard observed for similar community land leases in other councils. That situation is likely to be more prominent now in 2018.
- 2.9 Since 2009, Council has negotiated with the Club on and off with regard to a new lease agreement. At least 3 draft leases have been prepared during that period. More recently, since around 2016, the Council has negotiated with the Club to attempt to resolve the dispute, but the parties have been unable to resolve the dispute and Club Loan repayments remain in arrears.
- 2.10 Council intends to undertake a master planning exercise for redevelopment of the Oval in the coming years.

### 3. COUNCIL OBJECTIVES IN RESOLUTION OF DISPUTE

We are also instructed that the following objectives (listed in no particular order of priority) are relevant to the resolution of this dispute:

- 3.1 recovery of the debt owing by the Club to Council;
- 3.2 Council's maintenance of leases with lessees on terms consistent with the current market;
- 3.3 effective management of the Oval;
- 3.4 reduction of Council's future debt exposure and reduction of Council resources to manage difficult lessees;
- 3.5 continued community use of the Oval consistent with Community Land Management Plan 2 – Walkerville Oval Precinct (adopted 16 December 2016) (**CLMP**).

#### 4. OVERVIEW OF COMMUNITY LAND MANAGEMENT PLAN - 2

- 4.1 It is relevant for the Council to understand the terms of the CLMP, which impact upon the strategic direction and process that the Council adopts in relation to the Oval in order to resolve the dispute.
- 4.2 The CLMP outlines that the Oval be utilised for the purpose of providing to the local community:
- 4.2.1 contemporary and well maintained open spaces that will encourage community use; and
  - 4.2.2 sporting, recreational and community facilities and improvement for the use and benefit of the community.

Under the CLMP, any business purpose that is complementary, ancillary or consistent with this above stated purpose may be approved by Council.

- 4.3 Relevantly the CLMP sets the following performance target:

*"in respect of the utilisation of the land and improvements, to ensure that the land and its improvement are appropriately utilised by the grant of leases, licences and permits"*

On this basis the CLMP arguably anticipates the grant of leases per se, albeit this is only referenced expressly in relation to a performance target.

#### 5. OPTIONS TO RESOLVE DISPUTE

- 5.1 Attached is a matrix of the four main options available to Council to resolve the dispute. However, not all benefits and costs listed have equal weighting and the selection of an option is largely a commercial and political consideration for Council.
- 5.2 Option 2 is the Council's preferred option, having regard to its 20 August 2018 resolution. **(SEE APPENDIX A)**

#### 6. COMMUNICATIONS STRATEGY

- 6.1 The following strategy is proposed to guide Council's future communications with the Club in relation to the dispute:
- 6.1.1 Further communications with the Club should only occur when Council has determined its full strategy (which includes a Plan B).
  - 6.1.2 Then Council Administration should meet with the Club to notify the Club of future action required of the Club and the Council's reasons for such action (with reference to overarching objectives where relevant), so as to maintain a positive relationship with the Club and community, and Club's continued use of Oval, as far as possible.
  - 6.1.3 Assuming that Option 2 remains the preferred option, the Council should then subsequently:

- 6.1.3.1 serve the written notice of intention to terminate the periodic tenancy on the Club in accordance with notice requirements under the existing lease (not less than 6 months, but perhaps longer); and
    - 6.1.3.2 provide to the Club a new lease and new loan agreement and an express deadline for execution (e.g. 2 months).
  - 6.1.4 No direct communication should occur with member clubs until the deadline for the execution of the new lease and new loan agreement has passed.
- 6.2 The following strategy is proposed to guide Council's treatment of Council meetings and documents pertaining to the dispute:
  - 6.2.1 To date Council has considered agenda items concerning the dispute in confidence and has retained documents in confidence under section 90(3)(d) of the LG Act.
  - 6.2.2 It is generally appropriate to consider and retain matters in relation to this dispute, and its resolution, in confidence for the following reasons (as applicable to the particular factual scenario):
    - 6.2.2.1 Section 90(3)(b)
      - (a) a commercial advantage to the Club or prejudice to the Council in the Club having access to the details of the Council's commercial position and tactics in how the Council may resolve the dispute and/or negotiate of a future new lease or new loan agreement with the Club. This could result in Council realising a lesser commercial rate in any such deal and/or ratepayers bearing all or part of the Club Loan and this would be contrary to the public interest. This would outweigh the general public interest in public access to such information.
      - (b) a commercial advantage to a third party or prejudice to the Council in the negotiation of a future new lease or management agreement for the Oval with that third party. This could result in Council realising a lesser commercial rate in any such deal if Council's commercial position and tactics are known and this would be contrary to the public interest in Council obtaining the best return to stop ratepayers bearing all or part of the Club Loan. This would outweigh the general public interest in public access to such information.
    - 6.2.2.2 Section 90(3)(d)
      - (a) prejudice the commercial position the Club or conferral of an advantage to a third party seeking to be a future lessee or management body, in any such future dealings where the Club may be in commercial competition with a third party to be the future lessee or management body of the Oval. This would be contrary to the public interest as it may discourage other groups from wanting to deal with the Council if during

commercial negotiations the sensitive commercial position of such groups is released to competitors.

6.2.2.3 Section 90(3)(h)

- (a) maintenance of legal professional privilege in Council's legal advice from Wallmans Lawyers, Mellor Olsson Lawyers and Norman Waterhouse Lawyers. To date Council has received much legal advice from multiple firms. Council is not obliged to waive privilege in such advice nor is it recommended that this occur. Council is not obliged to waive privilege in its legal advice. It is important for Council to understand that such waiver would occur if Council released any information containing a copy of that legal advice (such as this document) or the paraphrasing of the legal advice. This does not require a public interest test.

6.2.2.4 Section 90(3)(i)

- (a) information relating to litigation the Council believes on reasonable grounds will take place involving the Council and the Club concerning the lease and/or loan defaults and/or breaches of such. As such defaults exist and the Council has taken legal advice on its options in relation to the defaults, and that advice includes taking litigation against the Club, these would be reasonable grounds for Council to believe that such litigation will take place if the Club Loan is not repaid. This does not require a public interest test.

6.2.2.5 Section 90(3)(k)

- (a) future tenders for the provision of services by way of a management contract for the Oval. This does not require a public interest test.

6.2.3 As a matter of law, any orders under section 90(2) and section 91(7) of the LG Act will need to take into account the particular content of the item and/or documents being considered and whether such orders are appropriate in the circumstances and therefore compliant with the LG Act. However, it appears likely that there may at any one time be multiple reasons for which confidentiality orders may be made under s90(3) given the breadth of issues relating to this dispute. It is recommended that where multiple reasons apply to the particular content of the item and/or documents being considered, that Council make a confidentiality order(s) under each s90(3) so applicable. Council may also seek legal advice on the legality of any specific proposed confidentiality order to address any outstanding concerns before making such an order.

6.2.4 It is appropriate for information that would harm Council's negotiating position on the commercial negotiations with the Club to be retained in confidence until such time as the negotiations have ended, litigation is no longer a threat and/or all defaults have been made good.

6.3 There may be instances where the other documents concerning this dispute as distributed by the CEO to Elected Member should also be confidential:

- 6.3.1 For the reasons stated above, information relating to this dispute, its resolution and future interests in the Oval should be maintained in confidence whether an item on the agenda of a Council meeting or not;
- 6.3.2 Any such information provided by the CEO to Elected Members under section 61 of the LG Act should contain an indication from the CEO that the information contained therein is confidential; and
- 6.3.3 Notwithstanding this, Elected Members should continue to treat such information as confidential given the general duties of Elected Members under section 62(3) and section 62(4a) of the LG Act – which attract a maximum penalty of \$10,000 or two years imprisonment.

## 7. RECOMMENDATION

- 7.1 Council should consider agenda items concerning the dispute individually on their own merits for the purpose of confidentiality orders (as applicable).
- 7.2 The CEO and Elected Members should treat other information relating to the dispute as confidential (as applicable).
- 7.3 After considering the options and advice, assuming the Council is in agreement with the recommendation it should resolve to proceed with Option 2 in **Appendix A**. More particularly, it should resolve to:
  - 7.3.1 give notice to the Club that the periodic tenancy is terminated and requiring that the Club vacate the premises at the end of the notice period (which should be not less than 6 months and not more than 12 months) unless a new agreement on acceptable terms is reached in the meantime;
  - 7.3.2 advise the Club that the Council is prepared to enter into a short term agreement involving a lease and loan agreement, which agreement must be in place by a defined “sunset date” otherwise the Council will cease negotiating with the Club and will require the Club to vacate the premises at the end of the notice period.
- 7.4 Concurrently, the Council may consider and determine a “Plan B” to be employed if Option 2 fails.
  - 7.4.1 Alternatively, if the Council doesn’t want to consider a Plan B at this stage, it should do so at the expiry of the negotiation period (as specified at 7.3.2 above) and if a new lease and loan agreement has not been agreed by the sunset date.
- 7.5 The Council should obtain a market valuation for the lease of the Oval (if considered necessary).

- 7.6 The Council should finalise the preparation of a new lease and new loan agreement with the Club consistent with Option 2 and this advice.

Yours faithfully  
Norman Waterhouse



Rebecca McAulay  
Principal  
Direct Line: (08) 8210 1278  
e-mail: [rmcaulay@normans.com.au](mailto:rmcaulay@normans.com.au)

Yours faithfully  
Norman Waterhouse



Peter Psaltis  
Principal  
Direct Line: (08) 8210 1297  
e-mail: [ppsaltis@normans.com.au](mailto:ppsaltis@normans.com.au)

Encl: Options table / risk matrix

Released

## APPENDIX A

No.	OPTION	LEGISLATIVE REFERENCE	RISK ANALYSIS*	PROFESSIONAL OPINION	RECOMMENDATION
1	Maintain the status quo on the lease and loan arrangement.	<p><b><u>Local Government Act 1999</u></b> (LG Act) <b>Sections 6, 7 and 8</b></p> <p>Sections 6 and 7 outline the role and functions of the Council respectively.</p> <p>Section 8 outlines the principles that must be observed by the Council in performing its role and in exercising its functions.</p> <p>Relevantly, the Council must provide open, responsive and accountable government, and it must use its resources and maintain public assets in a fair, efficient and financially sustainable manner. These principles have direct application to management of public sporting and recreation facilities.</p> <p><b>Section 49</b></p> <p>Section 49 of LG Act requires Council to prepare and adopt a policy on the “sale and disposal of land or other assets”.</p> <p>That policy takes the form of Council’s Disposal of Land and Assets Policy (last reviewed 19 March 2017) (<b>Policy</b>) (Annexure A). That Policy contains the processes for Council’s disposal of land, which we interpret as</p>	<p>Socio-Political &amp; Community Issues:</p> <p><b>Insignificant</b></p>	<p>The factors relevant to the insignificant risk socio-political and community analysis are that the political backlash from the Club is likely to be low because the status quo is maintained and the debts are not recovered, or are recovered according to the timeframe set by the Club.</p>	This option is not recommended as it does not resolve the matter, and would arguably involve the Council being in breach of its obligations under the LG Act.
			<p>Business Impact:</p> <p><b>Major</b></p>	<p>The factors relevant to the major business risk analysis include that:</p> <ul style="list-style-type: none"> <li>the Lease is not on commercial terms so Council loses the opportunity to recover commercial rent;</li> <li>there is a likelihood that defaults under the lease and loan agreement will continue and that the Club Loan will not be repaid, resulting in Council not recovering these funds;</li> <li>there will likely be additional financial and resource costs to Council associated with an attempt by Council to recover the Club debt to the Council. The financial cost associated with non-repayment of the new loan is \$50k-\$100k. This option may simply delay resolution of the dispute to a future date, thereby further perpetuating Council’s financial and resource costs associated with resolution of the dispute;</li> <li>the current holding over situation is arguably in breach of sections 6,7 and 8 of the LG Act in that the Council is not managing the facility in an efficient, transparent or financially responsible manner;</li> <li>the current situation is arguably also in breach of section 202 of the LG Act in that the Club has been an ongoing tenant for a period far in excess of 5 years without public consultation as required under section 202.</li> </ul>	



APPENDIX A

No.	OPTION	LEGISLATIVE REFERENCE	RISK ANALYSIS*	PROFESSIONAL OPINION	RECOMMENDATION
		<p>having application to Council's disposal of leasehold interests in the Oval.</p> <p>The Policy will apply to any future lease concerning the Oval in the following manner:</p> <ol style="list-style-type: none"><li>1. Council will generally need to follow the processes contained in clause 5 of the Policy in relation to the disposal of any future leasehold interest.</li><li>2. This Policy will apply to any new lease with the Club, so Council will first need to consider whether a direct negotiation with the Club as a "person with a pre-existing interest in the Oval" is the appropriate approach under the Policy given the considerations Council must take into account under clause 5.6 and clause 5.7 regarding the method of disposal. If Council proceeds with direct negotiation then it must comply with clause 6.1 by keeping a written record of the reasons for adopting such an approach in accordance with Council's Records Management Policy.</li><li>3. Pursuant to clause 5.8 and clause 5.9, disposal of land by sale under EOI, open tender, select tender or direct negotiation requires Council to obtain an independent valuation(s) no later than six months before the date of any "contact for sale" entered into in respect of land. This matter does not expressly concern the "sale" of land, so a current</li></ol>	<p>Public Safety:</p> <p>Insignificant</p>	<p>Public safety factors are currently unknown.</p>	

No.	OPTION	LEGISLATIVE REFERENCE	RISK ANALYSIS*	PROFESSIONAL OPINION	RECOMMENDATION
		<p>market valuation is not absolutely necessary. Clause 5.10 provides that Council will “endeavour” to dispose of land “<i>at or above current market valuation unless there are reasons for Council to accept a lesser price which are consistent with Council’s overall strategic objectives for the land or generally. In those circumstances, Council must record those reasons in writing.</i>” Therefore, it is open to Council to obtain a valuation to assist in discharging its obligations under clause 5.10, but again this is not absolutely necessary or typical in relation to community land leases.</p> <p><b>Section 202</b></p> <p>Section 202 provides that in respect of community land:</p> <ol style="list-style-type: none"><li>1. Council can grant a lease; and</li><li>2. Council is not required to comply with its public consultation policy for a lease term of five years or less, if the relevant community land management plan authorises the grant of the lease; and</li><li>3. the lease (including any extension) cannot exceed 42 years.</li></ol> <p>As established above, it is our view that the CLMP authorises the grant of a lease over the Oval. This means the Council is able to lease the Oval, provided it follows the requisite process (if any) applicable as triggered by the term</p>			

## APPENDIX A

No.	OPTION	LEGISLATIVE REFERENCE	RISK ANALYSIS*	PROFESSIONAL OPINION	RECOMMENDATION
		<p>of that lease.</p> <p><b><u>Retail and Commercial Leases Act 1995 (RCLA)</u></b></p> <p>Unless there is an application for exclusion, the RCLA would apply to any future lease or licence – given the use involves the sale of goods by retail and/or the supply of services.</p> <p>This has implications that would need to be considered during negotiations and preparation of any new lease or licence agreement, including:</p> <ul style="list-style-type: none"> <li>• restrictions on obligations for a tenant to make or reimburse capital expenditure;</li> <li>• minimum five year term (unless exemption sought);</li> <li>• obligation to serve disclosure statement and proposed lease on tenant;</li> <li>• implied warranty of fitness for purpose (unless excluded);</li> <li>• requirement on the Council to provide estimate of outgoings.</li> </ul> <p>An application for exclusion of the RCLA may be made in certain circumstances, and should be considered if the Club or new tenant proposed to make capital improvements.</p>			
2	<b>Terminate the lease and enter into a new short-term lease or licence on commercial terms and a new loan agreement with linked default mechanisms</b>	As above	<p>Socio-Political &amp; Community Issues:</p> <p><b>Moderate</b></p>	<p>The factors relevant to the moderate socio-political and community risk analysis include:</p> <ul style="list-style-type: none"> <li>• there will be financial implications for the Club associated with increased payments to the Council under a new lease and loan agreement;</li> <li>• the Club may be incapable of making payments under the new lease and loan agreement and may result in further defaults;</li> <li>• there is likely to be political backlash from the Club;</li> <li>• public consultation is unlikely to be required if the lease is short-term.</li> </ul>	<p><b>This is the recommended option.</b></p> <p>This option resolves non-compliance by the Council under the LG Act.</p> <p>Under the RCLA, a short term lease or licence with the Club may be less than 5 years, given that the Club has been in occupation for more than 5 years already. Whereas a new lease or licence agreement with the individual clubs would need to be 5 years unless an exemption is obtained.</p> <p>It also provides an interim solution until such time as the Oval Precinct master planning exercise is complete, at which time the Council may wish to consider entering into a longer term agreement with the Club (assuming it can clear any debt and demonstrate better fiscal and management practices) or, failing</p>

## APPENDIX A

No.	OPTION	LEGISLATIVE REFERENCE	RISK ANALYSIS*	PROFESSIONAL OPINION	RECOMMENDATION
			<p>Business Impact:</p> <p><b>Moderate</b></p>	<p>The factors relevant to the moderate business risk analysis include:</p> <ul style="list-style-type: none"> <li>that it is possible that new defaults will occur under the new lease agreement and new loan agreement if the Club is incapable of payments. This would result in the Club being in breach of the new lease which will lead to further pressure on the Council to evict the Club and assume management of the facility;</li> <li>there will likely be additional financial and resource costs to Council associated with preparation and management of the new lease and loan and an attempt by Council to recover the Club debt to the Council. The financial cost associated with these risks is \$20k-\$50k associated with future non-payment of the new loan.</li> </ul>	<p>that, an alternative management model.</p> <p>Ideally, concurrently with any decision to proceed with this Option 2, the Council should also consider "Plan B", in case the Club is not co-operative or is not agreeable to entering into a short term lease or licence on terms acceptable to the Council. In other words, what is the Council's plan if it sets the Club a reasonable deadline to negotiate a new lease but the Club is still unresponsive or uncooperative, or if the Club decides it is all too difficult and decides to walk away?</p> <p>In this scenario, if the Council has served notice on the Club to terminate the period tenancy, the Club would be required to vacate the premises at the end of the notice period (minimum 6 months), at which point management of the facility will fall to the Council. In order to secure a smooth transition, ideally, the Council would have a pre-determined idea about its preferred alternative management model so that Council administration can be giving effect to this in the lead-up to the Club vacating the premises.</p>
			<p>Public Safety:</p> <p><b>Insignificant</b></p>	<p>Public safety factors are currently unknown.</p>	<p>Developing a "Plan B" will also enable there to be clear and unambiguous communication with the Club (save to extent of any confidentiality orders) about the consequences if new lease terms cannot be agreed, which should provide the Council with leverage (which leverage has been apparently lacking in previous lease negotiations with the Club, extending back since 2007).</p> <p>Alternatively, if the Council does not wish to develop a "Plan B" at this stage, the Council should:</p> <ol style="list-style-type: none"> <li>serve notice on the Club to terminate the period tenancy, giving at least 6 months notice; and</li> <li>set a deadline for the new lease terms and new loan agreement to be agreed, failing which the matter will be brought back to Council for a decision on a "Plan B".</li> </ol> <p>Council can link a new lease with a new loan agreement and should consider seeking the addition of the following terms:</p> <ol style="list-style-type: none"> <li>reciprocal default mechanisms in both the lease and the loan agreement, triggering the ability for Council to terminate each and for Council to then seek repayment of the unpaid Club Loan in full;</li> <li>special conditions in the lease to acknowledge the: <ol style="list-style-type: none"> <li>outstanding amount of the Club Loan, letters agreeing the Club Loan, frequency of proposed instalments and the purpose of the Club Loan;</li> <li>Club as an entity that has been in occupation of the Oval for in excess of five years already; and</li> </ol> </li> </ol>

## APPENDIX A

No.	OPTION	LEGISLATIVE REFERENCE	RISK ANALYSIS*	PROFESSIONAL OPINION	RECOMMENDATION
					<p>3. reference in the disclosure statement for the lease (under the <i>Retail and Commercial Leases Act 1995</i>) to other money forming part of the lease arrangement by virtue of the Club Loan repayments</p> <p>Council should provide a timeframe (potentially two months) for the Club and Council to agree the new lease and new loan agreement. If this deadline is not met, then the Council should use the rest of the time available (four months if six months notice is given to the end periodic tenancy, or this time can be extended if more than 6 months notice is given) to focus on the implementation of the Plan B to ensure continuity of utilisation of the Oval consistent with the intent of the CLMP.</p> <p>If this eventuates, then Council should consider whether it should commence legal action to recover any debt from the Club.</p>
3	Terminate the lease and enter into a new lease on commercial terms at an increased rent to recover outstanding Club Loan repayments informally	As above	<p>Socio-Political &amp; Community Issues:</p> <p><b>Moderate</b></p>	<p>The factors relevant to the moderate socio-political and community risk analysis include:</p> <ul style="list-style-type: none"> <li>there will be financial implications for the Club associated with increased payments to the Council under a new lease and loan agreement;</li> <li>the Club may be incapable of making payments under the new lease and loan agreement and this may result in further defaults;</li> <li>there is likely to be political backlash from the Club;</li> <li>public consultation is unlikely to be required if the lease is short-term.</li> </ul>	<p>This option is recommended if Option 2 is not actioned.</p> <p>It is similar to Option 2. Instead of a lease linked to a parallel loan agreement, the two agreements are effectively rolled into one agreement terms (i.e. in effect defaulting back to the arrangement prior to the loan agreement being negotiated in 2005).</p> <p>If the Council would prefer to pursue this option, a valuation may be required to substantiate the value of the lease payments.</p>
			<p>Business Impact:</p> <p><b>Moderate</b></p>	<p>The factors relevant to the moderate business risk analysis include:</p> <ul style="list-style-type: none"> <li>it is possible that new defaults will occur under a new lease if the Club is incapable of payments. This would result in the Club being in breach of the new lease which will lead to further pressure on the Council to evict the Club and assume management of the facility;</li> <li>there will likely be additional financial and resource costs to Council associated with preparation and management of a new lease and an attempt by Council to recover the Club debt to the Council. The financial cost associated with these risks is \$20k-\$50k.</li> </ul>	

## APPENDIX A

No.	OPTION	LEGISLATIVE REFERENCE	RISK ANALYSIS*	PROFESSIONAL OPINION	RECOMMENDATION
			Public Safety: <b>Insignificant</b>	Public safety factors are currently unknown.	
4	<b>Terminate the lease and consider options for alternative Lessee or management model</b>	As above	Socio-Political & Community Issues: <b>Major</b>	<p>The factors relevant to the major socio-political and communities risk analysis include:</p> <ul style="list-style-type: none"> <li>significant change from the current arrangement will threaten the Club's continued control and existence.</li> <li>this is likely to result in harm to Council's relationship with the Club and result in political backlash from the Club.</li> </ul>	<p>We recommend this if Option 2 is implemented but fails. In other words, Option 4 is recommended as the Council's "Plan B" (referred to above)</p> <p>The potential sub-options of Option 4 include:</p> <ol style="list-style-type: none"> <li>An EOI for a lessee and/or management of the Oval; or</li> <li>Council management of the Oval via a section 41 committee or direct management by the Council</li> </ol>
			Business Impact: <b>Major</b>	<p>The factors relevant to the medium business risk analysis include:</p> <ul style="list-style-type: none"> <li>the potential inability of the Council to recover the full amount on Club Loan (approximately \$87,000). This would be an unfair result for ratepayers if Council bears Club Loan.</li> </ul>	<p>The socio-political &amp; community risk profile for each sub-option is likely to be major given the likely political backlash from the Club and loss of income streams for the Club and risk to occupation at the Oval.</p> <p>The business risk profile for each sub-option is likely to be major given that the loan (approximately \$87K) may not be recovered.</p>
			Public Safety: <b>Insignificant</b>	Public safety factors are currently unknown.	<p>The timing of this option would also need to be considered in light of the Oval Precinct Masterplan. It may be more appropriate to consider an EOI process or a section 41 committee <b>after</b> the master planning exercise is complete i.e. when the Council is clearer about its medium to longer term vision for the precinct and facilities.</p> <p>In the meantime, until the master plan is complete, the Council may choose to manage the facility itself via individual short-term occupancy agreements with each of the sporting clubs.</p>

\*Risk Analysis against Council's Risk Analysis Matrix provided by Council Administration