



## Surrender of Lease

Approved form 2017-82745 Reg 3 of the Transfer of Land Regulations 2004

The information in this form is collected under statutory authority and used for the purpose of maintaining publicly searchable registers and indexes.

### Jurisdiction

State of Western Australia

### Legislation

Transfer of Land Act 1893

### Lodging party details

Name McLeods, Barristers and Solicitors  
Address 220 Stirling Hwy  
CLAREMONT WA 6010  
Issuing box 346K  
Phone 0893833133  
Fax 089383 4935  
Email mcleods@mcleods.com.au  
Reference 48259 Cott - Surrender of Lease

### Preparer details

Name Trudi Firth  
Phone +61 8 9383 3133  
Reference 48259 Cott - Surrender of Lease

### Land / Interest

Title(volume-folio)	Extent	Land description	Interest
2704-97	Whole	LOT 555 ON DEPOSITED PLAN 62538	LEASE K909030

### Lessee(s)

CURTIN HERITAGE LIVING INC. (ABN 92393012622) OF 40 MARINE PARADE COTTESLOE WA 6011

### Lessor(s)

TOWN OF CLAREMONT (GPR L115) OF 308 STIRLING HIGHWAY, CLAREMONT  
TOWN OF COTTESLOE (GPR L116) OF 109 BROOME STREET, COTTESLOE  
TOWN OF MOSMAN PARK (GPR L121) OF POST OFFICE BOX 3, MOSMAN PARK  
SHIRE OF PEPPERMINT GROVE (GPR L123) OF 1 LEAKE STREET, PEPPERMINT GROVE

### Operative words

The lessee(s) as registered proprietor(s) of the above lease(s) hereby surrender the lease(s) over the land described above.

### Execution date

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Lessee(s) execution

Executed by CURTIN HERITAGE LIVING INC. (ABN  
92393012622)

Signature \_\_\_\_\_

Signer name \_\_\_\_\_

Signer designation **DIRECTOR** \_\_\_\_\_

Signature \_\_\_\_\_

Signer name \_\_\_\_\_

Signer designation **MANAGING DIRECTOR &  
COMPANY SECRETARY** \_\_\_\_\_

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Lessor(s) execution

The common seal of TOWN OF CLAREMONT (GPR L115) was hereunto affixed in the presence of

Common Seal

Signature \_\_\_\_\_  
Signer name \_\_\_\_\_  
Signer designation MAYOR

Signature \_\_\_\_\_  
Signer name \_\_\_\_\_  
Signer designation CHIEF EXECUTIVE OFFICER

The common seal of TOWN OF COTTESLOE (GPR L116) was hereunto affixed in the presence of

Common Seal

Signature \_\_\_\_\_  
Signer name \_\_\_\_\_  
Signer designation MAYOR

Signature \_\_\_\_\_  
Signer name \_\_\_\_\_  
Signer designation CHIEF EXECUTIVE OFFICER

The common seal of TOWN OF MOSMAN PARK (GPR L121) was hereunto affixed in the presence of

Common Seal

Signature \_\_\_\_\_  
Signer name \_\_\_\_\_  
Signer designation MAYOR

Signature \_\_\_\_\_  
Signer name \_\_\_\_\_  
Signer designation CHIEF EXECUTIVE OFFICER

Executed by SHIRE OF PEPPERMINT GROVE (GPR  
L123)

Signature \_\_\_\_\_  
Signer name \_\_\_\_\_  
Signer designation PRESIDENT

Signature \_\_\_\_\_  
Signer name \_\_\_\_\_  
Signer designation CHIEF EXECUTIVE OFFICER



## Lease

Approved form 2017-82730 Reg 3 of the Transfer of Land Regulations 2004

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### Jurisdiction

State of Western Australia

### Legislation

Transfer of Land Act 1893

### Lodging party details

Name McLeods, Barristers and Solicitors  
Address 220 Stirling Hwy  
CLAREMONT WA 6010  
Issuing box 346K  
Phone 0893833133  
Fax 089383 4935  
Email mcleods@mcleods.com.au  
Reference 48259 COTT

### Preparer details

Name Trudi Firth  
Phone +61 8 9383 3133  
Reference 48259 COTT

### Land / Interest

Title(volume-folio)	Extent	Land description	Interest
2704-97	Whole	LOT 555 ON DEPOSITED PLAN 62538	FEE SIMPLE

### Lessor(s)

TOWN OF CLAREMONT (GPR L115) OF 308 STIRLING HIGHWAY, CLAREMONT  
TOWN OF COTTESLOE (GPR L116) OF 109 BROOME STREET, COTTESLOE  
TOWN OF MOSMAN PARK (GPR L121) OF POST OFFICE BOX 3, MOSMAN PARK  
SHIRE OF PEPPERMINT GROVE (GPR L123) OF 1 LEAKE STREET, PEPPERMINT GROVE

### Lessee(s)

CURTIN HERITAGE LIVING INC. (ABN 92393012622) OF 40 MARINE PARADE, COTTESLOE, WA 6011

### Terms and conditions

Commencement  
Duration 25 years 0 months 0 days  
Option to renew No

### Operative words

The lessor(s) hereby leases to the lessee(s) the land described above in the terms and conditions set out or referred to in this lease subject to the limitations, interests, encumbrances and notifications as shown on the certificate of title and/or otherwise affect the land under the legislation stated above.

### Execution date

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Lessor(s) execution

The common seal of TOWN OF CLAREMONT (GPR L115) was hereunto affixed in the presence of

Common Seal

Signature \_\_\_\_\_  
Signer name \_\_\_\_\_  
Signer designation MAYOR

Signature \_\_\_\_\_  
Signer name \_\_\_\_\_  
Signer designation CHIEF EXECUTIVE OFFICER

The common seal of TOWN OF COTTESLOE (GPR L116) was hereunto affixed in the presence of

Common Seal

Signature \_\_\_\_\_  
Signer name \_\_\_\_\_  
Signer designation MAYOR

Signature \_\_\_\_\_  
Signer name \_\_\_\_\_  
Signer designation CHIEF EXECUTIVE OFFICER

The common seal of TOWN OF MOSMAN PARK (GPR L121) was hereunto affixed in the presence of

Common Seal

Signature \_\_\_\_\_  
Signer name \_\_\_\_\_  
Signer designation MAYOR

Signature \_\_\_\_\_  
Signer name \_\_\_\_\_  
Signer designation CHIEF EXECUTIVE OFFICER

The common seal of SHIRE OF PEPPERMINT GROVE (GPR L123) was hereunto affixed in the presence of

Common Seal

Signature \_\_\_\_\_  
Signer name \_\_\_\_\_  
Signer designation PRESIDENT

Signature \_\_\_\_\_  
Signer name \_\_\_\_\_  
Signer designation CHIEF EXECUTIVE OFFICER

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Lessee(s) execution

Executed by CURTIN HERITAGE LIVING INC. (ABN 92393012622)

Signature \_\_\_\_\_  
Signer name \_\_\_\_\_  
Signer designation DIRECTOR

Signature \_\_\_\_\_  
Signer name \_\_\_\_\_  
Signer designation MANAGING DIRECTOR & COMPANY SECRETARY

**ADMINISTRATION****10.1.4 CURTIN CARE INC. – PROPOSAL FOR NEW 25 YEAR LEASE - LOT 555 COTTESLOE ('WEARNE COTTESLOE')**

**File Ref:** SUB/983  
**Attachments:** [Attachment 1 CONFIDENTIAL CAPH Working Group Meeting Notes 27 January 2016](#)  
[Attachment 2 CONFIDENTIAL Draft Agreement to Lease](#)  
[Attachment 3 CONFIDENTIAL Draft Lease](#)  
**Responsible Officer:** Mat Humfrey  
Chief Executive Officer  
**Author:** Mat Humfrey  
Chief Executive Officer  
**Proposed Meeting Date:** 26 April 2016  
**Author Disclosure of Interest:** Nil

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**SUMMARY**

At the Council meeting of 2 November 2015, Council supported a new 25 year lease being granted to Curtin Care Inc. for Lot 555 Cottesloe (Wearne Cottesloe) for the purposes of the provision of care, accommodation and residential facilities for aged persons and all activities relating to the provision of such care, accommodation and residential facilities on a not for profit basis, and authorised the preparation of documentation.

This report presents the Agreement to Lease and new Lease for approval

**BACKGROUND**

Since the early 1980's Curtin Aged Person's Home Inc. (or CAPH), now trading as Curtin Care, has used the Wearne Site to provide care and accommodation services for aged persons. It now provides accommodation and care for 88 people, mainly with high care needs.

Prior to being owned by the four local governments (Claremont, Cottesloe, Mosman Park and Peppermint Grove), the site was owned by the WA State Government, and administered by the Fremantle Hospital Board. In 1999, work began on having the site transferred to the four local governments, however the site didn't settle until 2009.

A Co-Ownership Agreement was signed on 2 April 2009 for the Owners to guide the ownership arrangements. The Agreement provides for establishment of a Management Committee '*for the determination or approval of matters under the Agreement.....*'. It is not clear if the Management Committee was established, but in any event it has not been active in recent years.

The ownership of the site is a conditional tenure, under section 75 of the *Land Administration Act 1997*. The tenure provides ownership so long as the conditions on the title are met. In this instance, the title limits the use of the land to '*the provision of care, accommodation and residential facilities for aged persons and all activities and*

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*matters relating to the provision of such care, accommodation and residential facilities*'. Letters from the relevant department state that this includes the provision of a facility under the *Retirement Villages Act 1992*.

When the land was transferred to the four local governments in 2009, it was immediately leased to Curtin Care (at that time, CAPH) for a period of 20 years for nominal rent. The lease is registered on the certificate of title. In the second half of 2014, Curtin Care began its approach to the four local governments to have the land transferred to Curtin Care for nominal consideration. The Councils did not support the transfer of ownership but did indicate willingness to consider extending the term of the CAPH lease. Subsequently all owner councils have adopted resolutions to support the approval of a new lease.

The working group established with membership from each of the owner councils has held meetings on 5 August, 9 September and 7 October 2015 and on 27 January 2016. These meetings included one at which representatives of Curtin Care presented to the working group and answered follow up questions.

At the January meeting the working group considered a Draft Agreement to Lease and a Draft Lease. The working group also considered suggestions and requests from Curtin Care. The Claremont Chief Executive Officer was authorised to work with McLeods to finalise the documentation. (refer attachment 1 Meeting Notes).

### **STRATEGIC IMPLICATIONS**

Nil

### **POLICY IMPLICATIONS**

Nil

### **STATUTORY ENVIRONMENT**

Section 3.58 of the *Local Government Act 1995*:

S3.58(1) provides the meaning of disposal of land includes '*to sell, lease, or otherwise dispose of, whether absolutely or not.*'

S3.58(3) permits property to be disposed of other than by public tender or public auction

*'A local government can dispose of property other than under subsection (2) if, before agreeing to dispose of the property —*

*(a) it gives local public notice of the proposed disposition —*

*(i) describing the property concerned; and*

*(ii) giving details of the proposed disposition; and*

*(iii) inviting submissions to be made to the local government before a date to be specified in the notice, being a date not less than 2 weeks after the notice is first given;*

*and*

*(b) it considers any submissions made to it before the date specified in the notice and, if its decision is made by the council or a committee,*

*the decision and the reasons for it are recorded in the minutes of the meeting at which the decision was made.'*

Disposal of property may be designated as a major land transaction and if so S3.59 of the Act requires that a business plan providing an assessment of the land transaction is prepared and advertised. Whether this section applies or not is based on the value of the land transaction.

Section 3.59(1) defines major land transaction

**'major land transaction** means a land transaction other than an exempt land transaction if the total value of —

- (a) *the consideration under the transaction; and*
- (b) *anything done by the local government for achieving the purpose of the transaction,*

*is more, or is worth more, than the amount prescribed for the purposes of this definition'*

Legal advice has been obtained from McLeods which confirms that for the purposes of the definition of 'major land transaction' in section 3.59(1) of the *Local Government Act 1995*, it is necessary to consider the **actual** 'consideration under the transaction' – not, for example, a notional consideration based on a valuation.

Therefore, if the proposed transaction is a lease for a peppercorn rent to a non profit organisation, it would be the peppercorn rent that would be relevant for the purposes of section 3.59, not the rent that could have been charged if the property had been rented to a commercial entity.

If the working group recommendation to lease the land to Curtin Care for a nominal rent (say \$1 per annum payable on demand) there will not be a requirement to prepare and advertise a business plan.

The *Local Government Act 1995* Section 5.42 allows Council to delegate powers to the Chief Executive Officer, other than some powers which are excluded by the legislation (Section 5.43). The Council may delegate the powers and duties proposed by this report.

### **FINANCIAL IMPLICATIONS**

Legal costs have been incurred to prepare the proposed lease and legal agreement. The working group proposed that the Owners accept the legal costs and that they be shared equally by the Owners and this was accepted by Council. Costs for preparation of the Agreement and lease will be in the order of \$10,000.

### **STAFFING IMPLICATIONS**

Nil

### **SUSTAINABILITY IMPLICATIONS**

Nil

## CONSULTATION

Various meetings have been held with representatives of Curtin Care during the past 12 months. Meetings between the four affected local governments have also been undertaken.

The working group with membership from each of the owner councils has had meetings on 5 August, 9 September and 7 October 2015, and 29 January 2016. The Chairman for Curtin Care, David Cox and Deputy Chair, Michael Jones, attended the meeting of 9 September and made a presentation to the working group

The Claremont Chief Executive Officer has had several meetings and conversations with Mr David Cox of Curtin Care.

## STAFF COMMENT

The range of issues considered by the working group ranged from drafting (proof reading) issues easily remedied to matters of significance.

### Table of significant issues Agreement to Lease

Clause	Issue	Outcome
Definitions	Definition of Redevelopment Project to reflect the stated intention of CAPH to undertake staged development to a stated value of \$80million	Redrafted
4.9	Agreed Master Plan to show the entire concept, anticipated scheduling of future stages	Redrafted
Various	Establishing the Lessors' representative so that the process of working together and any approvals are not unnecessarily complex.	Activate the Co-Ownership Management Committee: this is discussed further in the report.
7.1, 7.2 Lease/ 22	Clarifying ownership of the buildings, in particular to make it clear the councils are not directly involved in the development	Redrafted

### Table of significant issues Lease

Clause	Issue	Outcome
30.1	To prohibit lodgement of any caveat (by CC) and for registration of lease at Landgate by CC.	Redrafted
17.2	To clarify that Manager will be an incorporated entity.	Redrafted
17.4	'End of Lease' concerns by CC – relates to the lessee having entered into 'lease for life agreements' which may run beyond the lease term.	Discussed in report
New	CC requested an opportunity for a further term after the 25 years of the	Working Group agreed there should be a

Clause	Issue	Outcome
	new lease.	provision to allow a new lease term at the end of the Lease: >conditional upon CAPH having undertaken the redevelopment project within the Term, unless there has been agreement with the Lessor >A clause to provide for a period of notice by the Lessee of its intention to seek an extended term, or not to do so.
New	Lease to exclude any use of the land which will involve the Commercial Tenancy Act.	Discussed in report

The working group approved discussions between the Claremont Chief Executive Officer and CAPH Chairman to finalise the provisions of the Lease subject to confirmation by McLeods that changes do not prejudice the interests of the Owners. Most of the matters recorded in the 27 January 2016 meeting notes have been discussed, reviewed by McLeods and the documentation has been amended by Mcleods. The remaining issues to highlight are:

- End of lease provision
- Commercial (Retail) Tenancy Act
- Co-Ownership Management Committee.

### End of Lease

Clause 17.4 of the Lease has provisions requiring approval by the Lessor for any occupancy or tenancy for any term which is longer than the term of the lease. It specifically requires this for 'lease or license for life' agreements. The Lessor may impose conditions if approving any agreement which extends beyond the term of the Lease.

Note also that the Lease now has a provision (Clause 46) which allows for one further term. The clause requires that the Redevelopment Project Works have been completed as a condition of being eligible for the new term.

### **Commercial Tenancy (retail Shops) Agreements Act 1985**

McLeods has assessed the implications of the Act and advised as follows –

*In relation to the definition of 'Commercial Facilities' and the operation of the Commercial Tenancy (Retail Shops) Agreements Act 1985 (CTA), if the 'Commercial Facilities' comprise a large portion of the Premises or if the volume of retail sales or income derived from those parts of the Premises are comparatively larger than the use of the Premises for aged care and residential accommodation, the Lease may be caught by the operation of the*

*CTA. From the information provided, it is our initial view that the Lease would not be caught by the operation of the CTA as the use of the Premises is not wholly or predominantly for the carrying on of a retail business. If this is not the case, please let us know.*

The Lease provisions allow commercial uses if the Lessor is reasonably satisfied that they are ancillary to the Permitted Purpose. This will ensure they can be kept to a reasonable extent and not ever be comparatively greater than the primary use of the premises. CAPH has indicated the proposed uses to be pharmacy, cafe, newsagent, hairdresser and similar. All of these are complementary to the permitted use and should not be a concern having regards to McLeods advice.

### **Co-Ownership Management Committee**

There are various matters in the documentation which require the Lessee to satisfy conditions to the satisfaction of the Lessor. The initial proposal by McLeods was that the Chief Executive Officer of one local government be authorised for most purposes and beyond that the councils would have to be involved. Over the term of the Agreement and the Lease there are likely to a number of relatively minor matters which need approvals. Attempting to deal with such matters through the formal process of four councils is potentially time consuming and unwieldy.

The working group recommended that the Councils convene the Co-Ownership Committee. This was based on an Agreement signed on 2 April 2009 for the Owners to guide the ownership arrangements. The Agreement provides for establishment of a Management Committee *'for the determination or approval of matters under the Agreement.....'*. It is not clear if the Management Committee was properly established, but a legal agreement exists between the four councils to form a management committee, appoint a representative from each council and for the committee to make binding decisions on behalf of the owners within the following powers:

- a) control, direct and manage the property;
- b) make and give any determination, approval, direction or order in relation to the Property; monitor compliance with and enforce as necessary the provisions of the CAPH lease; and
- c) delegate to any person (including a Participant) any of the above rights, authorities, powers and discretions.

The Co-ownership Agreement and management committee appeared to offer a formal way for matters to be dealt with efficiently in which the Councils could formally delegate the same powers to be extended to the Agreement to Lease and the New Lease.

Unfortunately the provisions of the Agreement were drafted without proper consideration of the *Local Government Act 1995*. Discussion with Neil Douglas of McLeods confirms that there is no provision which allows four councils to establish a joint committee and no capacity to delegate to a committee which is not a committee of the (individual) council.

After further discussion it was also confirmed that the only mechanism with legal validity to achieve an effective way to manage issues in the Agreement to Lease and

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the Lease is through delegation by each Council to its Chief Executive Officer. The delegation can be general or have limitations. The report recommends this delegation to the Chief Executive Officers of the four co-owners with only matters of material importance to be referred to the Councils for decision.

## **VOTING**

Absolute Majority

## **OFFICER RECOMMENDATION & COUNCIL RESOLUTION**

**Moved Mayor Dawkins, seconded Cr Burke**

**THAT Council, subject to the word “shall” being replaced with “may” in section 46 of the Lease document:**

- 1. Approves the Agreement to Lease and Lease (Attachment 2 and Attachment 3);**
- 2. Authorises the Mayor and Chief Executive Officer to execute the documents on behalf of Town of Cottesloe following completion of all statutory requirements pursuant to Section 3.58 of the *Local Government Act 1995*;**
- 3. Authorises the Chief Executive Officer in conjunction with the Shire of Peppermint Grove and Towns of Claremont and Mosman Park to give local public notice of the proposal to dispose of Lot 555 in accordance with the Section 3.58 of the *Local Government Act 1995*;**
- 4. (a) Pursuant to Section 5.42 of the *Local Government Act 1995* delegates to the Chief Executive Officer the duty, power and authority to, in consultation with the Chief Executive Officers of the co-owners:**
  - i. make and give any determination required by the Lease of Lot 555 on behalf of the Lessor, approval, direction or order in relation to the Property; monitor compliance with and enforce as necessary the provisions of the CAPH lease (but this power does not include statutory powers of the Town of Cottesloe); and**
  - ii. all matters relating to the Agreement to Lease of Lot 555 to Curtin Care.**
- (b) In exercising this delegation of authority the Chief Executive Officer shall not make a determination if:**
  - i. the Chief Executive Officer believes the matter for decision is a material change to the terms and conditions of the Lease or Agreement to Lease, or**
  - ii. the majority of the other co - owner Chief Executive Officers do not agree to exercise their delegated authority.**

- (c) If the Chief Executive Officer declines to give a determination (for reasons set out in part 4(b)) the Chief Executive Officer must report the matter to the Council for decision.

Carried 8/0